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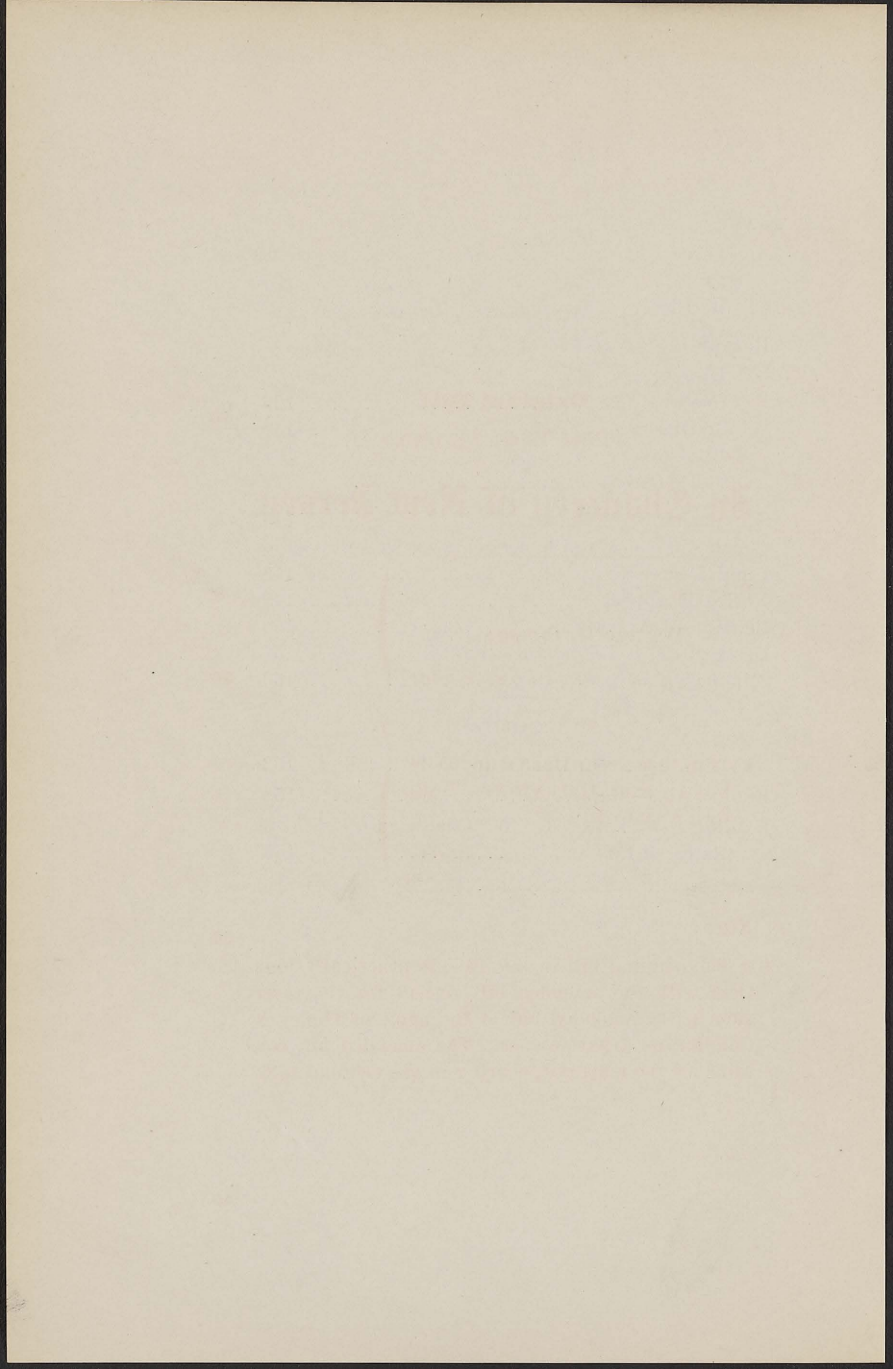
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Original Bill.

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(Filed March 11, 1910.)

In Chancery of New Jersey.

Between

WALTER H. CONDUCT,

Complainant,

20

and

ERIE RAILROAD COMPANY and NEW
YORK AND GREENWOOD LAKE
RAILWAY COMPANY,

Defendants.

NOTE:

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The original bill in this case is practically identical with the amended bill, except for the insertion in the amended bill of the name of Henry V. Conduct, as a part owner. The amended bill contains all the matter appearing in the original bill.

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Amended Bill.

(Filed, October 4, 1910.)

In Chancery Of New Jersey.

10	Between WALTER H. CONDICT, et al., <i>Complainants.</i> <i>and</i> ERIE RAILROAD COMPANY, et al., <i>Defendants.</i>	} Amended Bill.
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TO HIS HONOR, MAHLON PITNEY, CHANCELLOR OF
THE STATE OF NEW JERSEY:

20 Complaining shows unto your Honor, your orators, Walter H. Condict, of the Borough of Madison, County of Morris, and State of New Jersey, and Henry V. Condict, of the Borough of Essex Fells, County of Essex, and State of New Jersey:

(1) That on or about the eleventh day of February, nineteen hundred and ten, your orator, Walter H. Condict, purchased of Peter Donald, widower, for a full valuable consideration, and
30 the said Peter Donald conveyed, by a deed containing full covenants of warrantee and seizen, to your orator, Walter H. Condict, in fee simple, the following described tract and parcel of land and premises situate, lying and being in the Town of Montclair, County of Essex, and State of New Jersey, more particularly described as follows:

Beginning at a point in the center line of Prospect Avenue, where the same is intersected by the
40 northerly line of Claremont Avenue, if produced across Prospect Avenue; thence along the center

Amended Bill.

line of Prospect Avenue, north forty-seven degrees, ten minutes ($47^{\circ} 10'$) east one hundred and sixty-one (161) feet, two and one half ($2 \frac{1}{2}$ inches) to land of Elizabeth Mitchell; thence along said land south forty degrees, fifty-four minutes ($40^{\circ} 54'$) east two hundred and ninety-six (296) feet, eleven (11) inches, to land now or formerly of the Estate of Chapin; thence along said land south forty-seven 10 degrees, two minutes ($47^{\circ} 2'$) west one hundred and seventy-five (175) feet to the northerly line of Claremont Avenue; thence along said northerly line of Claremont Avenue, north thirty-eight degrees, twenty-four minutes ($38^{\circ} 24'$) west two hundred and ninety-five (295) feet, eight (8) inches to the center of Prospect Avenue at the place of beginning.

The said deed also contained the following clause: "Subject however to the right, if any, 20 of the Erie Railroad to a right of way across a portion of the above described land. The said Peter Donald covenants that he has not granted any such right or received any consideration for any such right; subject also to the use of Prospect Avenue as now laid out as a Public Highway."

That the said deed is in your orator, Walter H. Condict's possession, and ready to be produced and proved as may be directed, and that your orator. 30 Walter H. Condict, ever since the recording of said deed, been in the peaceable possession of the land therein and above described, and that at the time of purchasing said lands, and taking such deed, he believed and yet believes, he bought and acquired a good title to said lands, in fee simple, and he has always claimed, and does now claim to own the same accordingly, and that your orator, Henry V. Condict, has an equitable one-half interest in said land. 40

Amended Bill.

(2) That your orators' title to said land, or some part thereof, is denied and disputed by the Erie Railroad Company and by the New York and Greenwood Lake Railway Company, who are the defendants in this suit, and they, said defendants claim, and are claimed and reputed to own said lands, or some part thereof, or some interest
10 therein, and no suit or action of any kind whatever is pending to enforce or test the validity of such title or claim; and your orators charge that such claims so made by defendants are utterly without foundation, unjust and vexatious.

That by reason of such claim, your orators' claim in said land is greatly affected, and the same cannot be readily sold as it otherwise could.

That your orators have applied to the said defendants, or some of them, to release or relinquish their claim, or bring in some court of law a
20 suit which would test the validity thereof, and the said defendants refuse to do either, and your orators hoped that said defendants would have complied with such reasonable request as in justice and equity they ought to have done.

In consideration whereof, and forasmuch as your orators are relievable only in a court of equity, where matters of this sort are properly, and
30 according to the statutes of this state in such case made and provided, cognizable and relievable:

To the end, therefore, that said defendants, the Erie Railroad Company and the New York and Greenwood Lake Railway Company, and each and both of them, may, upon their several and respective oaths or affirmations, to the best of their respective knowledge, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid; and more particularly
40 that they, and every of them, may, in man-

Amended Bill.

ner aforesaid, answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they, or either of them, make or claim, and to what part or what interest; and further, how and by what instrument such title or claim is derived or was created; and that by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that your orator may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in, or encumbrance on said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void; and that your orators may have such other or further relief in the premises as the nature of the case may require and as he shall be entitled to, pursuant to the statutes in such case made and provided. 10 20

May it please your Honor, the premises considered, to grant to your orators a writ of subpoena, issuing out of and under the seal of this honorable court, to be directed to the said defendants, the Erie Railroad Company, and the New York and Greenwood Lake Railway Company, commanding them, and each of them at a certain day, and under a certain penalty therein to be specified, personally to be and appear before your Honor in this honorable court, then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, abide by and perform such order, direction and decree as to your Honor shall seem meet, and as shall be agreeable to equity and good conscience. 30

And your orators will ever pray, &c.

CONDUCT, CONDUCT & BOARDMAN, 40
Solicitors for and of Counsel
With Complainant.

Order Amending Amended Bill of Complaint.

(Filed, April 27, 1911.)

In Chancery of New Jersey.

Between

10

WALTER H. CONDUCT, *et al.*,

Complainants,

and

ERIE RAILROAD COMPANY, *et al.*,

Defendants.

On Bill &c.
Order Amend-
ing Amended
Bill.

20 Application having been made on behalf of the complainants for leave to amend the amended bill, IT IS on motion of Conduct, Conduct & Boardman, solicitors for the complainants, on this twenty-fifth day of April, nineteen hundred and eleven, ORDERED that the amended bill of the complainants in this cause be, and hereby is amended as follows:

30 By inserting the word "Orators" in the place of "orator" in the second line of the first numbered section of said amended bill, and striking out the name, in said line of "Walter H. Conduct."

40 And by striking out the third paragraph of the first numbered section of said amended bill, and inserting in the place thereof the following: "That the said deed is in your orators' possession and ready to be produced and proved as may be directed, and that your orators have ever since the recording of said deed, been in peaceable possession of the land therein and above described, and that

Order Amending Bill.

at the time of purchasing said lands and taking such deed, they believed and yet believe they bought and acquired a good title to said lands in fee simple, and they have always claimed, and do now claim to own the same accordingly, and that your orator, Henry V. Condict, is the owner of an equitable one-half interest in said land, having contributed one-half of the purchase price." 10

And it is further ORDERED that the defendants have fifteen days after service of a copy of this order upon them, within which to amend their answer to said amended bill or file a new answer, and that in default thereof, the answer to the said amended bill as heretofore filed shall be taken as the answer of the said defendants.

And it is further ORDERED that the replication heretofore filed to the answer to the original bill in this case be taken as if filed in time to the answer to the amended bill as it now is, or hereafter shall be amended. 20

And it is further ORDERED that the testimony heretofore taken before the examiner in this cause may be used at the hearing before the Vice Chancellor on the amended pleadings as if taken upon the amended pleadings, and that all parties have leave to adduce further testimony at the final hearing at this cause. 30

Respectfully advised,

MAHLON PITNEY,
C.

FREDERIC W. STEVENS,
V. C.

Answer to Amended Bill.

(Filed, May 13, 1911.)

In Chancery of New Jersey.

Between

10

WALTER H. CONDUCT,

*Complainant,**and*ERIE RAILROAD COMPANY and THE
NEW YORK & GREENWOOD LAKE
RAILWAY COMPANY,*Defendants.*On Bill &c.
Answer to
Amended Bill.

20 The answer of Erie Railroad Company and The New York & Greenwood Lake Railway Company, Defendants, to the amended Bill of Complaint of Walter H. Condict and Henry V. Condict, Complainants:

These defendants answering said Bill of Complaint say:

1. That they admit that on or about the eleventh day of February, nineteen hundred and ten, the
30 Complainant, Walter H. Condict received a deed alleged to be executed by Peter Donald which said deed purported to convey the premises described in said bill, and that by the said deed it was expressly stated that the said premises were sold subject to the rights, if any, of the Erie Railroad Company, in a right of way across a portion of the said premises and these defendants deny that said complainants are in possession of such part of the said premises as hereinafter stat-

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Answer to Amended Bill.

ed to be in the possession of these defendants or one of them.

And these defendants say, the said Walter H. Condict since the commencement of this suit has conveyed away to one Miriam V. Bogart so much of said premises described in said bill, as constitute a tract sixty-five feet front on Prospect Avenue by one hundred and fifty feet front on Prospect Avenue by one hundred and fifty feet in depth and which tract is distant northerly from Claremont Avenue ninety-nine feet; and to one Isborn B. Scott, Jr., a tract of land fifty feet front on Prospect Avenue by one hundred and fifty feet in depth lying immediately south of said tract so conveyed to Miriam V. Bogart, and that said complainants no longer have title, possession or right to possession of such land so conveyed away and are not entitled to bring and continue this suit in regard to such land; and these defendants claim all benefit of this defence as if made by way of Plea or Demurrer. 20

And these defendants further answering say that the said lands and premises were by said deed conveyed to said Walter H. Condict expressly "subject to the rights if any of the Erie Railroad to a right of way across a portion of said premises." And that by said restriction the right of way to a tunnel under said land as hereinafter stated to have been constructed was reserved to said Erie Railroad Company and the title to said land, if acquired by said Complainant or either of them, was acquired subject to such tunnel right of way. 30

And these defendants further say that by the acceptance of said deed the complainants agreed to hold such land subject to any right of way own- 40

Answer to Amended Bill.

ed or possessed by said Erie Railroad Company, and are estopped from denying such right of way, or attempting to remove the right aforesaid, as an easement or encumbrance on such land, and the said complainants cannot rightfully question the right of the Erie Railroad Company to such tunnel and these defendants pray all benefits of this defence as if made by plea or demurrer.

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2. And these defendants further say that by an Act entitled "An Act to Incorporate the Montclair Railway Company" approved March 18th, 1867, (Laws of 1867, Page 351), the said The Montclair Railway Company was duly incorporated as a Railroad corporation, with all the privileges and franchises appropriate to a Railroad Corporation, and among other things said Company was invested with all the rights and powers necessary or expedient to survey, lay out and construct a railway from the Village of Montclair in the Township of Bloomfield, in the County of Essex to the Hudson River at the Pavonia Ferry or at the Hoboken Ferry, or between the said ferries, and were authorized and empowered to construct a branch thereof in said township, and to extend the said Railway into the Township of Caldwell and beyond, and when a survey of its route, location and locations should be deposited in the Secretary of State's Office then the said Company was authorized to enter upon take possession of, hold, have, use, occupy and excavate the lands necessary or expedient for the construction of such Railway and to erect bridges, embankments, and all other necessary works.

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30

3. And these defendants further say that thereafter the survey and location of such route for said Railway and branches was determined upon

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Answer to Amended Bill.

and such survey was duly deposited and filed in the office of the Secretary of State; that said survey set forth and described a route or location of the Railroad of said Company through Essex County, and also a branch thereof extending from the Village of Montclair to the Town of Caldwell, and that such latter part of said survey extended over and across part of the lands described in said Bill of Complaint as hereinafter stated. 10

4. And these defendants further say that a high hill in Montclair, known as Orange Mountain, lies between the said Village of Montclair and the Town of Caldwell, and that in order to construct the said Railroad between said Village and said Town, it was necessary to tunnel the said hill or mountain under the subsoil of part of the premises mentioned in said Bill, which part of said premises lay above the level of said Railroad as located and surveyed: that about the year 1870 the said Montclair Railway Company having practically finished its main line began the construction of the said branch of said Railroad extending from Montclair to Caldwell: that said Railroad Company built the necessary embankments and bridges, and in great part purchased the right of way so as to construct and lay tracks from the said Village of Montclair partly to the Town of Caldwell, that is to say from said Village to the foot of said hill or mountain, and partly constructed its road bed from said main line to the foot of said hill or mountain; that said Company further began the construction of their railroad through the said hill, and actually built a tunnel underneath said premises described in said Bill, which tunnel was of sufficient size to afford passage for a railroad passenger car and locomotive through the tunnel, and the centre line of said tunnel extended diag- 40

Answer to Amended Bill.

onally across said premises in an easterly direction from a point on the north side of Claremont Avenue about fifty feet east of Prospect Avenue to a point on the east line of said premises described in said Bill of Complaint about fifty feet northerly of Claremont Avenue.

5. And these defendants say that the construction of the said tunnel occupied many months, and the fact of the tunnel being constructed was notorious and well known to the community in Montclair and to Peter Donald the then owner of the land through which the said tunnel was so constructed. And these defendants say that they are ignorant whether any deed has ever been secured from said Donald giving the Montclair Railway Company the right to construct their said Railroad under his land, but say that as they believe the said right to construct said tunnel was actually acquired by grant or license from said Donald, and that if not actually obtained yet the consideration therefor was actually agreed upon and paid, and that in any event the said Donald stood by and allowed the said Montclair Railway Company to expend large sums of money in constructing said tunnel and approaches thereto on the faith of some agreement between said Company and said Donald relative to payment of compensation for said right to construct and use such tunnel and they further say that said Donald never made any claim for compensation for said tunnel construction, or for damages on account thereof, either at the time it was being so constructed or since said construction, and they say that any right of said Donald or his grantors to object to said tunnel or to claim, compensation or damages therefor has been lost by lapse of time.

Answer to Amended Bill.

And these defendants further say that the said tunnel was so partly constructed as a public work, and that the said Montclair Railway Company and these defendants as its successors and as exercising its franchises are entitled to hold and retain the said tunnel and the space now or formerly occupied by it as a right of way for the said railroad, but if not then this Court will protect the said Railroad Company and prevent it from being deprived of said tunnel so constructed on payment of proper compensation. 10

And these defendants further say that not only did said Montclair Railway Company purchase land and partly construct said Railroad on the east side of said Orange Mountain, but also on the west side of said Mountain; that the right of way has been almost entirely acquired for said Tunnel Route from Montclair to Caldwell on both sides of the Mountain, and grading and embankments for a railroad was practically completed; that part of said branch near Caldwell as originally acquired is now actually used by these defendants for their business and the approach to the tunnel on the west side of the Mountain was partly begun by the Montclair Railway Company. 20

6. And these defendants further answering say that about the year Eighteen Hundred and seventy-three owing to the then severe financial panic, the Montclair Railway Company became embarrassed for funds to continue the construction of its said Railroad, including said tunnel and the work thereon ceased; that from time to time since said date some work has been done on the said tunnel route and its approaches, but the railroad to Caldwell has not been carried through said Mountain as yet; but these defendants say that such tunnel 30

Answer to Amended Bill.

route is the shortest and most practical way of reaching Caldwell and points beyond, and that the final construction thereof though postponed has never been abandoned, and the said route and the right of way already acquired, and the work already done on said tunnel and its approaches, embankments, cuts and grading already accomplished
10 are valuable assets which should be preserved to these defendants, and the loss of any part thereof would destroy the use of said Tunnel Route; and they further say that the construction of said railroad through said Mountain is now becoming more necessary and imperative every year, and that its final completion in the not distant future is expected.

And these defendants further say that by Mortgage dated September 1st, 1870, and recorded September 3, 1870 in Book P.5-381 of Mortgages for
20 Essex County, the Montclair Railway Company mortgaged to Marcus L. Ward and Abram L. Hewitt, Trustees, to secure bonds to the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000) in thirty years with interest; all of its Railway and branches constructed or to be constructed; and all its real and personal property held or acquired, or thereafter to be held or
30 acquired by said Montclair Railway Company, its successors or assigns, for the use in connection with said Railway and branches, and all the right of franchise of said Railway; and these defendants say that in said mortgage was embraced any and all rights and interests which said The Montclair Railway Company owned or possessed, or thereafter might own or possess in said tunnel and the land through which the same was constructed; and these defendants say that the said mortgage was a
40 first lien on the property described therein.

Answer to Amended Bill.

8. And these defendants further say that subsequently on November first, eighteen hundred and seventy-one, by mortgage of said date, recorded January twelfth, eighteen hundred and seventy-two in Book A. 6 of Mortgages for Essex County, page 373, and said The Montclair Railway Company mortgaged the said rights and interests mentioned in the Mortgage set forth in Paragraph 7 of this answer, to Abram S. Hewitt, Trustee, to secure bonds to the amount of One Million Five Hundred Thousand Dollars (\$1,500,000) and interest; that default having been made in payment of said interest the said Hewitt, trustee, on June twenty-sixth eighteen hundred and seventy-three, filed his bill of complaint in Chancery of New Jersey against said The Montclair Railway Company and such proceedings were had in said cause that on December twenty-second, eighteen hundred and seventy-three it was decreed that said Railway property and franchises should be sold by William Paterson, Master in Chancery; that the same were thereupon duly sold by said Master to Abram S. Hewitt, Trustee, and by deed dated January seventh, eighteen hundred and seventy-five and recorded February second, eighteen hundred and seventy-five in Book A. 18 of Deeds aforesaid, Page 516, said Hewitt conveyed said property and franchises to a new corporation created to take over said property and franchises, known as The Montclair and Greenwood Lake Railway Company, and by deed dated November twenty-seventh, eighteen hundred and seventy-five, recorded February eighth, eighteen hundred and seventy-six, in Book P. 18 of Deeds aforesaid, page 424, said Hewitt conveyed said property and franchises to said last mentioned Railroad corporation.

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Answer to Amended Bill.

9. And these defendants further answering say that subsequently to the institution of said suit to foreclose the said mortgage for One Million Five Hundred Thousand Dollars on Bill filed in Chancery May eighth, eighteen hundred and seventy-three, by Abram S. Hewitt, complainant against The Montclair Railway Company, Elias N. Miller,
10 Mason Loomis and Conrad N. Jordan were duly appointed receivers of said Montclair Railway Company, and while they continued such Receivers, and on November seventeenth, eighteen hundred and seventy-three, Marcus L. Ward and Abram S. Hewitt, as Trustees filed their Bill of Complaint in this Court against said Elias N. Miller and others Receivers, to foreclose the said first mortgage for Two Million Five Hundred
20 Thousand Dollars, and such proceedings were had in said cause that on June nineteenth, eighteen hundred and seventy five, final decree was had adjudging that all the property and franchises of said Railroad Company, or its receivers, included in said mortgage as aforesaid, be sold to pay the amount found due on said Mortgage, and that a fi. fa. for that purpose should issue to William Paterson, Master in Chancery, and these defendants say that afterwards in pursuance of such
30 fi. fa. duly issued, said Master sold said mortgaged property and franchises to said Marcus L. Ward and Abram S. Hewitt, Trustees, and afterwards by deed dated September twenty-seventh, eighteen hundred and seventy-five recorded February eighth, eighteen hundred and seventy-six in Book P. 18 of Deeds for Essex County, page 424, said Master duly conveyed the same to said Ward and Hewitt.

10. And these defendants further say that thereupon said The Montclair and Greenwood Lake

Answer to Amended Bill.

Railway Company, having been duly formed as a Corporation as aforesaid to take over all property and franchises originally of said The Montclair Railway Company, by deed dated November twenty-ninth, eighteen hundred and seventy-five and recorded in Book R. 18 of Deeds aforesaid, Page 278, said Marcus L. Ward and Abram S. Hewitt also conveyed all the said property and franchises mentioned and described in said first mortgage of Two Million Five Hundred Thousand Dollars (\$2,500,000) to said The Montclair and Greenwood Lake Railway Company. 10

And these defendants further say that by mortgage dated December first, eighteen hundred and seventy-five, recorded February eleventh, eighteen hundred and seventy-six, in Book D. 7, of Mortgages for Essex County page 284, and The Montclair and Greenwood Lake Railway Company mortgaged all the franchises, privileges, and property formerly of The Montclair Railway Company, and all property, privileges and franchises of said Montclair and Greenwood Lake Railway Company, and its railroad and branches constructed and to be constructed, whether acquired from The Montclair Railway Company or otherwise, and all real and personal property acquired or to be acquired by said Company, its successors or assigns for use in connection with its said Railway and branches, together with its franchises, to George Walker and Amzi Dodd, Trustees, to secure seven hundred thousand dollars (\$700,000) in Bonds, with interest and that default having been made in payment of interest, on said last mentioned mortgage, said last mentioned Trustees filed their bill in Chancery of New Jersey to foreclose said mortgage, and such proceedings were thereupon had in said cause 30 40

Answer to Amended Bill.

that the said mortgaged property and franchises were ordered to be sold by William Paterson, Special Master, who duly sold and conveyed the same to Abram S. Hewitt, Cyrus W. Field, and John B. Dumont, by deed dated October fifth, eighteen hundred and seventy-eight, recorded October thirty-first eighteen hundred and seventy-eight, in Book X 19 of Deeds aforesaid, page 449, and thereafter by deed dated November fifth, eighteen hundred and seventy-eight recorded November eighteenth, eighteen hundred and seventy-eight, in Book C. 20 of Deeds aforesaid, Page 17, said Abram S. Hewitt, Cyrus W. Field and John B. Dumont, conveyed the same to this defendant, The New York and Greenwood Lake Railway Company, a corporation organized to take over and exercised all franchises and property formerly of the Montclair Railway Company.

And these defendants further say that by said proceedings, mortgages and conveyances the right, estate and interest of said Montclair Railway Company in said tunnel route and in the tunnel under and through said premises, described in the Bill of Complaint in this cause passed to and became vested in said New York and Greenwood Lake Railway Company.

And these defendants say that since November eighteen hundred and seventy-five said New York and Greenwood Lake Railway Company has been and still is the owner of all the right of way, property and franchises originally of said Montclair Railway Company, including all rights and interest in said tunnel and the land through which the same was built originally held or possessed by said The Montclair Railway Company, or any of its successors. And they further say that in the year eighteen hundred and ninety-six said

Answer to Amended Bill.

New York and Greenwood Lake Railway Company leased its railroad property and franchises to Erie Railroad Company, and since said lease said Erie Railroad Company has operated said Railroad. And these defendants further say that a copy of such lease was filed in the office of the Secretary of State and said lease was consented to by the Legislature of this State by Act approved March 24, 1897 (Laws of 1896 page 125), and that all the terms and conditions of said consent have been fully complied with. 10

And these defendants further say that said New York and Greenwood Lake Railway Company as lessee, and their predecessors in title since eighteen hundred and seventy-one, have been the owners and possessors of said tunnel and its appurtenances as originally existing or projected through the said premises mentioned in said Bill, and that they have been in open, notorious and exclusive possession of said tunnel to the extent that it was capable of being owned and possessed, and that any rights which said complainants may have acquired in said premises were with full notice and knowledge of these defendants rights and interest in said tunnel, and were expressly subject thereto. 20

And these defendants further say that they are the owner and possessor of so much of the soil underneath the said land described in said Bill as is necessary or desirable for the construction and maintenance of such tunnel, and of so much of the land necessary for such tunnel and that the said complainant has no right to use or occupy said premises so as to interfere with the construction, reconstruction or maintenance of the said tunnel and any use that these defendants may now or hereafter desire to make of the soil 30 40

Answer to Amended Bill.

and right of way necessary or desirable in order to construct and maintain their railroad through and under said tract described in said Bill.

And these defendants further answering say that said Complainants have an adequate remedy at law and are not entitled to maintain their suit against these defendants or either of them and they pray all benefit of this defence as if made
 10 by way of plea or demurrer.

And these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

CORTLANDT & WAYNE PARKER,
 Solicitors of and of Counsel with
 Erie Railroad Company and
 The New York & Greenwood
 Lake Railway Company,
 20 Defendants.

Replication in common form.

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Testimony.

In Chancery of New Jersey.

Between

WALTER H. CONDUCT,

Complainant,

and

ERIE RAILROAD COMPANY and THE
NEW YORK & GREENWOOD LAKE
RAILWAY COMPANY,

Defendants.

On Bill &c.

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Testimony taken in the above entitled cause, before me, Maximilian T. Rosenberg, Examiner in Chancery, at my office No. 1 Exchange Place, Jersey City, New Jersey, this fifth day of July, nineteen hundred and ten, at two o'clock in the afternoon, pursuant to notice, and in the presence of Richard Boardman, Esquire, Solicitor of the Complainant, and Cortlandt Parker, Esquire, Solicitor of the Defendants.

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M. T. ROSENBERG,
Examiner in Chancery.

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Walter H. Condict—Direct.

WALTER H. CONDUCT, being duly sworn according to law, testified as follows:

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. You are the complainant in this cause? A. I am.

10 Q. I show you a deed from Peter Donald, widower, to Walter H. Condict: are you the person named in that deed as Grantee? A. I am.

Q. And are you in peaceable possession of the land described in that deed?

MR. PARKER: I object to that as leading.

A. I am, excepting for a portion which I have sold.

20 Q. Were you in possession of all of it on March 11th, 1910? A. I was.

Q. And do you claim to own it? A. I do, excepting for what I have sold.

Q. Did you claim to own the whole of it on March 11th and 12th 1910? A. I did.

30 Q. Was any suit pending against you by the Erie Railroad Company or the New York and Greenwood Lake Railway Company on March 11th and 12th, 1910? A. No, not to my knowledge.

Q. And the property described in that deed is the same as the property described in the bill of complaint? A. I believe it to be such.

Deed of Peter Donald, Widower, to Walter H. Condict, dated February 10, 1910, acknowledged before James Bishop, Notary Public of New York, February 10, 1910, and recorded in the Essex County Register's Office in Book N. 46 of Deeds,

Walter H. Condict—Cross.

pages 217, &c., offered in evidence and marked Exhibit C. 1.

CROSS EXAMINATION BY MR. PARKER:

Q. You say that you have sold a part of this property, Mr. Condict? A. I have.

Q. What part? A. I could readily show it on a diagram. The part is the northerly sixty five feet fronting on Prospect Avenue, being one hundred and fifty feet deep. 10

Q. Who did you sell it to? A. To a party by the name of Bogert.

Q. When? A. The contract was made during the month of April.

Q. When did you sell it? A. The contract was made during the month of April, and the deed was made during the month of May, to the best of my recollection, but I know the contract was made during the month of April. 20

Q. I see the consideration named is one hundred dollars: what was the true consideration?

MR. BOARDMAN: I object to the question as it is immaterial and irrelevant and not cross examination, and I instruct the witness not to answer.

A. I refuse to answer by advice of my counsel, 30
Mr. Boardman.

MR. PARKER: I ask counsel if that is the only objection which he has to the question, as he has stated it.

MR. BOARDMAN: I think that is enough.

Q. Was this property fenced in at the time you bought it? A. A fence was on two sides of it, or was at that time—on what I call the north side 40

Walter H. Condict—Cross.

and the east side—that is to say the side farther-
est from Claremont Avenue and the side farther-
est from Prospect Avenue.

Q. And it was entirely open on Claremont Ave-
nue? A. Yes, sir indicated by the usual side-
walk, trees, and so forth.

10 Q. And was open at the time that your suit
was commenced? A. Yes, sir.

Q. Nothing but a vacant field? A. It is an
ordinary case of unimproved town property.

Q. Is it covered with grass? A. Yes, sir, grass
and weeds, and as I recall one apple tree, but it
was ordinary open lot.

Q. And was when you bought it and remained
so? A. Yes, sir.

20 Q. There was signs on it of a tunnel having
been constructed underneath it, was there not?
A. Not that I ever saw.

Q. What sign was there of a tunnel there? A.
No signs whatsoever on the lot that I bought.

Q. The deed says "subject, however, to the
right, if any, of the Erie Railroad to a right of
way across a portion of the above described land."
Now was there any evidence of any such right of
way across the land at the time you bought it?

30 A. There was no evidence which I have ever seen,
nor is there now any evidence of any such right of
way on the land that I bought.

Q. Why was this clause put in then?

MR. BOARDMAN: I object to that because
it is immaterial and improper, and an at-
tempt to vary a written instrument.

A. I wanted a warranty deed, but Mr. Donald
was unwilling to give a warranty deed without in-

Walter H. Condict—Cross.

cluding such phraseology, and therefore I accepted a warranty deed with that in.

Q. Didn't he tell you that the property had been tunnelled in whole or in part by the Railroad Company? A. No, sir.

Q. Didn't you know that at the time that you took your deed? A. I knew that there was a rumor of such work having been done in the direction of this plot—a rumor that many years ago a cut had been made at a distance from my plot and extending supposedly under the plot. 10

Q. You knew at the time that you took your deed that a railroad had been partly tunnelled under the plot, is that true? A. I knew at the time I made my purchase that there was a rumor that a tunnel had been begun, as stated in my preceding answer, running towards and supposedly running under a portion of the property that I purchased. 20

Q. What do you mean by rumor? A. Well I understood in the first place from a dotted line shown on a map which I saw—an extension of a solid line,—The solid line to the easterly of my property indicating the ownership of the right of way of the railroad,—the dotted line being narrower than the solid line, and indicating what I understood to be a line of a tunnel, either actual many years ago or proposed. I also understood from some persons that such tunnel had been actually started at the end of the open cut. 30

Q. How far is the open cut from your property? A. About eighty feet, I should judge.

Q. And you understood that a tunnel had been commenced about eighty feet from your property and ran in the direction of and across your property,—is that right? A. Ran in the direction of 40

Walter H. Condict—Cross.

my property, but I didn't know how far the tunnel had been opened.

Q. Did you inquire how far the tunnel had gone? A. Why I have been down there myself to look and see.

Q. How far did you see? A. As far as I saw it was only eighteen feet. It was not long in
10 getting to a point beyond which it was absolutely impossible to enter by reason of its being filled with stones and water.

Q. When you went down in the cut you could see an opening or tunnel extending under your land? A. It could scarcely be called at that time a tunnel. It was an opening, but the thing was so filled up that it looked—well it bore no resemblance to a railroad tunnel. It was only about
20 at the highest point three feet high when I examined it.

Q. And eighteen feet long? A. Yes, sir, about that.

Q. And how wide? A. The width varied: at the base of the opening I should imagine it was about fifteen feet wide, and when you got in about three feet it narrowed down to about nine or ten feet, and then narrowed down to nothing.

Q. Was there any evidence of timbers which
30 had fallen? A. I saw absolutely nothing of the sort.

Q. And you saw all this before you purchased the property? A. No, sir.

Q. When? A. Subsequent to my taking the title.

Q. How long? A. About a week ago.

Q. And you never made any inquiries about
40 this tunnel or personal observations before you

Walter H. Condict—Cross.

took the title? A. I never personally went down in the cut before I took the title, but I made many inquiries.

Q. You say that you saw this delineation on a map of the extension of a right of way across your land which you claim to own: what map did you see that on? A. That is a map of Essex County.

10

Q. How old? A. I don't know: it is probably a new map.

Q. Did you ever see a map of 1881 of Essex County, published in book form? A. I am not familiar with the title—I can't recall.

Q. Where on any other map except this late map which you say you saw—was it Harrison's map? A. I don't think so: I don't recall the name of the map: it is a book map.

20

Q. And showed Montclair and a railroad running through it? A. Yes, sir.

Q. And showed, did it not, a branch of a railroad coming from the main line of the New York and Greenwood Lake Railroad, and coming up to a point beyond your property? A. No, sir, not exactly that. It showed in solid lines what I concluded to be a right of way approaching to within about eighty feet of my plot, and at that point the solid lines ended and ended the right of way, as I recall the map, and from that on there was on the map a very much narrower dotted continuation.

30

Q. Didn't that suggest to you that that dotted continuation was a representation of a tunnel existing or projected in that direction? A. Projected I think would fit the case, yes.

Q. And your testimony was that you saw that before you took your deed? A. Yes.

40

Walter H. Condict—Cross.

Q. Did you not know the property on both sides of your land had been purchased by the railroad way back in the seventies for a railroad and tunnel to run from Montclair to Caldwell? A. I understood that the railroad had bought a right of way up to within about eighty feet of my property, but not beyond my property nor across my property, excepting that way up and a little this side
10 of Caldwell there is a right of way of the railroad line, which they owned at the time I bought.

Q. You knew that that was a part of the line originally intended to be built from Montclair to Caldwell, running by tunnel through the mountain? A. I understood that that was a part of the proposed road, as proposed some forty years ago, but that road I believe is neither on the map or in any other condition, so far as I know, continued through.
20

Q. You never made any inquiries at Trenton to see what the filed map there stated? A. Yes.

Q. What did you find out? A. My impression is that there was no map filed showing the right of way. I didn't make personal inquiry myself, but I caused inquiry to be made.

Q. What is your profession? A. I am a lawyer.

30 Q. Did you find out whether or not the railroad paid taxes on any of this property? A. I don't think I made any inquiry in that direction: I am sure they have never paid any on the land that I claim to own.

Q. You are sure that they have paid no taxes on that tunnel or right of way which they claim to own through your land? A. Why they have not paid taxes on the real estate there: if they have paid taxes on some claim of franchise or
40

Walter H. Condict—Cross.

something, I don't know, but they have not paid taxes on the real estate there.

Q. They would pay taxes in Trenton—they wouldn't pay any in Montclair. Do you know whether they have paid any taxes on your property at Trenton? A. I am very strongly under the impression that they have not; I do not think so.

Q. But you have never made any inquiry of any sort to find out, have you? A. No, sir, not personally.

Q. How long have you known this property before you purchased it? A. I had passed the property a great many times in the last few years, and I own property a little ways on beyond in Caldwell, and I have passed it very many times in the last three or four years.

Q. Where do you live? A. I live in Madison, New Jersey. 20

Q. And don't some of your family live in Montclair? A. No, sir.

Q. Your only connection with Montclair is your having invested in real estate there? A. I have invested in a great deal of real estate in Essex County.

Q. How long have you been familiar with Montclair in investing in that vicinity? A. I think that my familiarity with Montclair dates back about three or four years. 30

Q. And you had been interested in the growth of Montclair, had you not? A. Montclair property has never taken my attention particularly, except this one piece; Essex County has been my broader field there.

Q. Then you had been interested in property in Caldwell, had you not? A. Yes, sir.

Walter H. Condict—Cross.

Q. And you had known for many years it had been hoped by considerable people that the Erie Railroad Company would construct a tunnel through the mountain between Caldwell and Montclair? A. I knew it had been hoped, but I didn't think it could get beyond that.

10 Q. For how long had you had investments in Caldwell? A. I can't fix the time without my books, but I have had investments in Caldwell for about three and a half years.

Q. And when you first invested in Caldwell you knew of this proposed road through the mountain by means of a tunnel from Montclair? A. No, I don't think I did.

Q. How soon after you invested in Caldwell did you know it? A. I can't answer that question.

20 Q. Well it was quite a length of time before you took this deed? A. I knew a long time before I took this deed that there had been an impression or hope at one time that this railroad would go through the mountain, yes.

Q. And did you not know at that time also that it was also hoped at the same time that the Erie or some other railroad would tunnel through the mountain at the place where the old tunnel had
30 been commenced—I mean shortly after you became the purchaser of land in Caldwell? A. That is a pretty hard question to answer. I knew that there had been this project about forty years ago, but that to all appearances it was dead and buried. I hardly know how to answer that question.

Q. This property remains in the same condition as it was at the time you first purchased it of Mr.
40 Donald, does it not, except that you have sold

Walter H. Condict—Cross.

off a portion of it? A. Why there is a sign which we caused to be erected on the property "For Sale", and there has been a few loads of earth dumped on it, but to all practical purposes it is actually the same.

Q. Who dumped the earth? A. I don't know.

Q. What possession have you had of this property? A. Absolute and complete possession. 10

Q. And in what regard—what have you done? A. I have been on the property.

Q. You have walked by? A. Yes, sir.

Q. Everybody can walk over it if they want to? A. Yes, sir.

Q. And you have a sign up that you want to sell the property? A. Yes, I caused a sign to be put up giving the name of an agent.

Q. How long ago did you do that? A. Very 20 shortly after I purchased; I can't give the exact date.

Q. You purchased this property on February 10th, 1910? A. Yes, that is the date of the deed.

Q. And you recorded your deed on the 11th? A. Yes, sir.

Q. And you commenced your suit March 11th, twenty nine days after? A. Yes. 30

Q. Was the sign erected at the time you commenced your suit? A. I think it was erected at about I should judge three weeks after I bought the land.

Q. Is it not a fact then that you have agreed to sell the land before you brought this suit?

MR. BOARDMAN: I object to that as immaterial and not cross examination.

Walter H. Condict—Cross.

A. No, I had made no contract to sell at the time the suit was begun.

Q. Had negotiations for a sale been commenced at the time the suit was commenced or before that time? A. I don't think there were any negotiations, Mr. Parker, I don't think there were any negotiations before March 11.

10 Q. When were those negotiations commenced? A. I made the contract with Mrs. Bogert on April 8th.

Q. She is the person who purchased this tract of sixty five feet front by one hundred and fifty feet? A. Yes, sir.

Q. Had you any other contract made about this property? A. Yes, sir.

Q. With whom? A. A man by the name of
20 Harn.

Q. When did you make that contract? A. April 9th.

Q. Now is it not a fact, Mr. Condict, that you purchased this property at a very low price because of the claim of the Erie Railroad upon part of it?

MR. BOARDMAN: I object to that question as not cross examination and immaterial, and it calls for a conclusion and not a
30 fact.

A. I don't buy property unless I buy it at what I consider a price which is attractive, and I don't think that buying the whole plot as one piece, I bought it at what could be termed a very low price.

Q. How much did you sell the property that you sold to Mrs. Bogert for?

40

Walter H. Condict—Cross.

MR. BOARDMAN: I object to that as immaterial and not cross examination, and I instruct the witness not to answer.

A. I am advised by my counsel not to answer, and therefore I decline to answer.

Q. What is the value of the property that you have left there?

10

MR. BOARDMAN: I object to that on the ground that it is immaterial and not cross examination, and I instruct the witness not to answer.

A. I decline to answer by advice of counsel.

Q. At what valuation is it taxed? A. I don't know.

Q. Do you know what taxes were paid last year upon it? A. No, sir, I do not.

20

Q. You did not ascertain its taxed valuation before you purchased it? A. I judge my own value in real estate generally; I don't go by its taxed value.

Q. I don't care what you do, but I want to know what you did in reference to this property?

A. I never ascertained what the taxed value was.

Counsel for the complainant now withdraws his instructions to the witness not to answer the questions which the witness has refused to answer, but reserves all of his objections to the questions on each of the grounds stated by him. These questions are again repeated to the witness, as follows:

30

Q. How much did you sell the property that you sold to Mrs. Bogert for? A. \$3,900.

Q. What is the value of the property that you have left there?

40

Walter H. Condict—Cross.

MR. BOARDMAN: I object to that on the ground that it calls for a conclusion or opinion.

A. I can't answer that with exactness, but I should say about ten thousand dollars.

Q. And what was the true consideration given for the property? A. Eight thousand dollars.

10 Q. Have you no map or sketch of this property? A. I have, but not here; I don't think it is here; I don't know what papers are here, but I have a little map.

Q. Did you have the property surveyed before you bought it? A. Not an outline survey; I had a survey to locate, so far as possible, where the line of this projected right of way were claimed to fall.

20 Q. You had that survey made before you took the title? A. I don't recall the date when I had it done—whether before or after.

Q. Where is the survey? A. That is the little sketch that I refer to—a small paper plotting.

MR. PARKER: I ask the complainant to produce that.

Q. Who made that map or survey? A. I don't recall the name of the man; he is an engineer of 30 Montclair.

Q. Can you describe him at all. A. Oh, yes, his name is Crane.

Q. Is there any depression or any other sign across the land which shows where the tunnel was originally constructed under the ground? A. Not that I have been able to find, and I have hunted for it with care.

Q. You say it was filled in there; was not that

Walter H. Condict—Cross.

to fill in some depression? A. No, sir, you are entirely wrong in that; the filling in I referred to was a section at the Prospect Avenue frontage, which is in another part of the property from where this line is claimed to run.

Q. I thought it had a frontage on Mountain Avenue? A. No, sir, it is the northeast corner of Prospect Avenue and Claremont Avenue. 10

Q. Was this deed that you have produced in evidence drawn by you? A. No, sir.

Q. By whom was it drawn? A. Mr. Donald's representative; I don't recall the man's name, but I could take you to his office, but I have forgotten the name.

Q. Was any written agreement made about this property before the property was purchased? A. A formal contract do you mean? 20

Q. Yes. A. No, sir.

Q. What kind of a contract did you make—by word of mouth? A. Yes, I think it was all by word of mouth and telephone. There may have been a letter or two.

Sketch referred to produced.

Q. I show you this little map which you produce; what is the meaning of the round circle? (indicating on map). A. That is the point where I understand it was rumored that there had been a cave in, but that had been filled in. 30

Q. How was that placed on the map? A. By Mr. Crane.

Q. There is another semi-circle there, what does that mean? A. Those merely indicate measurements.

Q. Is that the little map which you say you 40

Walter H. Condict—Cross.

saw before you took your deed? A. I may have seen another one, but this is the one I referred to as being in my possession.

Q. At or before the time you took your deed?

A. No, sir, I didn't have it before I took my deed; that map that I referred to at that time was a book map—the County map or City map.

10 Q. Has Mrs. Bogert done anything with her property that she has purchased? A. No, sir, not that I know of.

Q. It just remains in the state of nature that you found it? A. As far as I know, yes, sir.

Map above referred to marked D. 1 for Identification.

Q. Mr. Henry V. Condict in February last stated that he was about to purchase that property; is he interested in this property with you? 20 A. Yes, sir, he is.

Q. He lives in Montclair, does he not? A. No, sir.

Q. Where does he live? A. He lives in Essex Fells.

Q. That is just beyond Montclair? A. Yes, three or four miles beyond.

Q. Have you made him a party to this suit? A. 30 No, I have not made him a party to the suit.

Q. I show you a letter from Mr. Henry V. Condict addressed to the Erie Railroad, dated February 7th, 1910; will you kindly read that letter? Witness reads letter.

Q. You are familiar with Mr. Henry V. Condict's handwriting? A. Yes.

Q. Is that his signature? A. Yes, that is his signature.

Walter H. Condict—Cross.

Q. Well then you have talked together about this property before it was purchased? A. Oh, yes.

Q. And you knew that the City map showed a tunnel located under the land as long ago as '71 or '72? A. I don't know what the particular map he referred to was; the map I am familiar with is the map that I have referred to—the book map of Essex County. 16

Q. But he informed you that his information was at that time that the tunnel was actually built under the lot in about '71; is that right? A. I understood or the rumor was that the tunnel had been built towards the lot, but how far under the lot I did not know and do not know.

Q. And was you not told that it had been timbered? A. Yes, but as to what part I do not know. 20

Q. And that water came out of the tunnel and formed stagnant marshy places on this lot? A. I don't remember ever hearing that.

Q. And wasn't you told that about twenty years ago this marshy hole was filled up? A. I understood that there had been a depression filled up there.

Q. You don't know who filled up this marshy hole, do you? A. I think I do. 30

Q. Who? A. I think it was Mr. Crane.

Q. What was Mr. Condict's interest with you in this property? A. Mr. Condict and I own the property together jointly, but I hold the title.

Q. You mean to say that you are each half owners of it? A. Yes, we are each half owners of it.

Letter referred to marked D-2, for Identification. 40

Walter H. Condict—Re-Direct.

Q. And you were each such owners before this suit was commenced, is that true? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. BOARDMAN:

Q. You had this title searched before you purchased it, did you? A. Yes, sir.

10 Q. By whom? A. The Essex Title Company of Montclair.

Q. And what did they report about this matter, if anything? A. I can show you better by their title, but I understood that they found no right—

BY MR. PARKER:

Q. Was the report in writing? A. Yes, sir.

MR. PARKER: I object to this evidence then, unless the report is produced.

20 Question withdrawn.

BY MR. BOARDMAN:

Q. What condition did you find in the right of way in the matter of trees and shrubbery? A. I went down in the open cut to the east of my property, and the open cut is grown up with all sorts of trees and wild growth—some trees large and some smaller.

30 Q. Did you measure any tree there? A. Yes, I measured an elm tree.

Q. How large was that? A. About sixteen inches in diameter and forty eight inches in circumference, measured about a foot up from the ground as I recollect it. It was fairly near to the centre of the open cut.

Q. This open cut is the open cut that you referred to that began about eighty feet east of your property and ran towards Montclair? A. It is.

40

Walter H. Conduct—Re-Cross, Re-Direct.

Henry V. Conduct—Direct.

RE-CROSS EXAMINATION BY MR. PARKER:

Q. How long is this cut? A. I don't know.

Q. Could you say whether it is five hundred feet long or one thousand feet long, or how long?
A. I am unfamiliar with the length.

Q. Is it more than one hundred feet? A. It is; I know that because I went in the cut and walked through more than one hundred feet myself. 10

Q. Is there any railroad embankment in Caldwell or Montclair? A. I don't know.

Q. How far from the westerly end of the cut is this tree that you have spoken of? A. I should say thirty feet, roughly estimating.

RE-DIRECT EXAMINATION BY MR. BOARDMAN:

Q. Thirty feet from which end? A. Thirty feet from the face of the rock into which the tunnel is supposed to have entered. 20

HENRY V. CONDUCT, a witness on behalf of the complainant, being duly sworn according to law, testified as follows:

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. Mr. Conduct, you conducted the negotiations for the purchase of this property described in the bill of complaint? A. I did. 30

Q. Can you tell us how the clause that Mr. Parker has read from the deed came to be inserted in the deed? A. That was embodied from negotiations—as part of the negotiations at the time. I first refused to accept any deed with any such clause in it, and finally I said that I would make a search and ascertain what the rights of the Erie 40

Henry V. Condict—Direct.

Railroad or any other railroad were, and we would then decide whether we would take any deed. I made that search and investigation and found that they had no rights.

Q. Did Mr. Donald tell you whether he had ever given any deed to the railroad company or received any notice by which he knew they were
10 to build a tunnel? A. I had no negotiations personally with Mr. Donald; I had them all with his son-in-law Doctor James Bishop, and he told me that Mr. Donald had never given any deed and had never given any right whatever to the railroad or any railroad, and if they had built a tunnel there they were trespassers. Mr. Donald afterwards told me this same thing and made an affidavit to that effect, which affidavit I offered to show to Mr. Parker, if he wanted to see it.

20 Q. Before the deed to this property was given did you go over and see the Railroad Company about the matter? A. I wrote them the letter which Mr. Parker has offered and had marked for identification, but I received no reply and I went to see them. I had been to their office before writing that letter, and I had seen their own record and had been told by one of the employees, whose name is Mr. Palmer, I believe, that from
30 their record it showed they had no rights. After the writing of the letter I received no reply and I went again to see them and see whether I could get a reply to the letter, and I saw their tax and real estate agent, whose name I think is Williams, and he told me that he could not make a reply to my letter, explaining that possibly there might be something that was not written, but he said "As far as I can see the railroad has no right." I tried to induce him to give me something in
40 writing, but he refused. I then told him that the

Henry V. Condict—Direct.

only way would be for me to bring this suit after I got title, and he said he thought that would be the appropriate action.

Q. Did you see any maps of the railroad company showing the right of way of this proposed road? A. Yes.

Q. Can you tell us what that showed in regard to this property? 10

MR. PARKER: I object to that as not the proper proof.

MR. BOARDMAN: Will you produce that map, Mr. Parker?

MR. PARKER: If you will give me time.

(Witness Continues): I saw that map and it was explained to me by Mr. Palmer the meaning of the various marks, figures and writings on the map, which showed that the Erie Railroad or no other road, as far as that map was concerned, had any rights in this particular piece of property. It showed which property they had rights and ownership in, and it distinctly showed that they had no rights in this Donald property. I will explain that Mr. Donald is an old gentleman and that he did not want to be bothered with this matter. He is a very wealthy man and was anxious to dispose of this property. He at first agreed to give us a bargain and sale deed, without reference to any right of way, but after taking the advice of his son-in-law, he refused to do so, except by inserting the clause in it relative to the right of way. 20
30

Q. Have you caused inquiry to be made in the Secretary of State's office for a map showing this right of way in connection with this right of way?

A I have, and I find that there is no such map on file. 40

Henry V. Condict—Cross.

CROSS EXAMINATION BY MR. PARKER:

Q. You knew when you were buying this property that you were buying a cloudy title? A. I knew that we were buying a good title.

Q. You did not think it was a cloudy title then? A. I did not.

10 Q. Why did you file this bill then? A. Because of the necessity of clearing this up.

Q. What do you call a cloudy title? A. Well when I say it is a clear title, I know that there is not any outstanding title or right.

Q. You mean that you had a search made, and as far as you know no deed or deeds had been given for the property? A. I had made search in the ordinary way and there was nothing of record. And I made inquiry, as I have stated, and I was
20 told that they had no such rights.

Q. By no such rights, you mean by giving a deed or some paper writing; is that all you mean by "no such rights"? A. Had no rights whatever.

Q. Then you dont think that a person that goes in with the knowledge and consent of the owner and makes improvements in anticipation of a conveyance of the property, has any right in the property? A. I ascertained from Mr. Donald that he
30 had never given any rights whatever, and he was the owner of the property when the tunnel was built.

Q. But you had not seen Mr. Donald before the time you made this purchase? A. I ascertaned it through the son-in-law.

Q. What is the son-in-law's name? A. James Bishop.

Q. And you have simply Mr. Bishop's statement of what he thought Mr. Donald remembered about
40

Henry V. Condict—Cross.

it? A. I have the statement which I afterwards had verified by an affidavit from Mr. Donald himself.

Q. You say that he is a very old man; how old is he? A. He is over eighty.

Q. He may have forgotten a good many things? A. As a man his memory is treacherous, but his memory of past events is apparently very clear. 10

Q. Mr. Donald knew of this tunnel having been constructed across his property, didn't he? A. Yes, he knew it had been, but he ascertained that after it had been constructed, he told me.

Q. And it was constructed forty years ago? A. Not quite.

Q. Pretty near? A. Yes.

Q. And shortly after it had been constructed he had ascertained about it? A. Yes. 20

Q. And he had never done anything at all? A. He told me that he did not do anything, but he gave me his reason for that.

Q. I have not asked you for the reason. You had seen this cut which has been spoken of by the preceding witness? A. Yes, and known it a great many years.

Q. And you saw it leading right up to this property? A. Yes. 30

Q. And you knew that if the railroad was constructed in the direction in which the cut was pointing it would go through this property? A. I heard it and I knew it that there was an excavation made in there through this property.

Q. And according to what your statement is in the letter to the railroad a tunnel had been actually built under the property? A. No, sir, it had not been built, but there had been a hole dug in there. 40

Henry V. Condict—Cross.

Q. Did you not say in this letter that your information was that the tunnel was actually built under this land in or about 1871, and that the timbers had rotted and the tunnel had caved in?

A. As I understand your question, it was whether the tunnel was built, meaning completed.

Q. You wrote that letter? A. Yes.

10 Q. You knew that there was a tunnel under there, and you thought it was an uncompleted tunnel? A. I knew it was.

Q. How did you know it was? A. Because it had never been used, and had never been completed.

Q. You had not been in there? A. No, I had not been there.

20 Q. Then how do you know the tunnel had not been completed? A. Well, it is self-evident that it has never been completed; it didn't go through the hill.

Q. Oh, it had not been completed in its full length, but it was completed under your lot? A. No, it was not.

Q. In what respect was it not completed under your lot? A. It was not finished.

30 Q. In what was it not finished? A. Because it was timbered up; you couldn't have a tunnel with timbers in it.

Q. And you didn't regard it as completed because it had not yet been walled in; is that right? A. Well, it was not completed. There is not any question about that.

Q. Well, I want to know exactly what your information, if any, was—what you know about this thing yourself? A. I never was in the tunnel.

40 Q. And you don't know whether the tunnel was

Henry V. Condict—Cross Re-Direct.

completed or not, as a matter of your own knowledge? A. No, I don't know. I am morally sure it was not. I told your people that if they would go on and complete it and run their railroad through the mountain, we would give them the right.

Q. You are anxious to have the tunnel completed and carried through the mountain? A. Why, certainly, everybody up there is. I live at Essex 10
Fells.

Q. And that is only across the mountain from Montclair? A. Across two mountains.

Q. You drive into Montclair frequently? A. I drive it twice a day.

Q. And you are familiar with Montclair and the property there and have been for many years, is not that so? A. I lived right opposite this property. 20

Q. When did you live opposite this property?
A. This winter.

Q. And how long have you lived in Essex Fells?
A. My legal residence there is only since about a year, but for five years I have been living there.

Q. And did you ever live in Essex County or that vicinity before that? A. Except when I was a boy.

Q. And then didn't you hear there was a tunnel being constructed there? A. I didn't live in Montclair, but I knew that there had been a tunnel bored there. 30

Q. And partly constructed? A. Yes.

RE-DIRECT BY MR. BOARDMAN:

Q. Why did Peter Donald do nothing about this tunnel? A. Because the company failed and there was nobody to look to. 40

Henry V. Condict—Cross, Re-Direct.

RE-CROSS BY MR. PARKER:

Q. What you understood from Mr. Donald was that he could not get reparation for the construction of the tunnel and for the land taken for it by the railroad company by suit because the company became insolvent, is not that so? A. No; he and I were talking about the great damage that the
 10 railroad had done to his property, and he said that there was no use of suing them because they had failed.

Q. And then he knew at that time that the Montclair railroad failed in 1872 that a tunnel had been constructed through his land? A. No, he knew it after they had failed.

Q. How long after? A. I don't know.

MR. BOARDMAN: I want to offer D-1 and
 20 D-2 for identification in evidence.

Marked Exhibits C-2 and C-3.

Q. This Mr. Williams that you talked to was a youngish man, was he not? A. Yes.

Q. And so was the other, Mr. Palmer? A. No.

Q. Well, they were none of them persons who had any connection with the Montclair railroad at the time that this tunnel was built? A. They didn't
 30 tell me that, but I don't think they had.

Q. That was forty years ago pretty near and they couldn't have had, could they? A. Well, this Mr. Palmer might have had; he was old enough to be.

RE-DIRECT BY MR. BOARDMAN:

Q. Mr. Palmer had the map before him when he was talking to you, had he? A. Yes, he showed it
 40 to me.

William J. Harahan—Direct.

Q. What is your best information as to when this cavein was filled up? A. I can't say; I wrote here in this letter twenty years ago, but whether that is correct or not, I don't know.

Complainant rests with the exception of offering the map when produced by Mr. Parker under call made on him.

Adjourned until day to be fixed.

10

September 9, 1910.

WILLIAM J. HARAHAH, a witness produced and sworn on behalf of the defendants, being sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. PARKER:

Q. Where do you live? A. Montclair, New Jersey. 20

Q. What is your business? A. Assistant to the President of the Erie Railroad.

Q. How long have you been such? A. Three years.

Q. What are the general duties of assistant to the President of the Erie Railroad? A. Why, he has charge of matters assigned to him by the president, among which the engineering and general matters in connection with projects for the enlargement and extension of the railroad. 30

Q. Do such matters as projects for the enlargement and extension of the railroad come under your attention? A. They do.

Q. Can you tell us whether or not you know what is called the Morristown Branch of the New York and Greenwood Lake Railroad? A. I am familiar with it. 40

William J. Harahan—Direct.

Q. That railroad, if I understand, was originally projected to run from the main line of the New York and Greenwood Lake Railroad through a tunnel to Caldwell, and so on to Morristown? A. It was.

Q. Have you had brought before your attention any plans in relation to building that tunnel route through the mountain? A. Yes, in 1909.

MR. CONDUCT: I forgot, at the start, before Mr. Harahan was sworn, I ought to have corrected my testimony.

MR. PARKER: I will give you an opportunity to do that.

A. (Continuing) In 1909 we had very active negotiations toward building this line and it looked for a time as if we would make arrangements for building.

Q. (By Mr. Boardman) When was that? A. In 1909.

Q. Have the railroad officials ever abandoned the intention of putting through that tunnel line, if possible? A. No, it has never been abandoned. The matter has been gone into a number of times and there has always been a purpose to build that line when the occasion required it.

Q. What has prevented your taking up the matter and having that line built? A. The negotiations I spoke of, in 1909, were not concluded because we could not make satisfactory arrangements with the party who was desired to enter into it, but outside of that, it has not been built because we have had other more important things come up before the company which it had to get out of the way before it could take that up.

Q. What are the advantages of that line as re-

William J. Harahan—Direct, Cross.

gards development of the country beyond the mountain? A. The advantages are that it gives a shorter line than the present line and it gives a straighter line, freer from curvature, more susceptible of improvement into a high speed first class suburban line than the present line.

Q. Is there any desirable business around, which that road is adapted for reaching? A. Morris-
town would be reached by the Erie within a lesser
distance than the present line of the Lackawanna,
if that line was built. That is a very important
suburban town. 10

Q. If I understand it, you have an intention to build that line as soon as practicable it can be done?

MR. CONDUCT: I object to the question as the witness is not competent. 20

MR. PARKER: I will withdraw the question.

CROSS EXAMINATION BY MR. CONDUCT:

Q. Mr. Harahan, does it come within your province, as assistant to the president, to attend to the payment of taxes on property? A. No, sir, it does not.

Q. Who is the man that pays the taxes? A. 30
We have a tax agent.

Q. Would you know whether the taxes on the premises in question in this suit have been paid or not? A. I would not.

Q. If they were not paid, would that be an evidence that the property was abandoned by the railroad?

MR. PARKER: I object. It calls for a conclusion. 40

William J. Harahan—Cross.

Q. (Continuing) According to our customs?

A. No, sir, not necessarily.

Q. How long do you allow taxes to remain unpaid? A. I am not familiar enough with the payment of taxes to answer that question.

Q. Did you say in your direct testimony that the plans to carry this project through were completed, to your knowledge? A. Completed?

Q. Yes, the plans? Were the plans completed? A. They were completed in a general sense, but probably some details in connection with the construction which are never completed until actual construction begins, but the question as to the general location of the property, grades, and so forth, have been completed.

Q. This road, through this property, was to be a tunnel, was it not? A. I am not sure. I do not know what property it is.

Q. As a matter of fact, you are not using the right of way from Caldwell to Montclair, through Verona? A. We are using part of the right of way, from Caldwell to a point probably half a mile east of Caldwell, and from that point we are not using it actually for railroad purposes.

Q. Just describe, starting from the Caldwell depot, how your trains now reach New York. A. They run from Caldwell, over the line built from Caldwell to Great Notch, and then strike the Greenwood Lake at that point, and thence to Jersey City.

Q. The line from the Caldwell boundary line through Verona to the boundary line of Montclair is not being used at all? A. It has not been constructed.

Q. You said that it was always the purpose of

William J. Harahan—Cross.

your company to complete this road. How has that been exhibited? A. How was it exhibited?

Q. How was that purpose exhibited? A. Well, in the origination of the project there was some property bought, and it is my understanding that we have warrantee deeds for certain portions of the property, and we have preserved that, as I understand it, as the property. 10

Q. You would not claim the right to run over a piece of property unless you had a deed for it, or unless you had condemned it?

MR. PARKER: I object to the question on the ground that it is immaterial, irrelevant and incompetent, and also, that it call for a conclusion.

A. No.

Q. You said that in 1909 there were certain arrangements with a certain party, you could not carry through? A. I said there were active negotiations with a certain party. 20

Q. Are there any negotiations pending now with anybody? A. Not at the present time.

Q. Those negotiations, I presume, related to the raising of funds to build that line? Is that it? A. Financing the proposition.

Q. There is nobody at the present time attempting to finance it? A. No, not at the present time. 30

Q. You are familiar with the maps in your office in the Terminal Building, that show this right of way, are you not? A. I have seen them, but I cannot say I am so familiar with them I could recall everything in connection with them, the detail.

Q. Those maps show this line, do they not, from Montclair to Caldwell? A. As I recollect it.

Charles Buchholz—Direct.

Q. And there are properties between Montclair and Caldwell that the company does not own, are there not? A. I am reasonably sure that that is so.

Q. And those maps show which properties you own, and which properties are not owned by your company? A. I could not answer that with accuracy.

MR. PARKER: Those maps will be produced later.

CHARLES BUCHHOLZ, a witness produced and sworn on behalf of the defendants, testified as follows:

20 DIRECT EXAMINATION BY MR. PARKER:

Q. Where do you live? A. In New York City.

Q. What is your business? A. I am now consulting engineer of the Erie Railroad.

Q. How long have you been connected with the Erie Railroad? A. Twenty-five years.

Q. In what positions? A. As chief engineer and consulting engineer.

Q. In your business as engineer of the Erie
30 Railroad, have you made any investigations in regard to the construction and situation of what is called the Morristown or Caldwell Branch of the New York and Greenwood Lake Railroad? A. I have, several times.

Q. How often? A. I should think five or six times within that period, within the period of my service with the Erie Railroad.

Q. When was it first taken up by you? A. I
40 think it must have been about 1887 or 1888.

Charles Buchholz—Direct.

Q. What did you do, what was done then in relation to this branch?

MR. BOARDMAN: Which, the Morristown or Caldwell Branch?

MR. PARKER: They are both the same.

THE WITNESS: I take it you mean the branch from Montclair to Caldwell, the tunnel line? 10

MR. PARKER: Yes.

A. Why, I went over the line to examine its condition, report to the first vice president in the management as to its condition and about how much money it would take to complete it.

Q. Why were you asked to do that, do you know? A. No, I presume there was some—

Interrupted by Mr. Boardman. 20

Q. You presume it was what?

MR. BOARDMAN: I object. The presumptions of the witness are incompetent.

A. I presume there was pressure brought upon the railroad company to complete this railroad.

Q. What condition did you find that line in, as respects the line between Montclair and Caldwell?

A. Considering the length of time since the work had been abandoned, it was very good. 30

Q. Had there been any grading, or— A. Yes, embankments, they were made, and the cuttings, they are in a very fair condition, and the tunnel at some places had fallen in, but was not seriously impaired as far as the work had been done.

Q. Did you go into the tunnel? A. At that time, I did, yes.

Q. How far did you go into the tunnel, do you 40

Charles Buchholz—Direct.

recollect? A. I should say some two or three hundred feet.

Q. What was the character of the roof of the tunnel? A. Pretty shaky in some places.

Q. What was it made of? A. Red shale rock.

Q. You say it was partly graded? A. Yes.

10 Q. Could you give an estimate of about what proportion of the work had been done, from the tunnel to Montclair? A. From the tunnel to Montclair?

Q. Yes.

MR. CONDUCT: The tunnel is in Montclair.

MR. PARKER: To Montclair Junction.

20 A. It must have been pretty near two-thirds of that work finished, if not more.

Q. When was it taken up again, do you know?

A. I think in 1890, ninety or ninety-one. I think it was 1890.

Q. What was done then? A. The same agitation was evidently going on, as to finishing this road. My opinion was again asked as to the advisability of doing so and the cost of doing so.

30 Q. Can you tell the other times it was taken up with you? A. Not particularly, but it came up periodically, over four or five years. The last time I distinctly recollect is 1905, shortly after some parties built a railroad from Essex Fels to Morristown, and to make their investment profitable, they were exceedingly anxious that the Erie Railroad should build this tunnel line.

Q. Can you tell us why the work was not taken up, to complete the tunnel line? A. Yes, the principal reason was the railroad company needed the

Charles Buchholz—Direct.

money it had, at so many places, to increase its revenue, that were more urgent than the completion of this particular branch. That was probably the reason that in the previous times the thing had not been taken up seriously.

Q. Can you tell us as to the grades of that proposed road through to Morristown? A. The grades were not much to brag of. That is the case also on the Morristown and Essex Railroad,—eighty feet to the mile, eighty-three, to be exact. 10

Q. What would be the advantage of that road through the mountain? A. It is my opinion the greatest advantage would be the development of the country around Verona, between the South Mountain, I think you call it, and Caldwell.

Q. Is that country susceptible to development? A. It is a beautiful suburban country, yes. 20

Q. Would it be likely to give a lucrative business to such a branch? A. In my opinion, yes.

Q. The railroad has been built on from Caldwell to Morristown, has it not? A. Yes.

Q. By that tunnel route you would have a route through the mountain to Morristown, if it were completed? A. Yes.

Q. Do you know what the distance would be to Morristown, through the tunnel? A. Twenty-nine miles, I think. 30

Q. What is the Lackawanna's distance? A. Thirty miles.

Q. The present arrangement of going around the mountain at Great Notch, how much longer is that than the proposed line? A. Five miles.

Q. So there would be a saving of five miles on the route through the mountain? A. Yes, and it has the same objectionable grades in it that the other has. 40

Charles Buchholz—Cross.

CROSS EXAMINATION BY MR. CONDUCT:

Q. How long since any work has been done on that line? A. I do not know. I think it must have been away back in 1873 or 1874.

Q. Nothing done since then? A. Not as I know of, no.

10 Q. You say you went into the tunnel and you found the tunnel not in very good shape? A. It was not in shape to—

Q. When was it you went in? A. The first time was in 1888.

Q. Have you been in there since? A. Yes, I think I have been in there once, some time in the nineties, some time about 1895 or 1896.

Q. Which tunnel are you talking about? A. The tunnel under consideration.

20 Q. Where does that tunnel go into the mountain? A. At Montclair.

Q. What part of Montclair? A. The eastern part of Montclair, the northern part of Montclair, under the hill. I do not know how to describe it, the name of the street. I have been there often, but I do not remember the name of the street. Two streets come together at that point.

30 Q. Near Valley Road? A. I do not know.

Q. You do not live in Montclair? A. No, I live in New York.

Q. You know the premises in question in this case? A. The tunnel in question?

Q. The premises, the property? A. Yes, I do.

40 Q. Where is it located? A. As I understand it, the property in question is located in the northeast, immediately over the tunnel, after the mouth of the tunnel.

Charles Buchholz—Cross.

Q. Do you know where the mountain is? A. Yes.

Q. Just show us, whereabouts is this tunnel?
A. Let me have the map, I will describe it. I do not know the direction exactly. (Mr. Condict shows witness the map.) There is the tunnel (indicating) on the map); now, as I understand it, the property is here, between old Claremont Avenue and Prospect Avenue. 10

Q. You mean between Mountain Avenue and Prospect Avenue? A. Here (indicating on the map); I judge it from Mr. Parker's description. I have been here (indicating) frequently I have been on these bridges, and met carriages here (indicating on the map). I have walked over the line from its junction with the main line of the New York and Greenwood Lake, on to the mouth of the tunnel, and have gone into the tunnel as far as I could without getting too dirty, and then come out and have met a carriage generally at Claremont Avenue and driven over the hill to the other end of the tunnel and walked the balance of the way up to Claremont Avenue. 20

The map in question is called "Montclair and Greenwood Lake Railway, Morristown Branch." It is marked D-1 for identification. 30

Q. Does this map show the location of the tunnel correctly? A. Yes, apparently.

Q. It is marked "tunnel" here (indicating)?
A. But here (indicating) is the opening.

Q. Does this map show the tunnel and the cuts?
A. Not clearly, the profile map shows that better.

Q. Then where was it you went into the tun- 40

Charles Buchholz—Cross.

nel? A. At the mouth of the tunnel, the exact street, I cannot describe it. I did not take the name of the street down. From this map, there is the mouth of the tunnel (pointing to a place one hundred feet east of Claremont Road or Avenue, south of Prospect Avenue).

10 Q. Right at that point you have just pointed to, there are black lines drawn over the red center line of the right of way. What does that mean?

A. Indicating apparently the face of the tunnel, according to all the signs of engineering practice.

Q. And then beyond that shading—? A. Two parallel lines are drawn and still shaded, and then they stop. But if continued, they would meet other dotted lines further on, which are marked "tunnel."

20 Q. Why are those dotted lines you speak of, omitted? A. I don't know. It is a freak of the draftsman.

Q. You say you went into that tunnel, how many feet? A. About two hundred feet, two or three hundred.

Q. That was in—? A. 1888, the first time.

30 Q. The second time? A. I do not know the exact dates. I went in there at least three times within the period of my office with the railroad.

Q. Can you make a rough estimate as to when it was that you went in there the second time? A. Probably in 1890. I think it was in 1890.

Q. That was the last time? A. No, I think I went in there the last time, in 1897.

Q. 1897? A. Yes.

40 Q. It was all caved in then? A. No, it was not caved in in 1905, when I was at the mouth. I did

Charles Buchholz—Cross.

not go in because there was too much water in it, not because it was caved in, but because there was too much water in it.

Q. You know the mouth or near the mouth, of that tunnel, at that time, it caved in? A. No, the rocks had fallen in, and it was full of debris that had fallen from the roof, but it had not absolutely caved in, or made it impossible for a man 10 to go in.

Q. Don't you know it did cave in, and made a great depression of the ground above? A. No.

Q. You never heard of that? A. No.

Q. The work was abandoned, then, about just prior to the time you went with the Erie Railroad? A. I do not know when. It was before I knew anything about it. It was prior to my becoming chief engineer of the Erie Railroad. 20

Q. When you speak of having examined it, having examined the line, and that it was in good condition, you refer to the embankments and the cuts, do you not? A. Yes, I do, and what was constructed of the tunnel.

Q. You say that in 1890 the matter was taken up again, but there was no work done on the tunnel, was there? A. No.

Q. You say that this line would be, if run, if completed and run and operated, would be of great benefit to the public, do you? A. I do, yes. 30

Q. Then why don't you build it? A. I gave the reason, I think, because they didn't have the money. We needed the money we did have for more urgent purposes.

Q. Can you say when they will have the money? A. The Lord only knows that, we don't. 40

Charles Buchholz—Cross, Re-Direct, Re-Cross.

Q. Do you think there is any immediate hope of raising the money? A. That depends upon what you mean by "immediate." Tomorrow?

Q. Yes, tomorrow? A. Or within a year?

Q. Yes, within a year? A. Then I say, no.

Q. Does the railroad control the road from Morristown to Essex Fells? A. Yes.

10 Q. They do control it? A. I guess so, yes, I think they own all the stock.

Q. Mr. McEwan claims to own it. A. I misunderstood you. No, we do not. I thought you meant the Caldwell branch.

RE-DIRECT EXAMINATION BY MR. PARKER:

Q. The railroad controls the road between Great Notch and Caldwell, does it not? A. Yes, that is 20 what I thought he asked me.

Q. Did you make any estimate of the amount of money that had been expended in grading the road and building that tunnel at the time work ceased? A. I think I did.

Q. Do you remember what it was, approximately? A. No, I don't.

RE-CROSS EXAMINATION BY MR. CONDUCT:

30 Q. Have you constructed branches for the Erie Railroad? A. Have I constructed any?

Q. Yes. A. Yes.

Q. Is it their habit or custom to build on property that they have not got a deed for, or have not condemned? A. Sometimes it takes a long while to get deeds and get through condemnation proceedings. We have often finished the railroad before that.

40 Q. You have never known a case when they did

Alfred P. Boller—Direct.

not get title eventually? A. No. We have sometimes operated the road for thirty years before getting title.

MR. PARKER: At the close of the examination last time Mr. Condict reserved the right to put in a map that was introduced. I think there was a map shown Mr. Condict, and it is up to him to put it in. (Showing a map.) 10

MR. CONDUCT: I am not sure that that is the map, Mr. Parker. I would like to put Mr. Palmer on the stand.

ALFRED P. BOLLER, a witness produced and sworn on behalf of the defendants, testifies as follows:

DIRECT EXAMINATION BY MR. PARKER: 20

Q. Where do you live? A. In East Orange.

Q. What is your business? A. Consulting engineer.

Q. How long have you been in the engineering business, approximately? A. Well, since I graduated from the Polytechnic, in 1861. I have been in it ever since.

Q. Where do you operate? A. My office is in New York. 30

Q. Were you ever concerned with making a survey and an examination of what is called the Caldwell Branch of the New York and Greenwood Lake Railroad, extending from Montclair through a tunnel to Caldwell and beyond? A. I was.

Q. At what time was that done? A. My recollection in regard to that, it is so long ago, is very shadowy. It was in the early eighties. 40

Alfred P. Boller—Direct.

Q. Who employed you? A. J. Wyman Jones, who has been dead a number of years.

Q. Who was he connected with? A. He was an independent gentleman and he had considerable to do with railroads, and he had an idea of revamping this road in connection with the Greenwood Lake, and he wanted to know how much money
 10 it would take to complete it. He got me to organize an engineering corps and we ran out a center line and made an estimate and report of what the conditions were and what it would cost to complete the road.

Q. Mr. Wyman Jones was the trustee of one of the mortgages? A. Blessed if I know. He may have been.

Q. He was connected, to your knowledge, with
 20 the New York and Greenwood Lake management?
 A. In some way, yes.

Q. What did you do in relation to that matter?
 A. You mean in connection with this work?

Q. Yes. A. I organized, as I said before, a surveying party, which was under the charge of James Owen, I think, of Essex County, and we ran out the line and computed the work that had been done and the work that remained to be done,
 30 from the junction out to Verona, and beyond.

Q. Did you make any map at that time? A. I see a map before me, signed with my name, and that is pretty good evidence, I think, that I did. It is strange it is not dated. That is my signature.

Q. This is a blue print, you think, of the map you made? A. Yes.

MR. PARKER: I offer this for identification.

40 It is marked D-2 for identification.

Alfred P. Boller—Direct.

Q. Do you recognize this profile map? A. I do not know that I recognize this particular one, but I remember the profile of the line when we ran over it. I remember that junction of the track and the red sand stone (indicating). This comes back to me, that I have seen this very same profile.

MR. PARKER: I offer this map as an exhibit. 10

It is marked Exhibit D-3.

Q. Did you examine the work that had been done in the construction of that road? A. I did.

Q. About how much of it had been constructed, approximately? A. Well, I would not like to say. The grading had been pretty well done between the streets there, through Montclair. There had not been very much done over on the Verona side. 20

Q. But the grading was pretty much completed? A. It was pretty well completed, except what had been due to washing and lack of care.

Q. Did you go into the tunnel? A. I did.

Q. Describe its condition as you found it. A. The tunnel was shaly sandstone rock tunnel. I remember that very well. How far we went in, I do not think it was over two or three hundred feet, because the water bothered us, and we could not wade in, but there had been nothing—it had not been mucked out, as we say in tunnel operations, thoroughly, but I do not think there had been any falling of the roof, or anything of that kind. 30

Q. (By Mr. Condict) When was that? A. In the early eighties.

Q. How much of the tunnel had been completed at that time, do you know? A. I do not remember fully; my impression is there was about nine 40

Alfred P. Boller—Direct.

hundred feet driven. Whether it was all head and part of the bench had been taken out or not, I do not remember.

Q. The two hundred and three hundred feet you speak of, was that head or bench? A. Full section of the tunnel.

Q. Was it a single or a double track tunnel? A. 10 Single.

Q. Could you give us an estimate of how much it would cost to build the tunnel so far as you saw it? A. I gave an estimate of finishing the tunnel, finishing the surface and grading up—

MR. CONDUCT: That was not the question.

A. (Continuing) I am not certain. I cannot put my hand on the report which had it in detail. 20 The copy I had, I remember was destroyed with a lot of other papers.

Q. Can you give us an estimate of what it would cost to build the tunnel of that size, for say, three hundred feet?

MR. CONDUCT: I object. It is immaterial.

MR. BOARDMAN: I understand your question is, to build it the way it was then.

30 MR. CONDUCT: No, a tunnel, he says.

MR. PARKER: It is a question for an expert, I suppose.

A. I should think through that sandstone rock, it would cost forty dollars a foot.

Q. Forty dollars a foot? A. I should think so. That would not include lining.

Q. Does that tunnel have to be lined, did you

Alfred P. Boller—Direct.

say? A. Yes, because that shale rock is very loose, until they got to trap, then they probably wouldn't have to line it.

Q. Further on, if I understand it, the tunnel would run into trap rock? A. Yes, the profile shows that.

Q. Was any work done on the westerly side?

A. The tunnel had been commenced on the westerly face too, and worked both ends. This is the face. This is open cut here (indicating on the map). This portal had been taken out and dumped into these fillings (indicating). 10

Q. If I understand it, on the west side of the mountain, the beginning of the portal had been commenced? A. The tunnel itself had been commenced. The portal had been made, if my memory serves me. 20

Q. Had the grading been done on the road, on the west side of the mountain? A. I do not think there was any grading done except the stuff that came out of the portal—yes, there was some grading done there (indicating) on either side of Verona pond. The fillings from the tunnel excavation had been filled in at the depressions, near the pond. I think this is the same profile that Wyman Jones showed me. 30

Q. Did you ever have anything to do with this branch after that? A. Never.

Q. Where did you say you live? A. In East Orange.

Q. Do you remember the time the tunnel was being built? A. No, I never was over there on the line until I went over it to look after the trip that I spoke of.

Alfred P. Boller—Cross.

CROSS EXAMINATION BY MR. CONDUCT:

Q. When you went over it on the trip you speak of, you found the tunnel partially built? A. Partially built, yes.

Q. The shale was falling down into it? A. No, I would not say that. I think the floor was pretty clean, except the roughness and muck had not
10 been dressed off.

Q. It was timbered up? A. I don't think so. My impression is the rock was holding.

Q. There was a large amount of water there? A. Yes, it had not been excavated out, and it was not level so the water could run off.

Q. Can you tell how near the surface of the ground at the east portal, the rock came? A. No, I cannot tell anything about it except as I would
20 read it from this profile.

Q. Do you regard it safe to work a tunnel of that kind through shale, without timbering it?

A. It depends on how the shale lays. My impression is it was not a timbered tunnel, but I would not swear.

Q. You say you went into it in the early eighties? A. Yes.

Q. Are these maps dated, to refresh your memory as to when it was? A. There is no date upon
30 this at all (indicating).

Q. Can you tell whether it was 1879 or 1880? A. It was not before 1880, I am very sure.

Q. Was it after 1883? A. No, I think it was before. My impression is it was about 1881.

Q. Have you been there since? A. No.

Q. Are you in the employ of the Erie? A. No, I have never been with the Erie.

40 Q. The only reason you say that you think there

Alfred P. Boller—Cross, Re-Direct.

was a portal on the west side of the mountain, is by referring to this map (indicating)? A. By referring to this profile map. I think, but I would not swear, that this is the same map that Wyman Jones handed me as part of the documents.

Q. Does this profile map show the east portal?

A. Yes.

Q. Where? A. Here (indicating). This has 10' been taken out.

Q. I call your attention to the words "finished about 5500 yards removed," and ask you how far it is between the lines where those words appear. A. From here—let us see the scale—horizontal scale, 400 feet to the inch—according to that it would be, I would call it, five hundred feet. That would measure five hundred feet and the heading goes two hundred feet further. This is heading and this is bench (indicating). The usual thing is to drive the heading through and break the bench out. 20

RE-DIRECT EXAMINATION BY MR. PARKER:

Q. If I understand it, that map shows that the tunnel had been practically completed for five hundred feet? A. Yes, taking both ends.

Q. What do you mean by "taking both ends"?

A. It is not five hundred feet at the east end, but there has been a certain amount excavated. That portion of the tunnel (indicating) has been excavated for about five hundred feet. 30

Q. The heading which was made in constructing the tunnel, had been constructed two hundred feet more? A. Yes, that was seven hundred feet.

Alfred P. Boller—Re-Cross, Re-Direct.

George H. Palmer—Direct.

RE-CROSS EXAMINATION BY MR. CONDUCT:

Q. On the west end, how much had been completed? A. They got into the trap rock there (indicating). That is about four hundred feet, I should say about four hundred feet.

10 Q. Is it not a fact that this map shows that the tunnel must be kept up to the line of the trap rock, which trap rock is above where the tunnel now exists? A. That is grade line up to trap?

Q. Is it not a fact that this map shows it? (Reads) "It must be kept to the line of trap." A. I do not understand what they mean by that. The finished tunnel has got to keep up to trap?—It has got to *break* through it. I don't understand what that expression means.

20 RE-DIRECT EXAMINATION BY MR. PARKER:

Q. Do you remember what your estimate was, for the total construction of the road through the mountain? A. I cannot say.

GEORGE H. PALMER, a witness produced and sworn on behalf of the defendants, testified as follows:

30 DIRECT EXAMINATION BY MR. PARKER:

Q. Where do you live? A. In New York.

Q. What is your business? A. Assistant general land and tax agent of the Erie Railroad.

Q. How long have you been in that business? A. I have been with the company twenty-nine years, practically in the same line of business, in the same department.

40 Q. Does your office have charge of real estate

George H. Palmer—Direct.

matters at all? A. We have charge of all the records, real estate matters of the Erie Railroad Company and subsidiary companies.

Q. Mr. Condict says that some time in the early part of this year he called at your office and saw you, and a map was produced and shown him. Do you recollect his call? A. I do.

Q. Do you recollect which map was shown him? 10
A. Why, this map (indicating), to my recollection.

The map indicated is entitled Montclair and Greenwood Lake Railway.

MR. PARKER: I offer it and ask that it be marked.

It is marked D-4.

MR. PARKER: Mr. Condict, will you put that map in evidence? 20

MR. CONDUCT: Yes, we offer it.

It is marked C-10 in evidence.

Q. Mr. Henry V. Condict testified that at this interview he had been told by you, he believed, that from your record it showed that the company had no rights in the property in question in this suit. Do you remember any such conversation? A. Well, I remember Mr. Condict coming in and saying that somebody had offered to sell him the property, and he wanted to know what claim, if any, the railroad company made to it, and I got out the map and showed him what memorandum we had, deeds we had in the department, and asked him, or suggested to him, that he had better have a search made in the county clerk's office. I was not positive we had all the records in the department. We simply had what had been turned over to us. 40

George H. Palmer—Direct.

Q. Your only point was as to whether in your office you had a deed for the property? A. That was all, yes.

Q. Have you got a memorandum of the deeds referred to on this map? A. I have the original deeds of all the maps. I haven't any memorandum made up separately. I have the original deeds, all
10 the deeds we have in the department. There is one we do not seem to have.

Q. This first deed you have (indicating), James Crane and wife, to the Montclair Railroad, dated May 31, 1870—?

MR. CONDUCT: We enter a general objection to the offer of any deed unless it describes the premises in question, or conveys some rights in the premises in question in this case.
20

MR. PARKER: The maps that have been previously marked for identification, numbers D-1 to D-3, are now offered in evidence.

They are marked respectively D-1 to D-3 in evidence.

MR. PARKER: I now offer in evidence the deed I have just referred to, from James Crane and wife. It conveys the first tract on map known as Exhibit C-10, and other lands.
30

MR. CONDUCT: I object.

It is marked Exhibit D-6, in evidence.

It is marked D-5 in evidence.

Q. What is the next one? A. Deed from Richard Green and wife to the Montclair Railroad Company, dated June 11, 1870, conveying a part
40

George H. Palmer—Direct.

of the line of the Caldwell Railway, recorded in Book D-15, page 3, of Deeds for Essex County.

MR. PARKER: I offer it in evidence.

Q. These deeds, if I understand it, convey the property from the junction of the Greenwood Lake Railway to property marked on the map, "M. E. Hubbard"? A. Those, with the next one. 10

Q. What is the next one? A. George Stoker and wife to Montclair Railway Company, recorded in Book W-14 of Deeds, page 246.

MR. PARKER: I offer this in evidence.

It is marked Exhibit D-7 in evidence.

Q. The next? A. Deed by Joel M. Hubbard, dated May 24, 1870, recorded in Book B-15, page 265. This conveys the triangle marked "Hubbard." 20

MR. PARKER: I offer this in evidence.

It is marked Exhibit D-8 in evidence.

Q. The next? A. Deed by Albert Pearce and wife to Montclair Railway Company, dated March 3, 1870, recorded in Essex County Register's office, May 16, 1871, in Book S-15, page 140. That conveys a tract of land from the property marked "Jacob Meyer" to property conveyed by Julius H. Pratt to Montclair Railway Company, near the Valley Road. The Pratt deed we have not got. 30

Q. You have not got the deed from Julius H. Pratt and wife to Montclair Railway Company? A. No.

Q. The next tract? A. Joseph M. Black.

Q. The Stocking deed? A. That covers the corner of Pearce. We have not been able to locate the Stocking deed, exactly. 40

George H. Palmer—Direct.

MR. PARKER: I offer the Pearce deed in evidence.

It is marked Exhibit D-9 in evidence.

MR. PARKER: I offer the deed of Stocking to Montclair Railway Company, for property in the vicinity of lands marked "Kearney."

10

It is marked Exhibit D-10 in evidence.

Q. What is the next? A. Deed by Joseph Van Vleck to Montclair Railway Company, dated March 25, 1871, conveying property marked "Van Vleck."

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-11 in evidence.

20 Q. The next? A. Deed by Amos Crane and wife, dated April 10, 1871, conveying property marked "Amos Crane."

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-12 in evidence.

Q. What is the next? A. Deed by Henry Howe to Montclair Railway Company, dated May 1, 1871, recorded in Book U-15, page 141, conveying property marked "Howe."

30

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-13 in evidence.

Q. What is the next? A. Deed by Francis Oliver to Montclair Railway Company, dated April 17, 1871, conveying a small triangle in the right of way marked on Exhibit C-10, "Francis Oliver."

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-14 in evidence.

40

Q. All of these deeds, I think, call for fifty feet

George H. Palmer—Direct.

on each side of the center line, do they not? A. Except the deed of Julius H. Pratt, which calls for twenty-five feet on one side and seventy-five feet on the other, an odd irregular piece on the south. The others all call for fifty feet on each side of the center line.

Q. What is the next? A. Deed of Emma S. H. Littell to Montclair Railway Company. 10

MR. PARKER: I offer it in evidence.
It is marked Exhibit D-15 in evidence.

Q. The next? A. Deed by James Jackson, dated August 29, 1871, recorded in Book W-15, page 586.

MR. PARKER: I offer it in evidence.
It is marked Exhibit D-16 in evidence.

Q. You have protracted on this map the land granted by Jackson? A. I have. 20

Q. Both on the right of way and in a separate map? A. Yes.

Q. That property is for some of it, fifty feet, and then it is reduced to fifteen feet on each side of the center line? A. It is irregular. It is less than that. It is thirteen and a half or fourteen feet on each side.

Q. It is about twenty-five feet in width, twenty-six feet in width? A. Substantially twenty-six feet in width. 30

Q. This property of Jackson immediately adjoins the premises in question, does it not? A. So I understand.

Q. This narrow part is evidently the tunnel part? A. Yes.

Q. How long is that tunnel part, how much on the south side? A. The average is seventy-three feet. 40

George H. Palmer—Direct.

Q. The Littell deed conveys property bounded easterly by the land of Parkhurst, westerly by Sunset Avenue, northerly and southerly by lines parallel with, and fifteen feet from the center line of the company, containing twenty-nine hundredths of an acre. This is the property marked between the Turnpike and Sunset Avenue, is it not? A.

10 Yes.

Q. And is property west of the property in question? A. Yes.

Q. This deed is intended to convey land for the tunnel, is it not? A. Yes.

Q. And it expressly states (I quote from the deed), "it is expressly stipulated and mutually agreed by the parties hereto that the said strip or parcel of land shall be used only for the purpose of a tunnel for the railway of said company, which shall be subterranean and at least one hundred feet below the surface of the ground, and further, that all right, title and interest to and in said land remains in the party of the first part, except the right to construct and use said tunnel, which is hereby granted to said company, and no shaft shall be sunk on said land by said party of the second part, or its successors." The deeds stop there until they come to the other side of the mountain, do they? A. Yes.

30

Q. Then what have you? A. We have a deed of Marshall Baldwin, dated June 21, 1871, recorded in Book B-15, page 384.

Q. Does that convey land marked "Marshall Baldwin and wife"? A. It does.

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-17 in evidence.

Q. The next? A. A deed dated May 29, 1871,

40

George H. Palmer—Direct.

by Charles Smith to Montclair Railway Company, recorded in Book U-15, page 295, conveying the property marked "Charles Smith."

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-18 in evidence.

Q. The next? A. Deed by Sarah Catherine Dobbins, dated June 26, 1871, recorded in Book U-15, **10** page 290, conveying property marked "Sarah Catherine Dobbins."

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-19 in evidence.

Q. What is the next? A. Deed of Josephine C. Siler and husband, dated May 19, 1871, recorded in Book W-15, page 538, conveying property marked "Frederick Siler" on the map.

MR. PARKER: I offer it in evidence. **20**

It is marked Exhibit D-20 in evidence.

Q. The next? A. Deed by Marcus E. Kent, dated February 19, 1870, recorded in Book S-15, page 137, conveying property marked "Kent."

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-21 in evidence.

Q. The next? A. Deed by Stephen Personet, dated February 19, 1870, recorded in Book S-15, **30** page 136, conveying property marked "Stephen Personet."

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-22 in evidence.

George H. Palmer—Direct, Cross.

Q. The next? A. Deed by Alexander S. Gould and wife, dated November 27, 1869, conveying property marked "A. S. Gould" on said map.

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-23 in evidence.

Q. After that, I understand it, Mr. Palmer, the
10 line of the right of way of the Morristown branch strikes the railroad now actually existing and constructed up to Caldwell, does it not? A. It does.

Q. Of which you have obtained all the title deeds, either at the time that these deeds were obtained, or subsequently? A. Yes.

Q. What is the length of this branch to where it strikes the line in operation? A. It runs about four miles.

20 CROSS EXAMINATION BY MR. CONDUCT:

Q. All these deeds that have been offered are noted on the map C-10, are they not? A. Yes, all but the Stocking deed.

Q. Where is that? (Witness shows Mr. Condict the deed in question.)

Q. Where is that property? A. Somewhere in connection with the Pearce tract. We have never been able to locate that exactly. (Reads.)
30 "Bounded easterly on the west line of Central Avenue, southwesterly by the land of said company purchased of Albert Pearce," it is somewhere right in here (indicating on the map).

Q. It does not cover any part of the premises in question? A. No.

Q. (By Mr. Parker) It covers property between Harrison Avenue and Chestnut Street? A. Between Chestnut Street and Central Avenue.

40

George H Palmer—Cross.

Q. Why was it not noted on this map? A. Because we could not locate the exact boundary lines of both ends and we left it off until such time as we could look it up on the record.

Q. Who owns the property described in all these deeds you have offered in evidence? A. It belongs to the New York and Greenwood Lake Railway. 10

Q. Have you possession of all the deeds and records of that company? A. I could not say. We have all that were turned over to us. The records were passed around from one officer to another. I cannot say we have got all there are. I know we have not all the records.

Q. Are you a lawyer? A. No.

Q. Have you done searching? A. I have done searching. 20

Q. Have you searched any of these titles? A. No.

Q. Have you looked into the records to find whether or not there is any deed of the premises in question? A. No, I never have.

Q. Who has? A. We rely on this abstract, I think prepared by Mr. Parker.

Q. Does this cover the premises in question? A. No. 30

Q. Is there any other abstract or paper in your office relating to the premises in question? A. I do not know of any.

Q. If there were any there, would you know of it? A. Yes, if in the office, I would.

Q. Have you made a search in your office since the beginning of this suit with the object of finding such paper or record? A. No, not since the suit. It was all checked up very carefully a num- 40

George H Palmer—Cross.

ber of years ago. Everything we had was turned out then and put together.

Q. Then this map shows the property that was purchased by the railroad at the beginning of the construction? A. So far as the records of our department show. I cannot swear to anything else.

10 Q. And where the map has no notations on it, on any particular parcel, such as the parcel in question, would that indicate in your mind that the railroad had no interest in that parcel? A. No, not necessarily. It would simply indicate that either we were unable to locate the property from the deeds we had, or else that we had no deeds in our department for it, for that parcel. There is one offered today, we have never been able to locate, but I do not think it comes in this section.

20 Q. You know now, do you not, Mr. Palmer, that the Greenwood Lake Railroad now claims to have some right in the premises in question? A. Yes, by defending the suit.

Q. Do you know upon what they base their claim? A. I do not. i

Q. Is there any basis for their claim?

30 MR. PARKER: I object. The witness is not competent to answer the question.

A. I am not competent to say.

Q. You were of the opinion when I called there, that they had no claim? A. I knew that I showed you at the time you were there—

Q. (Interrupting.) All the claim you had? A. All the records we had in the department.

40 Q. You gave me to understand you had no claim, didnt you? A. No, sir.

George H. Palmer—Cross.

Q. You told me, didn't you, that so far as your office showed, it had no claim? A. I told you that so far as my office showed, we had no record of any conveyance covering this piece of property.

Q. Have you found anything since? A. No, sir.

Q. Do you think they have a claim now? A. I hardly think that is a fair question, is it? We have gone in and done work, certainly. 10

Q. Who has gone in and done work? A. There has been work done there.

Q. But not on the part of the New York and Greenwood Lake Railway? A. No; not as I know of.

Q. By some prior company? A. Presumably, yes. I do not know of any.

Q. The company that did work on this property, mortgaged it, didn't they? A. Mortgaged the land. 20

Q. The right of way? A. Yes.

Q. They didn't mortgage the premises in question, did they? A. I don't recollect, now. It was a regular blanket mortgage, covering all the property of the company, not specifying any particular piece.

Q. They did not have any interest in this property? A. I don't know. I do not say that. I do not know. All I can testify to is what we have in our department. 30

Q. There were some condemnation proceedings to cover part of this property on this line? A. You mean when the line was built. But they took title.

Q. For instance, the Jackson property? A. I don't know.

MR. PARKER: We expect to prove that. 40

George H Palmer—Cross.

Q. When was this map, C-10, made? A. I don't know. That map was handed to me by Abram S. Hewitt in his office.

Q. (By Mr. Parker.) Who was he? A. At that time, I think, president of the New York & Greenwood Lake Railroad.

Q. How long ago? A. Some time about 1893.

10 Q. These papers were turned over to you in 1893? A. About that date. We got these papers at different times, some maps we got at one time, and the map turned over to us was lost and I went down to Mr. Hewitt and got this map.

Q. No map was ever filed in the office of the Secretary of State? A. I cannot say.

Q. Did you ever file a map there?

MR. PARKER: We are going to cover that
20 point too. There is no map filed.

Q. How long have you been with the company?
A. Twenty-nine years.

Q. Do you know whether any work has been done on this property since you have been in the employ of the company? A. Well, personally, I don't know of any. Our department records have nothing to do with that.

30 Q. Do you know whether they have paid any taxes on this right of way? A. Yes; we have paid taxes on it.

Q. On all the property shown in these deeds you have here? A. Yes.

Q. Have you paid taxes on the premises in question?

Q. As a matter of fact, they have not, Mr. Palmer, paid any taxes. Where do you pay taxes? A. I think this is third class property.
40 We pay to the town of Montclair.

George H. Palmer—Cross.

Q. And you have never paid taxes on this right of way that you have offered the deeds of, to any other place, have you, except the town of Montclair or its predecessor? A. I cannot say, off hand. There have been so many changes in the tax laws in the last ten years I cannot say.

Q. As far as you know, you have never paid taxes in Trenton on this right of way? A. As far **10**
as I know personally, I do not want to say. I do not have charge of the payment of taxes. I cannot go into detail as to that.

Q. You knew that I was about to buy this property when I called on you, did you not? A. Yes, you said you had it offered to you.

Q. And you referred me to Mr. Williams, did you not? A. Yes.

Q. And you and Mr. Williams and I had a talk about the matter? A. I do not recollect. I **20**
know you came in to see Mr. Williams several times and I brought in the map. I do not remember that we three talked together.

Q. He is a man that has authority? A. He is in charge of the department, yes.

MR. CONDUCT: You are going to produce him?

MR. PARKER: I do not think so. **30**

Q. Do you remember him saying anything while you were there indicating that the road claimed the premises in question? A. I do not recollect the conversation. I do not recollect being present at the conversation.

Q. Don't you remember that you told me that if the railroad had any claim in the premises in question there would be some indication on this map to that effect? A. No, sir. **40**

George H. Palmer—Re-Direct.

Thomas Haggerty—Direct.

RE-DIRECT EXAMINATION BY MR. PARKER:

Q. Did Mr. Condict ask you whether or not the company—you could produce and show a deed for this property? A. No.

Q. (By Mr. Condict). Don't you remember I said something like this, that I thought the easiest
10 and simplest way to find out whether you had any interest was to come right to headquarters and ask the question? A. I think you did, yes.

Q. Mr. Condict wanted to know whether you had any record title to that property you could produce, and you told him you had none you could produce at that time? A. Not in so many words. That was it in substance, yes.

20 THOMAS HAGGERTY, Sergeant-at-arms of the Court of Chancery, being called by Mr. Parker, on behalf of the defendants, (and not sworn) testified as follows:

Q. I asked you to produce some records of the Court of Chancery, have you them? A. Yes.

He produces records of the following suits:

30 Suit of *Abram S. Hewitt vs. Montclair Railway Company*—

MR. PARKER: I offer in evidence the original records of the Court of Chancery in a suit between Abram S. Hewitt, and Montclair Railway Company for the foreclosure of the mortgage upon the property and franchises of the Montclair Railway Company, under a second mortgage.

40 MR. CONDUCT: I object to this offer, and

Thomas Haggerty—Direct.

all other records are objected to because the said foreclosure, and the said papers do not describe the premises in question or refer to the same, and because said evidence is immaterial.

MR. PARKER: This proceeding is to foreclose a mortgage dated November 1, 1871, made by Montclair Railway Company to Abraham S. Hewitt, Trustee recorded in Book A-6, page 373, of Mortgages for Essex County. 10

Suit of Marcus L. Ward and Abram S. Hewitt vs. Mason Loomis, and others.

MR. PARKER: I offer in evidence the proceedings in the Court of Chancery on bill filed November 17, 1873, in a suit between Marcus L. Ward and Abram S. Hewitt, Complainants, and Mason Loomis, Elias N. Miller and Conrad Jordan, receiver, defendants, for the foreclosure of a mortgage dated September 1, 1870, made by Montclair Railway Company to Marcus L. Ward and Abram S. Hewitt, trustees, to secure a large number of bonds, amounting in all to two million five hundred thousand dollars, this mortgage being recorded in Book P-5 of Mortgages for Essex County, page 381. 20 30

MR. CONDUCT: I make a proposition to you, that we get together and make a statement of the case as to what these papers contain, instead of having them all cluttered up on the record.

MR. PARKER: That will be satisfactory to me, but I have the original papers here.

Suit of George Walker and Amzi Dodd 40

Fred G. Stickel—Direct.

vs. Montclair & Greenwood Lake Railway Company.

10 MR. PARKER: I offer in evidence the foreclosure proceedings in Chancery, on bill filed December 28, 1877, in a case wherein George Walker and Amzi Dodd were complainants, and Montclair and Greenwood Lake Railway Company were defendants, for the foreclosure of a mortgage of seven hundred thousand dollars, recorded in Book D-7 of Mortgages for Essex County, page 284.

MR. CONDUCT: These offers are all subject to my objection as made above.

20 FRED G. STICKEL, JR., a witness produced and sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. PARKER:

30 MR. PARKER: I offer in evidence a certified copy of the survey and location of a part of the extension of the Montclair Railway into the township of Caldwell filed January 1, 1870, recorded with a number of other papers, in the Secretary of State's office, with certificate of the Secretary of State, of such filing. The survey is in words following: (Reads) "A survey and and location of the center line of a part of the extension of the Montclair Railway into the township of Caldwell, from the village of Montclair, at the termination of that part of the Montclair Railway line which leads from Jersey City to Montclair,

40

Fred G. Stickel—Direct.

to the westerly side of Corby Lane in the township of Caldwell, the distance being 12,255 feet.

“Beginning at a point in the township of Montclair, on the line of Amos Crane, two hundred and seventeen feet south, 7 degrees 30 minutes west, from a chestnut tree standing in the southeast corner of the lands of B. S. Musgrave; thence on a curved line inclining southwardly, with a radius of 1273 feet, a distance of 3245 feet; thence on a straight line tangent to said curve, bearing south 50 degrees 30 minutes west, a distance of 220 feet; thence on a curved line inclining northwardly, with a radius of 1,432½ feet, a distance of 1513 feet; thence on a straight line tangent to said curve, bearing north 69 degrees west, a distance of 4462 feet; thence on a curved line inclining northwardly, with a radius of 2865 feet a distance of 850 feet; thence on a straight line tangent to said curve, bearing north 52 degrees west, a distance of 1955 feet to the westerly side of Corby Lane aforesaid. December 31, 1869. J. H. Pratt, President of the Montclair Railway Company.” (Endorsed) “Filed January 1st, 1870.”

MR. CONDUCT: I object to the offer as being immaterial and incompetent testimony in this case.

It is marked Exhibit D-24 in evidence.

Q. You are an attorney at law? A. Yes.

Q. You practice in association with Cortland and Wayne Parker? A. Yes.

Fred G. Stickel—Direct.

Q. Have you made a copy of the documents constituting the title of the Montclair Railway Company, as set forth in the answer filed in this case? A. I have.

Q. Are these copies made by you? (indicating)
A. Copies made and compared,—not made, but compared, by me, after having been made by a
10 gentleman under my superintendence, from the records at the Court House.

Q. What is the first one, in order of time?

MR. CONDUCT: All these copies are objected to for the reasons above given.

MR. PARKER: They are not objected to, for informality of proof?

MR. CONDUCT: No.

20 A. The first is a deed of trust, Montclair Railway Company to Ward and Hewitt, trustees, dated September 1, 1870, recorded in Book P-5, page 381, of deeds for Essex County, mortgaging all the property and franchises of the Montclair Railway Company, to secure a large issue of bonds, amounting to one million five hundred thousand dollars, covering all and singular the line of railway, known and to be known as the
30 Montclair Railway, as the same is being, and shall be, constructed from the line of the state of New York at Greenwood Lake, to the Hudson River, also the branches thereof, to wit, the Hackensack branch—and the Caldwell branch, extending from Montclair into the township of Caldwell, including all the railway, etc., and all real and personal property held or acquired or hereafter to be held or acquired by said company, its successors and assigns, for use in
40 connection with the said railway and the branches

Fred G. Stickel—Direct.

of the said party of the first part, or with any part thereof, or with the business of the same.

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-25 in evidence.

Q. What is the next? A. Mortgage from Montclair Railway Company to Abram S. Hewitt, trustee, to secure a bond of fifteen hundred thousand dollars, dated November 1, 1871, recorded in Book A-6 of mortgages of Essex County, on page 373, conveying the premises, railway and franchises of the Montclair Railway Company by substantially the same description as in the last mentioned mortgage, and including the Caldwell Branch of said railway. 10

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-26 in evidence. 20

Q. What is the next? A. Deed from William Patterson, Master, to Abram S. Hewitt, trustee, dated January 7, 1875, conveying the same property and franchises as described in the mortgage from Montclair Railway Company to Hewitt, dated November 1, 1871, recorded in Book A-18, page 516, of deeds for Essex County.

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-27 in evidence. 30

Q. What is the next? A. Deed from William Patterson, Master, to Marcus L. Ward and Abram S. Hewitt, trustees, dated September 27, 1875, and made in accordance with a decree in Chancery in a case wherein Marcus L. Ward and Abram S. Hewitt trustees were complainants, and Elias M. Miller, and others, receivers of the Montclair Railway Company were defendants, and convey- 40

Fred G. Stichel—Direct.

ing the property and franchises set forth and described in the mortgage made by the Montclair Railway Company to Marcus L. Ward, dated September 1, 1870, recorded in Book P-18, page 424.

MR. PARKER: I offer it in evidence.

10 It is marked Exhibit D-28 in evidence.

Q. What is the next? A. Deed from Marcus L. Ward and Abram S. Hewitt, trustees, to the Montclair and Greenwood Lake Railway Company, dated November 29, 1875, conveying all the premises, franchises and property formerly of the Montclair Railway Company, conveyed to them by William Patterson, Master, as aforesaid, recorded in Book R-18 of deeds, page 278.

20 MR. PARKER: I offer it in evidence.

It is marked Exhibit D-29 in evidence.

Q. What is the next? A. Mortgage by Montclair and Greenwood Lake Railway Company to George Walker and Amzi Dodd, trustees, dated December 1, 1875, recorded in Book D-7 of mortgages for Essex County, page 284, to secure the sum of seven hundred thousand dollars, conveying all the franchises and privileges and property
30 of the Montclair Railway Company, now of the Montclair and Greenwood Lake Railway Company, and all the franchises and privileges of the said last named company, whether or not derived from the Montclair Railway Company, especially all the said railway of the said company, lately known as the Montclair Railway, as the said railway is being and shall be constructed from the line of the State of New York at or near
40 Greenwood Lake to the Hudson River, and also

Fred G. Stickel—Direct.

the branches thereof, there being mentioned, among others, the Caldwell branch, extending from Montclair into the Township of Caldwell.

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-30 in evidence.

Q. What is the next? A. Deed by William Patterson, Master, to Abram S. Hewitt and C. W. Field, and John B. DuMont, under a decree in Chancery, in a cause wherein George Walker and Amzi Dodd, trustees were complainants, and Montclair and Greenwood Lake Railway Company, et al, were defendants, conveying all the franchises and privileges and property described in a mortgage made by the Montclair and Greenwood Lake Railway Company to George Walker and Amzi Dodd, trustees, recorded in Book X-19 of deeds, page 449. 20

MR. PARKER: I offer it in evidence.

It is marked Exhibit D-31 in evidence.

Q. What is the next? A. Deed by Abram S. Hewitt, Cyrus W. Field and John B. Dumont of the first part, and New York and Greenwood Lake Railway Company of the second part, conveying all the property which was conveyed to them by deed of William Patterson, Master, as aforesaid, recorded in Book C-20 of deeds, page 17. 30

MR. PARKER: I offer ti in evidence.

It is marked Exhibit D-32 in evidence.

MR. CONDUCT: All these documents are objected to as being irrelevant, immaterial and incompetent.

Q. What is the next? A. I have here a copy 40

Fred G. Stickel—Direct, Cross.

of the act to incorporate the Montclair Railway Company, (Pamphlet Laws of 1867, page 301) and amendments to said act, allowing amended surveys in lieu of surveys deposited in the Secretary of State's office, March 17, 1869 and May 18, 1869 and May 27, 1869, being the Pamphlet Laws of 1871, page 469.

10 MR. PARKER: I offer the same in evidence.

It is marked Exhibit D-33 and D-34 respectively, in evidence.

MR. PARKER: I also offer in evidence a copy of the lease of the Greenwood Lake Railway, made to the Erie Railroad Company, dated May 1, 1896, and recorded in the office of the Register of Essex County, August 4, 1896.

20

It is marked Exhibit D-35 in evidence.

MR. PARKER: I also offer in evidence the articles of association of the New York and Greenwood Lake Railway Company, filed November 1, 1878, and recorded in Book E of Corporations, page 264, in the office of the Secretary of State.

It is marked Exhibit D-36 in evidence.

30

CROSS EXAMINATION BY MR. CONDUCT:

Q. Have you made a search of the records of the County of Essex, relative to these documents?

A. I have traced them down from the two mortgages, the devolution of title down to the last deed into the New York and Greenwood Lake Railway Company.

Q. Have you searched the records at Trenton
40 to ascertain whether there are any other documents? A. No, I have not.

Fred G. Stickel—Cross.

John R. MacArthur—Direct.

Q. Did you search particularly against this Peter Donald tract, the premises in question? A. In connection with this comparison?

Q. Yes. A. No, sir.

Q. In any connection? A. I searched Peter Donald. I grantored Peter Donald, yes.

Q. Did you find any deed or document by him ¹⁰ affecting the premises in question? A. No, sir, I did not.

Q. Did these documents that you have offered in evidence here, cover the Peter Donald property, the premises in question? A. They purport to cover the railroad, as shown on Exhibit C-10, but there is no specific reference to Peter Donald.

Q. Or to the premises in question? A. Or to the premises in question, except as being covered ²⁰ by the other terms, by the "Caldwell branch".

Q. Except in a general way, as Mr. Parker has read it? A. From the mortgage, yes.

Examination adjourned to Monday, September 19, 1910, at two p. m.

September 19, 1910. ³⁰

JOHN R. MACARTHUR, a witness produced and sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. PARKER:

Q. Where do you live? A. I live in New York City.

Q. What is your business? A. Engineering ⁴⁰ and contracting.

John R. MacArthur—Direct.

Q. Were you ever in partnership with your father George W. MacArthur? A. No, my father's name was Archibald.

Q. Were you ever in partnership with him? A. We were a corporation and he was the president, and I was an officer of the corporation.

10 Q. In what business? A. Engineering and contracting, largely railroad building.

Q. How long did the MacArthur firm in various forms carry on that business? A. About eighty-five years now.

Q. (By Mr. Condict). What is the name of the firm? A. MacArthur Brothers Company.

Q. Was your father's firm engaged on the Caldwell branch of the Montclair Railroad? A. They were, yes.

20 Q. In what years was this construction carried on? A. I cannot be perfectly exact about the months, 1870, 1871 or 1872, to the best of my recollection.

Q. Where did you live at the time that this work was carried on? A. On Valley Road, not far from the embankment that was to cross the road, going through the fields.

30 Q. In Montclair? A. In Montclair, and Upper Montclair now.

Q. What did you observe; describe the construction of the railroad while it was going on through there? A. It was as evident as railroad construction always is. We had a full force, teams and men and cars laying down track from the mouth of the tunnel across the fields, across Amos Crane's old place at Valley Road at that time, I think across Valley Road, and the materials out of the tunnel and its approaches were

40

John R. MacArthur—Direct.

carried on across, down across these fields, and used for the railroad embankment, as is the usual custom and practice.

Q. Was there any noise in the construction of this tunnel? A. Oh, yes, noise in the construction of the earth work and in the construction of the tunnel, noise of blasting, drilling, dumping of cars, and the shouting of teamsters. 10

Q. And they were blasting in the tunnel at that time? A. They were blasting in the tunnel and also blasting before the tunnel was reached, in the approach cuts.

Q. In the streets near to the mouth of the tunnel could the tunnel be seen? A. Oh, yes, the tunnel could be seen if anybody came near enough to see it; it was always conspicuous, people visited it at all times. 20

Q. Did you ever go in the tunnel? A. Very often.

Q. How far did you go in? A. Well, I went into the bench and went into the headings. I used to go with my father very often into the tunnel as far as the tunnel work had advanced from time to time. It was driven by cutting a number of feet heading, and the bench. I don't recall the number of feet, but it was a long way, to a boy's imagination. 30

Q. Did the tunnel have any defect on the water supply of the town? A. I remember there were a great many complaints. I remember hearing my father discuss it, that one neighbor and then another neighbor in the neighborhood of the tunnel were complaining that it was drying their wells. It was wet.

Q. Were there any bridges across any cuts? A. I don't recall any bridges at that time. 40

John R. MacArthur—Direct.

Q. Do you know of any disputes about title at that time? A. No, I never heard of any disputes, I was a young boy.

Q. Did you observe any cessation of the work on account of disputed title or anything of that sort? A. No, not that I ever heard. The work did not cease and I never heard of any disputes about title.

Q. Was the work continuous? A. Continuous, until it came to a full stop because of some legal difficulty, I believe the foreclosure of the bonds.

Q. Was the work your firm did on the tunnel all paid for? A. No, sir, to the present time, within a considerable amount of money. I think there was some ninety odd thousand dollars. It may have been reduced. I know it was rather a black eye at that time and remained so for some time.

Q. Do you know the cost of the construction work that you did? A. No, I don't know. I could pretty well figure it. I remember I had occasion three years ago when they were putting through this Bergen cut, to know what it cost, and father produced his old contract,—it was very interesting, thirty or forty years old. Operations then were almost double what they come to now. I don't recall, but if I had the number of feet I could make a calculation of it; two or three hundred feet, I don't know what, I would have to guess at that or figure it.

Q. Did you observe any work being done on the west end of the tunnel? A. Yes, I remember the approach work there, approaching the west end of the tunnel. I don't recall whether they ever got to the turn of the tunnel, I mean the portal of the tunnel, where you go in under

John R. McArthur—Cross.

ground, but there was considerable approach in trap rock, which was carried to Verona Lake. That was harder rock.

CROSS EXAMINATION BY MR. CONDUCT:

Q. How old are you? A. Forty-eight.

Q. You went into the tunnel then in 1871 or 1872? A. Yes. **20**

Q. Was it timbered up at that time? A. I don't recall that it was timbered, except the heading would be timbered. I don't recall. I don't think it was fully timbered. It may have had the construction timber in, that I cannot recall. I am inclined to think it was. I know there was not a permanent timber, a permanent lining.

Q. There was plenty of water there? A. Yes. **20**

Q. That being the case, wouldn't that cause the timber in there to rot? A. It might, if there was any great amount of timber.

Q. How long would that timber last in there? A. The life of timber under water——

Q. (Interrupting.) That wouldn't be all under water? A. It might last longer if there was water. I don't know to what extent the water might preserve it or rot it. As we advance our headings, before it has gotten to its full section, to protect the workmen, it is ordinarily timbered and it is determined afterward whether the tunnel is in such ground that it needs permanent timber. **30**

Q. The tunnel not having been completed, naturally the timber would be left there? A. I don't know. I know we left it over night, just the way it was.

Q. What sort of rock was it? A. On the east **40**

John R. McArthur—Cross.

side, red sandstone, and on the other, trap.

Q. Red sandstone, that is not very safe for a tunnel without timbering, is it? A. It depends upon the density and quality of the sandstone. We build a great many sandstone tunnels without timbering.

10 Q. Was this a sort of shale? A. No, I wouldn't call it shale. I would call it laminated red sandstone, hardly in the shale class.

Q. How thick should be the roof of the tunnel in order to make it safe, a red sandstone tunnel?

A. Well, that is rather a question, it depends upon a great many conditions, as the quality of your sandstone, and other collateral conditions. I should say a cover of twenty or twenty-five feet probably would insure a safe roof. We some-
20 times make roofs much shallower than that. I should say a roof of twenty or twenty-five feet of that rock would be called a fair covering. I do not recall what this was.

Q. Did your company have anything to do with, and do you know anything about, what rights the railroad company had to go into and upon the land? A. No, I don't know anything about that, whether my father did or not I don't know.

30 Q. Did your company file any mechanics lien?

MR. PARKER: The law was not applicable at that time.

A. I think we had an attachment, but we very soon lost our attachment.

Q. The bonds were foreclosed? A. I can't answer with any specific knowledge as to that. I recall my father said the company had failed and he couldn't get his estimates, and he was
40 advised to remove his property with the utmost speed.

John R. MacArthur—Cross, Re-Direct.

Q. Did he get paid? A. He got two lots in Morrystown, two town lots, and some other small payments.

Q. Who gave him those? A. They were owned by somebody who had purchased them for the company. I don't know anything about them. Ten or fifteen years afterwards somebody offered him a couple of hundred dollars for them and he sold them. I am inclined to think he got a considerable amount of it, which reduced it to sixty thousand dollars, I think. 10

Q. Had he received any money at all for this work? A. Oh yes, he had received his money from month to month, over a period of two years, until the crash came, and whatever was due him then he didn't get.

Q. That crash was the beginning of the panic of 1873? A. I think so, yes. 20

RE-DIRECT EXAMINATION BY MR. PARKER:

Q. Who was the foreman on the job? A. A man named George Ford, was the general foreman, Tom Carroll was another foreman.

Q. Is Tom Carroll still alive? A. I think so. He was in our employ some years after that, many years after that. He was up at the Soo (Saulte St. Marie) in charge of the Government locks. We took him there and he remained there, in the Government employ. There was Reynolds; he is dead; Bill Gamble, he is dead; on the West End. I don't recall who was foreman there. The only one I recall who is alive is Tom Carroll. 30

James Owen—Direct.

JAMES OWEN, called and sworn on behalf of the defendants testified as follows:

DIRECT EXAMINATION BY MR. PARKER:

Q. Where do you live? A. Montclair.

Q. What is your business? A. Civil engineer.

10 Q. Have you had any public position in the County of Essex? A. I have been County Engineer.

Q. Can you recollect so far back as when you first commenced to be County Engineer? A. I commenced in 1868. I was appointed in 1868.

Q. You have been County Engineer of the County of Essex ever since? A. With one hiatus of one year or two years.

20 Q. And you said you lived in Montclair? A. Yes.

Q. How long have you lived there? A. Since 1872.

Q. Are you familiar with the cut in the tunnel on the Caldwell branch of the Montclair and Greenwood Lake railway? A. I am

Q. How long have you been familiar with it? A. Since they began work in the tunnel.

30 Q. Do you recollect when they commenced work on the tunnel? A. I think some time about 1870 or 1871.

Q. Can you describe what that work consisted of, as far as you observed? A. The work in Montclair?

40 Q. Yes. A. It consisted of excavating the approach to the tunnel and making fill on the line across in a southeasterly direction from the face of the tunnel, and excavating the tunnel for a distance of about seven hundred feet altogether.

James Owen—Direct.

Q. What mechanical means did it require to construct the tunnel and the approaches? A. Do you mean the means of getting the rock out or of moving it?

Q. Both. A. The rock was done in the ordinary old-fashioned way, blasting and hand drilling, and the fill was carried out in small cars on the railroad tracks, and as the fill was carried along, **10** bridges were put over the different streets. I think there were three bridges.

Q. Was there any bridge carrying a street over the railroad? A. No.

Q. On Mountain Avenue? A. Yes, there was a bridge, a wooden bridge put there; afterwards it was taken down and an iron bridge put there.

Q. Were you ever employed to go over the line and make observation from it? A. Yes, in 1876 **20** Mr. Boller was deputized by, I think, Wyman Jones to make an estimate of the cost of the completion of the Caldwell branch. Mr. Boller came to me and asked me to assist him in the matter, and I turned my assistants over to him to make a survey, and to help at certain parts of the work. I made the measurements myself of the amount of work done in the tunnel, and afterwards we made a report showing the map, the profile map. **30**

Q. I show you this profile marked Exhibit D-3? A. That was the profile that accompanied the report to Mr. Jones, made by Mr. Boller and myself and assistants.

Q. I see some figuring on it. Do you recognize the handwriting? A. This is the map that I kept in my office for about twenty-five years, and I loaned it to the Erie Railroad about a year ago. They said they wanted it. They never gave it back to me. This is the map I have had in my office **40** for twenty-five years.

James Owen—Direct.

Q. That shows the profile of the railroad from— A. Montclair to Caldwell.

Q. Does it show the construction and work that had been done and was to be done there? A. Yes.

Q. I see some little figures. They show the work as actually constructed, as you found it? A. Yes, from station 22 to about station 47 showed
10 the filling that was made from the tunnel, 47 to about 57 showed open excavations, and 57, or call it 56, to 63, showed the tunnel work. That was the tunnel finished to full height (indicating), and this the heading. (Witness points to words "Finished, about 5,500 yards removed").

Q. Did you go into the tunnel at that time? A. I did, in 1876.

Q. Describe what condition you found it in?
20 A. There had been a slight fall of the roof in the mouth of the tunnel, consequently a great deal of water in the tunnel, and we had to build a float or raft to get into the tunnel. We got in and measured the distance of the full height and of the heading. It was red sandstone rock. It was full width as far as the profile shows.

Q. How far does the profile show the tunnel to have been fully constructed? A. About five
30 hundred feet.

Q. How far had it been partly constructed, that is the roof had been provided for? A. About 270 feet.

Q. Had there been any excavation or construction at the west end of the tunnel? A. Yes, quite a deal of it. Quite an amount of it. There was a deep cut in trap rock amounting to about 55 feet at that time. No, that is wrong. There was an approach cut with a distance of about seven
40 hundred feet, with an average of ten feet.

James Owen—Direct.

Q. (By Mr. Condict). This blue line (indicating) is the original topography of the ground? A. Yes. Change that 700 feet to about 1,000 feet. They made a considerable fill over towards Verona Pond, took the dirt out of that cut to Verona Pond, on the east side, I think; practically all the excavating, to where the Caldwell station is now, for the track. 10

Q. Have you marked on this map about where the property in question in this suit is located? (Indicates map marked Exhibit C-10, D-4) A. The full tunnel was completed to where it was marked on this map "Samuel Adams," afterwards the property known as the Peter Donald tract.

Q. (By Mr. Condict.) Afterwards? A. Yes.

Q. (By Mr. Condict.) At that time? A. Marked here, "Samuel Adams", and then afterwards owned by Peter Donald. 20

MR. CONDUCT: No, it was owned by Peter Donald at that time. (Indicating on the map near old Claremont Avenue or Road.)

THE WITNESS: The tunnel was the full width of excavation and height, through the land of Peter Donald, across what is marked "Claremont Avenue" on this map, and partly through the land of Parkhurst. 30

Q. To the place marked in pencil on the map? A. Yes.

Q. There is another mark in pencil. What is that? A. That is the end of the drift.

Q. That is the heading (Indicating). A. Yes.

Q. How far below the surface of the ground at Mr. Donald's land did this tunnel run, the top of the tunnel? A. The roof of the tunnel was about 25 feet at the portal, and at Claremont 40

James Owen—Direct.

Avenue which was the side of Mr. Donald's land, about 40 feet.

Q. (By Mr. Condict). How was that? A. It was about 25 feet. The roof of the tunnel was about 23 or 25 feet below the surface of the ground, and at Claremont Avenue it was about 40 feet.

10 Q. Further on, under property named Littel, on the other side of the Turnpike how deep was it there? A. I don't think it ran under the Littel property. It ran under the Parkhurst property.

Q. It was not constructed through the Littel property? A. No, it was not.

Q. The Littel property is on the mountain? A. Yes.

Q. What is the depth of the tunnel from the top of the mountain? A. About 153 feet to the floor of the tunnel, and 133 feet to the roof.

Q. Did you make an estimate of the cost of the completion of the road at that time? A. We did, but I have not a copy of those figures, and I don't remember them.

Q. You do not remember about what the figures were? A. As near as my memory serves me, it was about two hundred and thirty thousand dol-
30 lars.

Q. To complete the road to Caldwell? A. Yes.

Q. About what was the value of the work that had been done? A. That is pretty hard to say. I don't know exactly what prices they had to pay for the work at that time. Prices were higher then than now.

Q. What proportion of the work of the construction of the railroad had been done at the time
40 you made your examination? A. Of the whole road?

James Owen—Direct.

Q. Yes. A I should say about one third, from one third to forty per cent.

Q. About one third was finished? A. Yes, one third in quantity, but about one quarter in cost. The tunnel was the costly part of the construction.

Q. And the tunnel, so far as constructed, about how much value had been put in there? A. 10
The estimate here was 5,500 yards. With the price of say five dollars a yard, if that was paid, twenty-seven or thirty thousand dollars for the work in the tunnel itself.

Q. When you went in the tunnel what was the condition of the roof and sides? A. Everything at that time was intact; for a certain distance from the portal the roof was timbered. They had notched the rock and put heavy timbers in the roof. I don't think there were any side timbers 20
at all, if I remember right.

Q. Was it intended in a tunnel like that to have it roofed in with arch and mortar? A. They would have to have done that surely.

Q. The tunnel when completed under Donald's land would have had rock inside to protect the roof? A. I could not say for sure about that, because it depends on the character of the rock, the solidity of the rock, and the amount of rock 30
covering over it. I do not recollect the ground or the solidity of the rock. It was fairly solid of the character of the rock that it was.

Q. In your business of civil engineer and surveyor in Essex County, have you had opportunity to become familiar with the values of property in the vicinity of Montclair? A. I used to be pretty well posted in Montclair valuations, but 40

James Owen—Direct.

in the last few years I have got out of the run of things there.

Q. I want to go back to old valuations, if you please? A. In 1872 I know fairly well what properties were worth then.

Q. Are you familiar with this Donald property at the corner of Claremont and Mountain Avenues? A. Yes.

Q. What was the value of the property at that time?

MR. CONDUCT: I object on the ground that it is immaterial.

A. Somewhere between fifteen hundred and two thousand dollars an acre. Property at that time was very sluggish. That is what I would estimate it was worth at that time.

Q. Would there have been any damage to the land by the construction of a roof tunnel through it? A. No.

Q. (By Mr. Conduct). No damage? A. No damage to the property if the tunnel was built and arched in.

Q. Do you know Peter Donald? A. I used to know him, yes.

Q. Where? A. I have met him and done business with him and been to his office and talked with him.

Q. Have you seen him in Montclair? A. No, I never saw him there.

Q. He was a large landholder, wasn't he, in Montclair? A. No, he had that tract.

Q. Did you ever talk to him about this tunnel? A. No.

James Owen—Cross.

CROSS EXAMINATION BY MR. CONDUCT:

Q. Mr. Donald was a pretty careful business man? A. Quite so.

Q. Always the same way? A. Yes.

Q. He is not the sort of a man that would be likely to allow the railroad company to trespass on his land when he knew it? A. I couldn't say that. I imagine he knew all about this business. 10

Q. You think he did? A. I think so, I could not say positively. I don't think I met him at that time.

Q. He didn't live in Montclair? A. No.

Q. What makes you think he knew about it? A. Why it was such a matter of notoriety.

Q. To people in Montclair? A. To everybody, and Donald was such a careful man I should think he would keep track of all that was going on. 20

Q. When did you see him in Montclair? A. I never saw him in Monclair.

Q. You said that the tunnel if finished would not be any damage to property, Donald's property? A. I said so, yes.

Q. Don't you consider it is a damage to property as it now stands, without a roof? A. No, because part of it is filled in, I think. 30

Q. Because it is filled in; the tunnel has in other words caved in? A. Part of it has, yes.

Q. So far as the Donald property is concerned, that tunnel is all filled up? A. I couldn't say that.

Q. Don't you think that is the fact? A. I could not say how far the fill would stretch. The mouth is filled up from the bottom upwards from 40

James Owen—Cross.

the falling in of the roof, how far that is I don't know.

Q. You cannot tell without getting in? A. Nobody could get in.

Q. Nobody could get in more than a foot or two? A. I don't know, I couldn't say. I never tried to get in and I guess nobody has.

10 Q. When were you there last? A. Last Friday. I have been constantly along through there. The contractor built the bridge on Mountain Avenue and we had to rebuild that bridge. I have had to survey all along through there in the last fifteen years. I am fairly cognizant of it.

Q. Will you describe the condition of the mouth of the tunnel? A. The mouth of the tunnel I think is filled up within four or five feet.

20 Q. Within four or five feet of the roof? A. Yes, that is as far as I saw in, making the surrounding surveys outside.

Q. Have you looked in? A. No, I could not see anything if I did.

Q. Is it not a fact that after you get in about fifteen feet, as a matter of fact the roof of the tunnel slopes up at the portal, and after you get in about fifteen feet the roof has entirely filled the tunnel? A. I would not dispute it.

30 Q. Then you think the damage to the Donald property now does not amount to anything because the tunnel has fallen in and has been filled in? A. Yes.

Q. Who filled that in? A. Mr. Donald, I think.

Q. Do you know how many loads of earth he put in there? A. No, I don't.

Q. At present the Donald lot shows no evidence 40 of any depression, does it? A. Not at all.

James Owen—Cross.

Q. It is level? A. Yes.

Q. When was it filled in, about twenty-two years ago? A. Do you mean when Mr. Donald filled it in?

Q. Yes. A. I should say some time about twelve years ago.

Q. As a matter of fact the necessity of filling that in was brought about by reason of the depression on his lot and accumulation of water that came up out of the tunnel; is that not a fact? A. Due to depression and accumulation of water, but it didn't come from the tunnel, from the surface. 10

Q. It came from the surface too? A. Yes.

Q. You say that the value of the property in 1870 was about two thousand dollars an acre? A. Fifteen hundred to two thousand dollars. That is an estimate on my part because property was very sluggish at that time, I I gave you what I consider a fair valuation. 20

Q. But shortly after that it went up didn't it? A. No, not for that mountain property. It didn't develop until about 1885 I think, or 1890. There were some houses built then. After that things were slow until about fifteen years ago.

Q. Prior to 1872 it was much higher than two thousand dollars an acre? A. Property in 1872 was sluggish, that was about the valuation. There was no particular demand for property. After 1874 things were very dull and there was nothing doing for years. 30

Q. But in 1870 wasn't it much higher than it was in 1872? A. No, sir.

Q. Do you know when they began to build that tunnel? A. I gave it to you in my direct testi- 40

James Owen—Cross.

money, I think it was somewhere about 1870 or 1871.

Q. When did they stop? A. I think they stopped in the winter or spring of 1873. I know I lived quite close to it in 1872, and used to hear the cars rattling along all night until they stopped.

10 Q. Did they work day and night? A. Yes.

Q. When you went in there you found that it was sandstone? A. Yes.

Q. Now that is not a very safe roof, is it? It is apt to cave? A. It depends upon the character of the stone and upon the amount of rock overhead and quite a number of conditions. My testimony was I thought it would be better to finally line it.

20 Q. It never was lined? A. Oh no.

Q. How far is the portal of the tunnel from the boundary line of Donald's land? A. Somewhere about eighty feet.

Q. How low is the roof of the tunnel at the portal, from the surface of the land? A. Twenty-two feet, twenty or twenty-two feet.

30 Q. How wide is the tunnel at the portal? A. I should say, as far as my memory serves me, somewhere about twenty feet, I think. It was built for a single track tunnel.

Q. Can you say whether or not this map, D-4, C-10, shows the correct location of the tunnel? A. (Witness examines the map) Yes, it is fairly accurate.

40 Q. Is the center line of the tunnel, as it is located on the ground, in exact accordance with the center line of this right of way, as shown on this map, D-4? A. Where is the other map that accompanied this report? (Witness examines other maps). Yes.

James Owen—Cross.

Q. How far is the center of the tunnel as located, from the north line of Claremont Avenue, along the east line of the Donald property? A. About ninety feet northerly.

Q. At what point does the center line intersect the north line of Claremont Avenue? A. About 170 feet westerly from the southeast corner of Mr. Donald's lot. The two lines seem to be almost coincident. (Examining maps). 10

Q. And you say that the roof of that tunnel is about forty feet from the surface of the ground under the Donald lots? A. Yes.

Q. Would you think it safe to build a house on the Donald lot over that tunnel now? A. Now, yes.

Q. Absolutely? A. Yes.

Q. And to put it on a foundation? A. There is no question about that now. 20

Q. You said it would cost about two hundred and thirty thousand dollars to complete the line to Caldwell? A. Yes, as near as I can remember the estimate. It was made in 1876.

Q. And you said that it was about one third finished? A. That is only a rough approximation. I gave you that as an idea.

Q. And that one quarter had already been expended? A. Yes. 30

Q. What did you make that profile map for? A. We made that for Mr. Jones, the receiver of the road at that time. His idea was to see whether or not he would complete it. We had this map made.

Q. Did he decide to complete it? A. I think not. He never did it. I don't think they could sell any bonds at that time. 40

James Owen—Cross.

Q. The timber of this roof you speak of would naturally rot away, wouldn't it, in that damp place? A. No, water is a preservative of wood.

Q. But dampness is bad? A. No, it is alternation of drying and wetting. I think the part that is timbered is the part that stayed, if I remember rightly. It was right near the portal. Whether
10 it is there now or not I couldn't say.

Q. But at all events you are satisfied that that tunnel is all filled in by reason of the caving in? A. No, I do not think you can say that, because the volume of the hole at the top is greater than the contents of the subsidence of the Donald lot. The subsidence of the Donald land would not be equal to the hole. The amount of yards that Donald had to put in would not fill a quarter of the hole, consequently there is an opening
20 left yet in the tunnel.

Q. But it would be physically impossible for anybody to get in there now? A. Yes, there is no question about that.

Q. How long has that condition prevailed? A. Twenty or twenty-five years.

Q. If there is still a tunnel under the Donald property and part of that tunnel did cave in, how would it be safe for a man to build a house
30 on that property? A. There has a weak spot been discovered and overcome, and if it did not break then it would not break any more. That is my theory.

Q. Do I understand you to say that the Donald property is not all filled up? A. No, sir, I think not.

Q. You said it was fully constructed five hundred feet? A. Yes.
40

James Owen—Cross.

Q. That means to the end of the head? A. No, to that point (indicating on the map), and there was two hundred and thirty feet more of heading.

Q. That made seven hundred and thirty feet altogether? A. Yes.

Q. When was it you were last in the tunnel?
A. 1876. 10

Q. And this rock is shale? A. No, it is not exactly shale rock. It is a hard sandstone. It is what we know as first Mountain sandstone, softer rock than hard sandstone, but it is not what we call shale rock.

Q. That tunnel was not completed by any means, was it? A. Oh no. Let me understand you, in what way?

Q. So you could run a train in it? A. Only 20
as far as it went.

Q. Was it completed under the Donald property? A. Yes, it was completed for the full width of excavation and height.

Q. Tracks laid in there? A. Yes, the tracks that were used for the construction.

Q. If a house were built on the Donald property and heavy trains went through the tunnel, would they not shake the house? A. I presume there 30
would be a certain amount of vibration.

Q. Do you know what the present value of the property is? A. I suppose that the Donald property, on Prospect Avenue, is worth sixty or seventy dollars a foot.

Q. About how deep, one hundred and fifty feet deep? A. The Donald property is deeper than that, I mean take it as it stands. I think it is about two hundred and thirty feet deep. 40

James Owen—Cross, Re-Direct.

Q. Those tracks that were in there, the construction tracks were not the regulation width? A. Oh no, sir.

Q. Did you ever hear or do you know anything about the title that the Erie Railroad has to this property, if any? A. The Donald property, no, sir, I don't know that they have any.

10 Q. Did you ever hear that they had none? A. I never understood that they had.

Q. You never understood that they had any? A. No.

RE-DIRECT EXAMINATION BY MR. PARKER:

Q. Do you mean you never understood that they had a regular deed for the property? A. I never understood they had.

20 Q. If I understand your testimony, it is your opinion that the tunnel for about half way under the Donald property remains practically as it was when constructed? A. That is what I should presume is the case.

Q. The other part, the one nearer to the mouth of the tunnel, is filled up? A. Yes.

30 Q. How about the removal of dirt in reconstructing the tunnel, as compared with the blasting out of the tunnel again, what would be the difference in value? A. The process now would be rather complicated, because you would have to use regular tunnel procedure, in the reconstructing of the tunnel. That would be probably as costly as the original work.

BY MR. CONDUCT:

40 Q. You never were an officer or in the employ of the company? A. The Greenwood Lake?

Fred G. Stickel—Direct.

Q. Yes. A. Yes, I was; I did their engineering from 1880 to 1883, on the main line.

Q. On this line did you do any? A. No, sir.

BY MR. PARKER:

Q. In the development of the Donald lot, where is the more valuable frontage, as between Claremont and Prospect Avenues? A. Prospect Avenue is the more valuable frontage. 10

Q. And houses are constructed on Prospect Avenue with their sides parallel to Fairmount Avenue? A. Yes.

FRED G. STICKEL, JR., recalled on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. PARKER: 20

Q. Did you at my request make up a list of the considerations paid, and the condemnation awards as expressed in the deeds of the Montclair Railway Company for evidence in this case? A. Yes, I did.

Q. What is the total amount of the payments for the land? A. \$32,642.60. There is one deed which has a consideration of one dollar, but which judging by the Revenue stamp, the real consideration is something like two thousand dollars, which would bring the total to \$34,642.60. 30

Q. That deed had on it a two dollar stamp in 1871? A. Yes, and judging by the revenue stamps on the other deeds, which have their true considerations expressed, the consideration of that deed would be something like two thousand dollars.

Q. You are not familiar with the tax law of that time? A. No, sir. 40

Fred G. Stickel—Direct, Cross.

MR. PARKER: I offer in evidence a certified copy of the certificate of organization of the Montclair and Greenwood Lake Railway Company.

It is marked Exhibit D-37, in evidence.

10 MR. PARKER: I made an abstract a year ago of this thing and there are some deeds in it which are not in evidence. I would like to put the abstract in evidence.

MR. CONDUCT: I don't see why we can't get together and make a statement of the case here.

MR. PARKER: Make a statement of the documentary evidence? I think that would be easily done.

20 MR. CONDUCT: Of all the other evidence too.

MR. PARKER: I call on you to produce or prove the deed from Peter Donald to Walter H. Condict, conveying the lands in this case.

MR. CONDUCT: I will produce it.

CROSS EXAMINATION BY MR. CONDUCT:

30 Q. You say you have made a statement of the cost of the land obtained by the Montclair Railway Company, from where to where? A. I have made up a statement of the considerations as expressed in the deeds already put in evidence in this case, and also the condemnation proceedings which were marked in evidence.

Q. Did you find any document or paper that related in any way to the Donald property, of record? A. That related to it? Only as bounding upon the Donald property.

40

Fred G. Stickel—Direct.

Q. Where did you search for any papers or documents? A. I didn't search for any papers at all.

Examination adjourned to Tuesday, September 27th, at 2 P. M.

10

September 27, 1910.

FRED G. STICKEL, JR., being recalled, testified as follows:

DIRECT EXAMINATION BY MR. PARKER:

Q. Have you examined the records of Essex County, to find the deed by which Peter Donald got title to this property? A. Yes. 20

Q. Have you a copy of that deed? A. I have an abstract of it.

Q. How many acres were there? A. Twelve and six hundredths acres, more or less.

Q. What was the consideration? A. Sixteen thousand two hundred and fifty dollars.

Q. The date? A. Dated April 1, 1869.

Q. Recorded? A. Recorded April 19, 1869, in Book H14 of deeds for Essex County, page 536, from Dorman T. Warren and wife to Peter Donald. 30

MR. PARKER: I ask that that be marked in evidence.

It is marked Exhibit D-38 in evidence.

Q. You have a deed from Joseph Kittridge to Warren, dated March 1, 1869, recorded in Book 40

Fred G. Stickel—Direct.

H14, page 534 of deeds for Essex County, showing a consideration of nineteen thousand dollars? A. Yes, for fourteen and twenty-one hundredths acres.

MR. PARKER: I ask that that be marked in evidence.

It is marked exhibit D-39 in evidence.

10

Q. Have you examined as to any condemnation proceedings or other records affecting the line from Montclair to Caldwell, other than as testified to before? A. I find three condemnation proceedings, one as to the lands of Henry Asmus, containing ninety-three hundredths of an acre, in which the petition is dated April 8, 1871, and the award was twenty-eight hundred dollars. I have an abstract from the records in the county clerk's office, which I made and herewith present.

20

MR. PARKER: I ask that that be marked in evidence.

It is marked Exhibit D-40 in evidence.

A. (continuing) I have similar proceedings as to the lands of Emma Saunders, wife of Thorn-dike Saunders, containing one and four hundred and forty-nine thousandths (1.440) acres, in which the petition was dated April 27, 1871, and the award was twenty-two hundred and fifty dol-lars.

30

MR. PARKER: I ask that that be marked in evidence.

It is marked exhibit D-41 in evidence.

A. (Continuing) And similar proceedings as to the lands of Nancy S. Mackey, containing one and fifty-two hundredths acres, in which the peti-tion is dated September 20, 1871, and the award is seven hundred and fifty dollars.

40

Fred G. Stickel—Direct.

MR. PARKER: I ask that that be marked in evidence.

It is marked Exhibit D-42 in evidence.

MR. PARKER: I find that we have not put in evidence the deed of Julius H. Pratt to the Montclair Railway Company for land, part of the right of way of the Montclair Railway Company. I find this deed dated November 29, 1871, recorded in Book C16, of deeds for Essex County, page 10. 10

The Witness: I herewith present an abstract of that deed.

MR. PARKER: I ask that that be marked in evidence.

It is marked exhibit D-43 in evidence.

MR. PARKER: I have here the abstract which was placed in evidence. In this abstract, attention was not called to the deed of Hannah N. Gould and husband to the Montclair Railway Company, dated November 2, 1871, recorded in Book E6 of deeds for Essex County, page 238, which covers part of the right of way of the Montclair Railway Company. The abstract itself is in evidence, but no mention was made of that specific deed. The consideration of that deed is four thousand seven hundred and fifty dollars. The abstract is in evidence, but it does not seem to have been marked. I now offer it in evidence. 30

MR. CONDUCT: I object to it as being immaterial.

It is marked exhibit D-44 in evidence.

Q. Were the considerations of these deeds included in the summary of the considerations of 40

Fred G. Stichel—Direct.

the deeds mentioned in our last hearing? A. No, sir, they were not.

Q. And they are in addition to those figures which you gave then, of moneys which appear to have been spent by the Montclair Railway Company, for land of this Caldwell branch? A. Yes.

10 Q. What is the total amount of that addition?

A. The total consideration now is \$43,192.60.

MR. CONDUCT: All this line of testimony is objected to as being immaterial.

Q. Referring to exhibit C-10, which is a map of the Caldwell branch of the Montclair Railway Company, can you specify on that map which lands have not been acquired by the Montclair Railway Company? A. Yes, I can.

20 Q. Just specify those, running from the beginning at the junction with the main line.

MR. CONDUCT: I object to it, as being immaterial.

A. There is a strip of land owned by Jacob Meyer, running between Park Street and Midland Avenue, of four hundred and thirty-five feet, and another strip of land between Claremont Avenue and the township line, marked Parkhurst, which we have not acquired, I mean from Claremont Avenue to the Turnpike; and a piece of land between Sunset Avenue and the property of Thorn-dike Saunders, which we do not appear to have acquired. I think that lies just about near the mark "A" on the map, near the mark which is supposed to show the commencement of the tunnel, on the western side of the mountain. There is also a strip of land running from the land of Sarah Catherine Dobbins, just west of Corby

30
4c

Fred. G. Stickel—Cross, Re-Direct.

Lane, to the land of Caleb Baldwin, marked "Isaac Dobbins" on the map which we do not appear to have acquired; and the land marked on the map as belonging to Caleb Baldwin, which we do not appear to have acquired. Other than that we appear to have acquired the entire line.

CROSS EXAMINATION BY MR. CONDUCT:

10

Q. I call your attention to the piece of land on this map, marked "A. S. Gould." Does the company own that land now? A. Now?

Q. Yes. I plotted this up from the deed which we have for that property. As to whether they have sold it since that date, I cannot say. The deed is in evidence.

Q. You have not said anything about the Donald property, the premises in question in this case? A. I did inadvertently skip that. We apparently do not own the Donald property, so far as I can ascertain from the deeds in our possession.

20

Q. (By Mr. Parker) You mean there is no deed of record, of which you are aware, for that property? A. Yes, none that I am aware of.

Q. (By Mr. Conduct.) If there was a deed in existence, you would have been able to find it? A. I could not say that. It might be in existence and I couldn't locate it.

30

RE-DIRECT EXAMINATION BY MR. PARKER:

Q. Have you examined the records as to deeds made by Mr. Conduct, of this property, since he claims to have acquired title to it? A. Yes.

Q. Have you found any conveyances? A. I find two conveyances, one to William V. Bogert, and the other to Isbon B. Scott, one recorded May 11, 1910, and the other September 21, 1910.

40

Fred G. Stichel—Re-Direct.

Q. Have you made a copy of that deed to Bogert? A. I have had a copy made and compared it with the records at the court house. This Bogert deed is from Walter H. Condict and wife to William V. Bogert, dated May 5, 1910, acknowledged May 10, 1910, before Henry V. Condict, Master in Chancery, and received in the office
10 of the Register of Essex County, May 11, 1910, and recorded in Book D47, of deeds, page 125,

Q. What was the consideration? A. One dollar and other valuable consideration.

Q. What does it convey? A. A tract of land in the southeasterly side of Prospect Avenue, sixty-five feet front by one hundred and fifty feet in depth.

Q. And it forms the land off the—? A. Northwesterly side of the Donald property.
20

Q. The corner of the Donald property? A. Yes.

Q. As conveyed to Mr. Condict? A. Yes.

Q. And the other deed? A. Is from Walter H. Condict and wife to Isbon B. Scott, Jr., dated September 1, 1910, acknowledged September 7, 1910, before Henry V. Condict, Master in Chancery, received in the office of the Register, September 21, 1910, and not yet recorded in any book. This is copied from the original deed in the
30 Register's office in Essex County. The consideration is one dollar and other valuable consideration. It conveys land adjoining land conveyed to Bogert, and being fifty feet in front on Prospect Avenue, and one hundred and fifty feet in depth.

MR. PARKER: I offer in evidence the two deeds.

MR. CONDUCT: I object, as being immaterial.
40

Fred G. Stickel—Re-Cross.

Robert B. Harris—Direct.

The Scott deed is marked Exhibit D-45 in evidence and the Bogert Deed, D-46 in evidence.

RE-CROSS EXAMINATION BY MR. CONDUCT:

Q. Those two pieces of property, conveyed by those two deeds do not affect the premises claimed by the defendant in this case, do they? A. Claimed by the defendant in this case, you mean the tunnel? 10

Q. Yes. A They just about reach to the tunnel, so far as I was able to make out on the map, just about reach to the tunnel, that is, the tunnel which is marked on the map.

Q. But they do not encroach upon it? A. I do not think so, so far as I was able to make out. 20

ROBERT B. HARRIS, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PARKER:

Q. Where do you live? A. Montclair, New Jersey.

Q. How long have you lived there? A. Fifty-seven years. 30

Q. What is your business? A. My business is real estate, and placing of mortgages.

Q. Are you connected with the tax office? A. I am one of the assessors of Montclair.

Q. How long have you been such? A. Twenty-six years.

Q. When did you enter the real estate business? A. I was called to take my father's place in 1868. I think it was the fall of 1868. 40

Robert B. Harris—Direct.

Q. And your father was also engaged in that business? A. He established the business in 1853, in Montclair, William H. Harris.

Q. You have dealt in real estate there since that time? A. I have.

Q. How old were you then? A. Eighteen.

Q. Did you know Mr. Peter Donald? A. I
10 did.

Q. When did you first become acquainted with him? A. In the spring of 1869.

Q. In what connection? A. As broker, selling land to him from Mr. D. T. Warren.

Q. Did you sell the land of which the premises in question in this case are part, to Mr. Donald? A. I did. It was done at our office, by my father.

Q. Do you recollect what the consideration
20 was? A. In the neighborhood of sixteen thousand dollars.

Q. Do you remember the construction of the Caldwell branch of the Montclair Railroad? A. I do.

Q. What knowledge did you have of that construction? A. I was interested in the road in a measure, with Mr. McArthur, who was the contractor at that time; I was well acquainted with
30 him. I rented him a house in Montclair and also had done some work for the railroad at that time, on the main line, about right of way.

Q. Purchasing rights of way? A. Yes.

Q. Did you have anything to do with the purchasing of the right of way for the Caldwell branch? A. I did not.

Q. During what years was the Caldwell branch being constructed? A. As I remember it, it commenced about the summer of 1870, and it was
40

Robert B. Harris—Direct.

perhaps, I should say about three years or two and a half years in the course of construction.

Q. Did you notice the construction of the tunnel there? A. I did.

Q. Tell us what was done about the construction of the tunnel, how was the work conducted, and so forth? A. A cut was made in from the north of Mountain Avenue to within about twenty feet of the Donald east line. I remember that because I sold off property there owned by a colored person at that time, and there was a strip along from the fence line east to where the mouth of the tunnel was, I should say, eighteen or twenty feet, because I have driven across through there a number of times, and the tunnel proper, I think, commenced there. I have been in the excavation for the tunnel several times. I had an idea that it ran in there, the excavation, perhaps six hundred or seven hundred feet, from where the mouth of the tunnel was.

Q. How far is the mouth of the tunnel from Mountain Avenue? No, I will withdraw that? Did you notice any construction of bridges by the company? A. There were bridges over each street but they were of a temporary nature.

Q. Across Mountain Avenue? A. There was, at Lower Mountain Avenue.

Q. That was built by the company, was it not? A. Yes.

Q. You are referring to the bridge nearest the tunnel, across the street nearest the tunnel? A. There are three Mountain Avenues in Montclair.

Q. Which is the street at Caldwell? A. Upper Mountain Avenue.

Q. That is the one where the bridge was? A. Yes.

Robert B. Harris—Direct.

Q. How was the work conducted, with what appliances, and animals and machinery? A. The cars running, taking out the excavation—(Interrupted).

MR. CONDUCT: I object to this as immaterial.

10 A. (Continuing). The stone and the earth and so on was carried by small cars, rather of a dump-car nature, down by gravity, down, perhaps, half a mile from the mouth of the tunnel and were towed back by horses or mules or something of that kind.

Q. Any blasting going on? A. Yes.

Q. How audible was that? A. Well, you could hear that at least to Mountain Avenue. I cannot tell you. That is a hard question.

20 Q. Did you ever know Mr. Donald after you met him in connection with the purchase of that property? A. I did.

Q. In what way did you know him in Montclair? A. I knew him at Montclair by his coming to my office at Montclair occasionally. I perhaps can remember three or four times he came there, and I went with him personally up to the property, and sometimes we drove around
30 a little around Montclair.

Q. Did going to the property require you to go through Prospect Avenue? A. Prospect Avenue, at that time Highland Avenue.

Q. And Upper Mountain Avenue? A. Yes.

Q. You drove him around the property generally, I understand? A. He would want to look at his own property.

Q. What did he do about looking at his own
40 property, walk over it? A. Not often. I think

Robert B. Harris—Direct.

that perhaps in one or two cases he did, but he didn't care to walk very much.

Q. Do you have any recollection of going to the property in question, that is the Claremont Avenue, the front of the property? A. We went up Claremont Avenue as a rule. There was no other cross street from Bloomfield Avenue then.

Q. In going there you crossed right over this tunnel? **10**

MR. CONDUCT: I object. It is leading.

A. In going from Prospect Avenue, yes.

Q. Did you go with him to the property in 1869, when he purchased it? A. I did.

Q. Can you tell us how frequently Mr. Donald came to the property, how many times a year? A. I have no way of fixing that. I should say, perhaps three or four times during, it may have **20** been, four or five years after his purchase of the property, that he was out.

Q. That you knew of? A. Yes, that I knew of it.

Q. Do you recollect ever talking to him about this Caldwell branch and its construction, anything of that sort? A. I have no recollection of any such conversation.

Q. What was the value of the property in the **30** year 1870, when this tunnel was first constructed?

MR. CONDUCT: I object, as immaterial.

A. From thirteen to sixteen hundred dollars an acre.

Q. The tunnel at this place runs at a depth of about forty feet below the Donald property. The intention was to construct and fully complete a safe tunnel under this property. Do you think **40**

Robert B. Harris—Direct, Cross.

that the property would have been damaged to any extent by reason of the construction of such tunnel, assuming that it was made in good, workmanlike way, so that it would not fall in? A. Practically none, but I think there was a damage, simply the fact of its being there, under the property.

10 Q. Do you estimate what damage you think that would be? A. Well, if the adjoining lot was for sale at the same price, that this was, and I was to buy it, I would make at least twenty per cent difference in the cost of it.

Q. You think an allowance of twenty per cent. of the value of the ground would be about what the damage is? A. I think that would be fair

CROSS EXAMINATION BY MR. CONDUCT:

20 Q. Well, Mr. Harris, in other words, if an acre of this property was worth sixteen hundred dollars, and this tunnel were under it, you think that three hundred and twenty dollars would be all the damage that it would suffer? A. I would qualify that a little bit if I can. I can perhaps show what I mean. (Makes a diagram on paper) Here is an acre (indicating). I think that the development on that property (indicating Pros-
30 pect Avenue front) at that time was about two houses on that front. I think that half of that would have been damaged twenty per cent., half of that entire acre.

Q. Isn't it a fact that it would be impossible today to use that whole Donald property, as we call it, for one person to build a fine house on it, on account of that tunnel underneath? A. No, I don't think so. The class of residence all
40 around there—here is a twenty thousand dollar

Robert B. Harris—Cross.

place, and here is a twelve or fourteen (indicating).

Q. But the fact that there is a tunnel under there creates a prejudice against this particular piece of land? A. Yes; about twenty per cent.

Q. Isn't it a fact that you couldn't locate a large house like the house upon the adjoining property, without encroaching on the tunnel? A. 10
I cannot tell. I don't know the measurement.

Q. If it were a fact that you could not build on that property without encroaching on the tunnel, a large house, you think, do you not, that it would be impracticable to try to sell it for a large house? A. I do not think it would bear as large a house as this is (indicating the adjoining property) under any circumstances. It is as desirable.

Q. That property is desirable for five thousand 20
dollar houses? A. No, there are no five thousand dollar houses in that vicinity.

Q. What would you say it would be adapted for? A. I think it would be practicable and adapted for a house costing eight or twelve thousand dollars.

Q. You do not think it would be safe to build a house on top of that tunnel? A. Properly 30
protected, yes.

Q. How would you protect it? A. I think by brick work, or something of that kind, or a properly constructed tunnel. The railroad company would not want it to fall in either.

Q. But this tunnel is there, and has been abandoned by the railroad or by the owner, if there is an owner.

MR. PARKER: I object. That is an assumption. 40

Robert B. Harris—Cross.

Q. Now, it is not protected, it is not lined, it is not timbered up, don't you think it would be a dangerous thing to build on top of that until it was protected underneath? A. I certainly would not build over it if I owned it, as it is now, right over the tunnel.

10 Q. A witness called at the last hearing stated that there would be vibration when the trains went through. Don't you think that would be a damage? A. I don't know. I am not an engineer.

Q. Don't you think it would be a damage? A. I should think it would, if there was.

Q. As I understand your testimony, your office sold this property to Mr. Donald? A. Yes.

20 Q. And at that time you took him around, drove him around there, to see the property? A. Yes.

Q. And that was the time that you drove around that you have testified to in your direct testimony? A. At that time, and after his purchase of the property.

30 Q. At that time and immediately after his purchase? A. Well, within—he would come out—it is a good while ago. I have no way of fixing dates, but I should think, I am positive he was out at least three times after the time he bought the property.

Q. But you cannot state when those three times were? A. I cannot.

Q. As I understand your testimony, Mr. Donald never said anything to you about the tunnel? A. I don't know whether he did or not.

Q. You cannot recollect? A. No, I don't.

40 Q. When did you see Mr. Donald last? A. Oh, I don't think I have seen him in five years. I do not know, more than that.

Robert B. Harris—Cross.

Q. He is living now? A. I think he is. He was at the last account. He is very old.

Q. You have been in the tunnel? A. I was in the tunnel on more than one occasion.

Q. That tunnel was begun in 1871, about? A. My recollection is 1870.

Q. 1870 or 1871? A. 1870.

Q. Anyway, it was after Mr. Donald bought? ¹⁰
A. After Mr. Donald bought it.

Q. When was the last time you went into the tunnel? A. I cannot give the date of that. The tunnel was very curious in those days, for us. Everybody was wanting to see it.

Q. Have you been in it within twenty-five years? A. I don't think so.

Q. That tunnel caved in, didn't it? A. Twenty-five? Well, twenty-four years. I have not been ²⁰
in it since work was abandoned, whenever that was.

Q. That tunnel caved in, didn't it? A. There was a cave-in, yes.

Q. Do you know what happened then? A. What happened?

Q. Did Donald fill it up? A. I don't know.

Q. It was filled up? A. It is filled up, yes.

Q. And at the present time the land has no ³⁰
evidence of ever having any depression in it? A. The last time I saw it I don't think there was any.

Q. It would be impossible to go into that tunnel now, wouldn't it? A. I don't know the condition of affairs at all.

Q. Since that tunnel was abandoned, which was about 1873, has the Erie Railroad been in possession of that Donald property?

Robert B. Harris—Cross.

MR. PARKER: I object. He is not competent to say.

A. I don't know anything about it.

Q. Mr. Donald has been in possession of that Donald property since he bought it, hasn't he? A. Donald was in possession of it, as our tax books show, up to the time of your purchase.

10 Q. And that property has been assessed every year to Mr. Donald? A. Yes.

Q. Has it been assessed to anybody else, or any other corporation? A. Not to my knowledge.

Q. Then the Montclair Railroad and the Montclair & Greenwood Lake Railroad, and the New York and Greenwood Lake, and all the other railroads that have been successors of the Montclair, have not been assessed? A. This property, at the surface, has been assessed to Peter Donald, between Prospect Avenue and that land (indicating).

20 Q. Take it down to the middle of the earth, has it been assessed to anybody else? A. I suppose it goes to the middle.

Q. Whoever paid the taxes on the surface paid them to the middle? A. I suppose so.

Q. Can you state when that cave-in took place? A. No, I have no way of fixing the date of that.

Q. What is that property worth today, facing it on Claremont Avenue? A. That is not the way it is being sold, as I understand it.

Q. Take it the other way, on Prospect Avenue, make it one hundred and fifty feet deep. A. It is worth forty dollars a foot, on Prospect Avenue.

Q. One hundred and fifty feet deep? A. Yes.

Q. How much would the Claremont Avenue 40 frontage be worth? A. Thirty-five dollars. If

Robert B. Harris—Cross, Re-Direct.

this old house was away (indicating) it might be worth more. (The house referred to adjoins, on the east).

Q. The property on Prospect Avenue has brought as high as one hundred dollars a front foot, has it not? A. The highest price I have heard of is eighty dollars, one hundred and eighty feet deep.

Q. Then this property is not as desirable as—? **10**
A. It is not as deep. It is never as desirable on the east side of the street, with us in Montclair. It never brings within five or ten dollars a foot of the price on the west side, other things being equal.

RE-DIRECT EXAMINATION BY MR. PARKER:

Q. When you went into the tunnel, who was in possession of the tunnel? A. The only person I knew in the matter was MacArthur, the contractor. **20**

Q. The contractors and employees of the Montclair Railroad were in possession of the tunnel? A. Yes.

Q. You say that this building of the tunnel collected crowds to look at it? A. Yes.

Q. Where did they assemble? A. Often on the bridge, looking in, and the tunnel as far as they could get without interfering with the work. **30**

Q. It was an open and notorious and well known fact that the tunnel was being constructed? A. It was.

RE-CROSS EXAMINATION BY MR. CONDUCT:

Q. Would they allow the general public to go in there? A. No, not to interfere with the work.

Q. And nobody could tell how far they had gone in? A. Anybody who went in. **40**

Robert B. Harris—Re-Direct, Re-Cross.

Q. Unless they did go in? A. No, or somebody's statement to that effect.

RE-DIRECT EXAMINATION BY MR. PARKER:

Q. Up to a few years ago, did you ever tax any railroad property in Montclair? A. No, this property has only been assessed to the Montclair
10 Railroad, by us, in I think the last four years.

Q. Since the new law has gone into effect?

MR. CONDUCT: Wait a minute. What property do you mean?

The Witness: I am talking about railroad property, this right of way that runs through Montclair. It has been assessed, since the change in the law about four or
20 five years ago, to the railroad company.

Q. Four or five years since they have been taxing that right of way in Montclair itself? A. Yes.

Q. You do not know what went on before that, in the State Board of Assessors? A. No.

Q. You don't know whether they taxed that branch before that or not? A. No.

RE-CROSS EXAMINATION BY MR. CONDUCT:

Q. This right of way, running from the tunnel east of Mountain Avenue has an embankment
30 which exists there to-day, has it not? A. Yes.

Q. And those embankments are a nuisance, are they not, to the town? A. They are unsightly, no nuisance.

Q. And the neighborhood that has grown around them is an undesirable neighborhood? A. No, there is a little piece in there, on William Street and James Street, with small houses. With that
40 exception there is no particular damage.

Robert B. Harris—Re-Cross.

Q. How about Valley Road? A. The same way. There are these houses there.

Q. There is an undesirable element there? A. East of the railroad; yes. But there was plenty of that there before the railroad started.

MR. PARKER: I will state that with the exception of a witness that I might desire to examine on deposition and possibly, some further testimony, if a witness I have not been able to see—a man named Doremus—should return to town, and any necessary documentary evidence to complete the chain of title in the railroad company, we have no further testimony to offer. 20

MR. CONDUCT: I don't know what that means. 20

MR. PARKER: I have been hunting testimony, covering a period of the last forty years, but as far as I can see, this is all the testimony I can produce.

THE MASTER: You want to close, reserving the right to produce further testimony?

MR. PARKER: Yes; if necessary.

THE MASTER: Of course, you have the right to insist that Mr. Parker close his testimony, but I suppose the proper thing for you to do now, is to go on and take your testimony. 30

Examination adjourned to Monday, October 3, 1910, at 2 P. M.

Henry V. Condict—Direct.

John V. Rowe—Direct.

Continuation, October 3, 1910.

APPEARANCES :

Mr. H. V. Condict and Mr. Parker.

10 HENRY V. CONDUCT, a witness produced on behalf of complainant, being sworn, testified as follows:

DIRECT EXAMINATION :

On Thursday of last week, since the last taking of testimony, I called at the residence of Peter Donald, expecting to ask him to appear here today and testify. I was unable to see him, but
 20 saw his daughter. She informed me that it would be absolutely impossible for Mr. Donald to testify, that his mind is not in condition to give competent testimony, and that he will not be able within any reasonable time in the future, to testify in this case. I therefore will abandon the calling of Mr. Peter Donald as a witness.

MR. PARKER: So much of this testimony as is hearsay is objected to.

30

JOHN V. ROWE, a witness produced on behalf of the complainant, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. CONDUCT:

Q. You are a lawyer and title officer of the Montclair Trust Company? A. No. Essex Title Guarantee and Trust Company.

40 Q. You are title officer of the Essex Title Guarantee and Trust Company? A. Essex Title Guarantee and Trust Company, of Montclair.

John V. Rowe—Direct.

Q. What is the business of that company? A. To search and examine titles, and insure the title.

Q. How long have you been in the business of examining titles? A. A little over five years.

Q. Do you do anything else at the present time? A. No.

Q. The titles that are examined by your company go through your hands? A. Every title that we issue a policy on, or reject, is read, is passed upon by me before the company signs the policy. 10

Q. Did you examine the title to the Donald property, the premises in question in this suit? A. I did.

Q. Where is that located? A. The corner of Prospect Avenue and Claremont Avenue, Montclair, New Jersey. 20

Q. What did you find? A. I found the title to be in fee simple in Peter Donald, no mortgages on it, no encumbrances, nothing but a possible right of the railroad to tunnel under it.

Q. What do you mean by that? A. Well; I mean that we who live up there know that the Erie Railroad or its predecessors at one time had an idea of running a branch through to Morristown or Caldwell, and bought a lot of land for a right of way through Montclair there, and took deeds from a good many owners for this right of way and also attempted or started to tunnel through the mountain there. 30

Q. Did you examine to see whether they had any rights? A. I looked it up and found that the Montclair Railway Company had been incorporated under the laws of 1867, and had the right to run a railroad there, of condemning the prop- 40

John V. Rowe—Direct.

erty if they could not buy it, but I did not find any deed or grant by Peter Donald or his grantors to this property.

Q. Did you find any condemnation proceedings? A. No.

Q. Did you find any documents in favor of any railroad company? A. No.

10 Q. Were there any documents or papers? A. There were none on record that we could find, after a careful search, of course. We were careful, knowing that they had attempted to tunnel a long while ago. Of course, that search against Donald went right down to date.

Q. And then did you advise the complainant in this action whether or not the title was good? A. Yes.

20 Q. What did you tell him? A. I told him that the title was good in fee simple in Peter Donald subject to the rights of the railroad, if any. I think my letter so stated.

Q. The deed to the complainant contained a clause to that effect? A. Yes.

Q. And your company would guarantee the title to it? A. Guaranteed your deed to it, with that subject-clause on it.

30 Q. The defendants in this case have offered in evidence a deed of trust by the Montclair Railway Company to Marcus L. Ward and Abram S. Hewitt, dated September 1st, 1870, to secure two million and a half dollars, also a mortgage by the Montclair Railway Company to Abram S. Hewitt, trustee, to secure one million and a half of bonds, also a deed given by William Patterson, Master, to Abram S. Hewitt, reciting foreclosure proceedings under the last named mortgage, also a deed by William Patterson, Master,

40

John V. Rowe—Direct, Cross.

to Marcus L. Ward and others, reciting the foreclosure of the first mortgage or trust deed above mentioned, also a deed by Marcus L. Ward and Abram S. Hewitt, to the Montclair & Greenwood Lake Railway Company, also a mortgage by the Montclair & Greenwood Lake Railway Company to George Walker and others, for seven hundred thousand dollars, also a deed by Patterson, Master, to Abram S. Hewitt, reciting the foreclosure of the last mentioned mortgage, also a deed by Abram S. Hewitt to the New York & Greenwood Lake Railroad Company. Have you inspected those documents? A. Yes, I have. 10

Q. Do you find that Peter Donald or any person owning this Donald property was made a party to any foreclosure proceedings above mentioned? A. No; they were not.

Q. In passing this title for Mr. Condict, did you notify him that these mortgages were on the property? A. No, sir. 20

Q. Why not? A. Because I do not consider that they affect the property.

CROSS EXAMINATION BY MR. PARKER:

Q. How long have you lived in Montclair? A. Five years—almost five years.

Q. Did you make the search yourself, or did you have it made? A. No; I did not make it myself. 30

Q. You have your knowledge of the title from returns made to you by other people, who searched the title of record? A. Yes.

Q. You made no search in Trenton for located survey or right of way? A. I wrote a letter to the Secretary of State. I will read it if you want me to. 40

John V. Rowe—Cross.

Q. No; I don't want you to. You wrote the letter? A. Yes.

Q. And asked what? A. I asked him if there was anything on record in Trenton to show who was the legal owner of the right of way, and then described it, running through Montclair.

10 Q. You knew there was a right of way running through Montclair? A. I know there are a number of deeds on record affecting property along there, and that they have put up an embankment in spots, which has been there a number of years.

Q. That was a matter of common notoriety in Montclair when you came there? A. Yes.

20 Q. And you knew also that they had tunneled underneath the Donald property? A. I knew they had started to tunnel. I did not know how far they had gone. Now it is filled up.

MR. PARKER: I object to that answer as not responsive, and ask that it be stricken out.

Q. You knew they had started to tunnel under the Donald property? A. I say I know that, just from its being a notorious fact. I never went in on the property and saw the tunnel.

30 Q. And your company did not think it safe to guarantee the title of the property because the Erie Railroad Company or the successors of the Montclair Railway Company, might have some interest in it? A. Yes.

Q. You will notice in these deeds that have been referred to by Mr. Condict, that they all refer to the railroad constructed or to be constructed on certain rights of way and surveys as filed in the Secretary of State's office? A.
40 Well; I don't—I am not quite sure about that,

John V. Rowe—Cross.

that those exact words are in. I know it is in there, about the right of way acquired or to be acquired by the railroad then building, I think.

Q. The deeds speak of the Caldwell branch of said railway, extending from Montclair into the township of Caldwell? A. Well, here is the deed to Ward and Hewitt as joint tenants, etcetera, in trust, to their assigns, of all and singular (reads) the line of railway known and to be known as the Montclair Railway, same as being and shall be constructed from the line of the State of New Jersey near Greenwood Lake, to the Hudson River—also the Caldwell branch of said railway and all real and personal property held or acquired or hereafter to be held or acquired by said company. I do not find anything in there that says anything about surveys being filed at Trenton.

Q. It speaks of this Caldwell branch and the lines acquired or to be acquired, and all rights. That is substantially the description that runs through all these deeds, is it not? A. Yes; substantially.

Q. Did you notice that there is in the Laws of the State, the pamphlet laws of the State of New Jersey, a law referring to surveys filed by the Montclair Railroad? A. You mean in the law of 1867?

Q. I mean the subsequent laws? A. I know they have to file surveys etcetera for their right of way. I do not know of any particular law, now.

Q. You did not look at the laws of 1871, page 469? A. No.

Q. (Continuing.) Which allows amended surveys in lieu of surveys deposited in the Secre-

John V. Rowe—Cross, Re-Direct.

tary of State's office, March 17, 1869, May 18, 1869 and May 27, 1869? A. No, sir.

Q. Didn't you look at the charter of the Montclair Railway Company? A. Of 1867?

Q. Yes. A. Yes.

Q. Did you look at the charter of the Montclair & Greenwood Lake Railway Company? A. **10** No, sir.

Q. Or of the New York & Greenwood Lake Railway Company? A. No, sir.

Q. Did you look at the foreclosure proceedings in this case? A. No, sir; only through the Master's deeds.

RE-DIRECT EXAMINATION BY MR. CONDUCT:

20 Q. Did you make a full examination, as full an examination as could be made for the purpose of ascertaining whether or not there was anything of record in any office affecting this property? A. Well; that is—I did in Essex County, but as far as Trenton is concerned, as I read the law of 1867, the Montclair Railway Company had the right to go in and condemn property if they could not get it by grant or deed from the owners, to condemn it, and we could not find any record **30** of any condemnation proceedings on this particular piece of property, and our old maps that we have, and our atlases and everything, and our tax map shows all the land owned by the Railway Company, as marked on these various maps, and there is nothing on any of the maps to show that the railroad owned the Donald property. The line goes up from where it starts, in the main line, and goes to the Donald land, and there is a break, and on the other side of it, off **40** toward Caldwell, the line starts again to show

John V. Rowe—Re-Direct, Re-Cross.

the right of way. So I did not consider it necessary to go any further.

Q. Did you search in every office where you thought it necessary to search? A. Yes.

RE-CROSS EXAMINATION BY MR. PARKER:

Q. Does the map of Montclair of 1871, in the tax office, show the line running directly cate-¹⁰ cornered across the Donald property? A. We have not the tax map, but a map of 1871, made by Thomas Hughes of Bloomfield, Montclair, (it is now Glen Ridge), and that does not show it.

Q. Don't the later maps show it? A. No, sir; and the 1906 atlas does not show it. Neither does our present atlas.

Q. Have you Miller's atlas? A. I don't know. It is a 1906 atlas. I have forgotten the name.²⁰ We have so many maps. Our present tax map, which I believe, was made by Frank W. Crane, shows the right of way going up to the Donald line.

Q. Did Mr. Condict talk to you about this matter before, while you were examining the title? A. Oh, yes; we had several conferences about it.

Q. Well, he, Mr. Condict, in a letter of February 7, 1910 (Exhibit C-2) wrote:³⁰ "The city map shows that a tunnel was located upon this lot in or about 1871 or 1872. This was a railroad which was projected to run from Montclair to Caldwell, but was never finished." Didn't you see the map he refers to, in which it shows this tunnel so located? A. If you will give me a sheet of paper, I will show you how the present tax map— (interrupted).

Q. I am not talking about that. Didn't you see⁴⁰

John V. Rowe—Re-Cross.

a map showing the right of way as he describes it in that letter? A. I didn't see any map where the right of way extended across the Donald property.

Q. Yet you say you have all the maps that are published? A. I don't know that we have all the maps that are published, but we have all
10 we can get our hands on. There may be some maps in the possession of lawyers which we have not got.

Q. You have the Miller map, the county atlas, haven't you? A. 1906; well, I don't know it by the name "Miller". I am not sure who made it. We call it the 1906 atlas.

Q. That is the most recent one. What is it you say it does not show about the tunnel?

20 MR. BOARDMAN: I object. It is immaterial. The atlas if produced, will show it.

MR. PARKER: You introduced it.

A. That shows the right of way running—starting from the main line, running right along through the town till it gets—right before it comes to the Donald property it runs this way, and goes *in* (indicating) and there is a small line running up to the Donald line (indicating
30 two parallel lines and, later, two parallel lines at a less distance apart). The second line—in explanation—the line last mentioned is, of course, very narrow. That is, I should say, on the 1906 map, three quarters of an inch wide—the right of way—and when it comes to about an inch from the Donald line, it comes together at a right angle and comes up to a line less than a quarter of an inch in width—two parallel lines. Further on it goes through Verona the same way.

40

John V. Rowe—Re-Cross, Re-Direct, Re-Cross.

MR. CONDUCT: We will telephone down to the office and get that map.

RE-DIRECT EXAMINATION BY MR. CONDUCT:

Q. Do you know the premises in question? A. Yes.

Q. Have you visited them recently? A. Yes; I passed there less than a week ago in an automobile. 10

Q. Do you know whether or not the railroad company has fenced in their right of way? A. They have fenced in practically all they have got there, all that embankment, all along the road, across Midland Avenue and Park Street, and in Verona where it runs through Baldwin's property, they have fenced it with wire fence. This property is not fenced. 20

Q. Which property? A. The Donald property. It was not fenced a week ago.

RE-CROSS EXAMINATION BY MR. PARKER:

Q. When were these fences made? A. They have stood about four or six weeks.

Q. Since the commencement of this suit? The suit was commenced in April? A. I am not sure about that. 30

Fred G. Stickel—Direct.

MR. STICKEL recalled.

DIRECT EXAMINATION BY MR. PARKER:

Q. Have you made any efforts to get Mr. Donald to testify in this case? A. Yes. I went to his office about a month ago and found out that he lived in Ossining, and I could not see
10 him until the return of Dr. Bishop after September 1st. I wrote to his daughter and received a reply in which she stated that I could not see him until after October 1st. Yesterday I saw Miss Douald personally and was told by her that he could not be seen at present, and in any event could not be seen until the return of Dr. Bishop, who would return about the third.

20

MR. CONDUCT: I close the complainant's case, subject, of course, to the right to rebut any further testimony you may put in.

MR. PARKER: I do not think I have any more testimony.

—o—

CASE CLOSED.

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Stipulation.
In Chancery of New Jersey.

Between

WALTER H. CONDUCT, *et al.*,

Complainants,

and

ERIE RAILROAD COMPANY, *et al.*,

Defendants.

} On Bill &c. 10

IT IS on this twenty-ninth day of June, nineteen hundred and eleven, STIPULATED between the parties and between their respective solicitors that the following facts are admitted in addition to proofs heretofore taken. 20

1. That the complainants, Henry V. Conduct, and Walter H. Conduct, each contributed one-half of the purchase price upon purchase of property, described in the bill, from Peter Donald, and

2. That Peter Donald paid taxes on the property described in the bill of complaint for five consecutive years next preceding the filing of the bill, to the City of Montclair, and that the said property during said years was assessed for taxes to said Peter Donald, and 30

IT IS further STIPULATED that this case be submitted, on briefs, to be interchanged between the parties and furnished to Vice Chancellor Stevens within ten days of this date. Complainants to reply within two days thereafter.

CONDUCT, CONDUCT & BOARDMAN,
Solicitors for Complainants.

CORTLANDT & WAYNE PARKER, 40
Solicitors for Defendants.

Conclusions of Vice Chancellor Stevens.

(Filed, September 9, 1911.)

In Chancery of New Jersey.

10	Between WALTER H. CONDUCT, <i>et al.</i> , <i>Complainants,</i> <i>and</i> THE ERIE R. R. Co., <i>et al.</i> , <i>Defendant.</i>
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Mr. Richard Boardman, for complt.

20 Mr. Cortlandt Parker for deft.

Stevens, V. C. It seems to me plain that complainants proper remedy is ejectment. He claims to have the legal title to and to be in possession of a lot of land in Montclair through which, forty years ago, the predecessors of the defendant company constructed a tunnel. The possession which he proves is possession of the surface. The company does not deny possession of the surface, but by its amended answer to Complainant's amended

30 bill says that since 1871, it and its predecessors have been the owners of the tunnel (forty feet below the surface) and in the open, notorious and exclusive possession thereof to the extent that it was capable of being owned and possessed. It does not pretend that it has a paper title.

It appears that the tunnel was constructed through the land now owned by complainant, apparently without objection, in 1871, but because

40 of the then company's pecuniary embarrassments, not through the whole of the Orange Mountain.

Conclusion of Vice Chancellor.

It further appears that the tunnel has to some extent, though not entirely fallen in. The evidence does not show that complainant or his grantor ever entered upon the tunnel or that either complainant or defendant ever made any actual use of it. If defendant now has possession, it is because its predecessors once had possession or because the possession thus had has never been taken away. It is obvious that these are questions within the exclusive jurisdiction of a court of law. There is nothing to prevent complainant from trying them in a legal action. It is true that defendant in addition to its defence that the action is legal sets up certain equities. Those alleged equities may have to be passed upon hereafter, in this Court at defendants' instances, but the legal question, which is the only one raised by complainant, must first be determined by the law court. There is no cross bill. The bill may be retained till the action at law is decided.

A true copy.

SAMUEL K. ROBBINS,
Clerk.

30

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Final Decree.

(Filed, October 31, 1911.)

In Chancery of New Jersey.

Between

10 WALTER H. CONDUCT, *et al.*,*Complainants,* } On Bill &c.*and* } Final Decree.ERIE RAILROAD COMPANY, *et al.*,*Defendants.*

This cause coming on to be heard on bill, answer, replication and proofs, and having been duly argued by Richard Boardman, Esquire, of Counsel with Complainants and Cortlandt Parker, Esquire of Counsel with Defendants, and the Court being of the opinion that the questions of possession of the tunnel through said premises raised in this cause, are within the exclusive jurisdiction of a court of law, and should first be determined by a law court before proceeding further in this cause, and for that purpose the bill might be retained, until the action at law should be decided.

30 And counsel for complainants stating in open court that the complainants did not desire to have the bill retained, until the question of legal title was determined.

It is now on the thirty-first day of October 1911, on motion of Cortlandt & Wayne Parker, Solicitors of Defendants ORDERED that the Bill of Complaint in this cause be and the same is hereby dismissed with costs.

40

Respectfully advised,

FREDERICK V. STEVENS,

V. C.

Notice of Appeal.

(Filed, Dec. 11, 1911.)

In Chancery of New Jersey.

Between

WALTER H. CONDUCT, *et al.*,*Complainants,**and*ERIE RAILROAD COMPANY, *et al.*,*Defendants.*On Bill &c. 10
Notice of
Appeal.

The complainants hereby appeal from the final decree made in this cause and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. 20

CONDUCT, CONDUCT & BOARDMAN,
Solicitors for and of Counsel with
Complainants.

Dated, December 11, 1911.

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

RICHARD BOARDMAN, 30
Of Counsel with Complainants.

Petition of Appeal.

(Filed Dec. 18, 1911.)

New Jersey Court of Errors and Appeals.

Between

10	WALTER H. CONDUCT, et al., <i>Complainants,</i> <i>Appellants,</i> <i>and</i> ERIE RAILROAD COMPANY, et al., <i>Defendants,</i> <i>Respondents.</i>	}	Petition of Appeal.
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20 To the Honorable, the Court of Errors and Appeals
in the Last Resort in All Cases:

The humble petition of Walter H. Conduct and Henry V. Conduct, the complainants in the Court of Chancery, appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a decree made in the Court of Chancery, by his Honor, Mahlon Pitney, Chancellor of the State of New Jersey, bearing date the thirty-first day of October, nineteen hundred and eleven, in a cause wherein Walter H. Conduct and Henry V. Conduct were complainants, and the Erie Railroad Company and the New York and Greenwood Lake Railway Company were defendants, in these respects, to wit:

(1) That the said decree adjudges and finds "that the questions of possession of the tunnel through said premises raised in this cause are within the exclusive jurisdiction of a court of law, and should first be determined by a law court before proceeding further in this cause."

40 (2) That the said decree orders that the bill

Petition on Appeal.

of complaint in said cause be, and thereby was dismissed with costs.

(3) That said decree does not decide and the Court of Chancery expressly refused to decide the preliminary jurisdictional question as to whether the complainants were, at the time of the filing of the bill of complaint, in peaceable possession of the land described therein, claiming to own the same, said bill having been filed under and pursuant to the provisions of an act entitled "An Act to compel the determination of claims to real estate in certain cases and to quiet the title to the same." Approved March 2, 1870. 10

(4) That the Court of Chancery refused to make a decree in favor of the complainants and against the defendants as prayed for in the bill of complaint, and as it should have done under the pleadings and evidence. 20

(5) That said decree does not "fix and settle the rights of the parties in said lands" mentioned in the bill of complaint, as is required by the terms and provisions of said act last above mentioned.

Your petitioners therefore pray that the said decree of the said Chancellor may be reversed and set aside, and for nothing holden, and that a decree fixing and settling the rights of the parties in said lands, may be directed to be made by the Court of Chancery in accordance with the statute in such case made and provided, and in pursuance of the prayer of the bill of complaint, and that your premises as to this court may seen meet. 30

CONDICT, CONDICT & BOARDMAN,
Solicitors for and of Counsel with
Appellants.

RICHARD BOARDMAN,
Of Counsel. 40

Exhibit C-1.

Peter Donald, widower, to Walter H. Condict,
DEED—Dated February 10, 1910.

Received in the Register's Office of the County
of Essex, N. J., on the 11th day of February,
1910, A. D., at 11.00 o'clock in the forenoon, and
recorded in Book N-46 of Deeds for said County,
pages 217-219.

10

EDWARD S. PERRY,
Register.

THIS INDENTURE, made the Tenth day of Feb-
ruary, in the year of our Lord, one thousand nine
hundred and ten, between Peter Donald, widower,
of the Borough of Manhattan, New York County,
New York, party of the first part, and Walter
H. Condict, of Madison, Morris County, New
20 Jersey, party of the second part,

WITNESSETH, that the said party of the first
part, for and in consideration of other good and
valuable considerations and the sum of One hun-
dred (\$100) Dollars, lawful money of the United
States of America, to me 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
30 the said party of the first part, therewith fully
satisfied, contented and paid, has given, granted,
bargained, sold, aliened, released, enfeoffed, con-
veyed and confirmed, and by these presents do
give, grant, bargain, sell, alien, release, enfeoff, con-
vey and confirm to the said party of the second
part and to his heirs and assigns forever, ALL that
certain piece or parcel of land and premises, here-
inafter particularly described, situate lying and

40

Exhibit C-1

being in the Town of Montclair, County of Essex and State of New Jersey,

BEGINNING at a point in the center line of Prospect Avenue, where the same is intersected by the northerly line of Claremont Avenue, if produced across Prospect Avenue; thence along the center line of Prospect Avenue north forty-seven degrees ten minutes east ($47^{\circ} 10'E$) One hundred sixty-one (161) feet two and one-half ($2\frac{1}{2}$) inches to land of Elizabeth Mitchell; thence along said land south forty degrees fifty-four minutes east ($S40^{\circ} 54'E$) Two hundred and ninety-six (296) feet eleven (11) inches, to land now or formerly of the Estate of Chapin; thence along said land south forty-seven degrees two minutes west ($S47^{\circ} 2'W$) One hundred seventy-five (175) feet to the northerly line of Claremont Avenue; thence along said northerly line of Claremont Avenue, north thirty-eight degrees twenty-four minutes west ($N38^{\circ} 24'W$) Two hundred ninety-five (295) feet eight (8) inches, to the center line of Prospect Avenue at the place of beginning.

TOGETHER with all and singular the tenements, hereditaments, and appurtenances to the same belonging or in anywise appertaining. ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part, of, in or to the above described premises, and to every part and parcel thereof, with the appurtenances TO HAVE AND TO HOLD all and singular the above described piece or parcel of land and premises with the appurtenances, unto the said party of the second part, his heirs and assigns, to his own proper use, benefit and behoof forever, subject however, to the right, if any, of the Erie Railroad to a right of way across a portion of the above described land. The said

Exhibit C-1

Peter Donald covenants that he has not granted any such right or received any consideration for any such right; subject also to the use of Prospect Avenue as now laid out as a Public Highway.

10 And the said Peter Donald, his heirs, executors and administrators, does covenant and grant to and with the party of the second part, his heirs and assigns, that the said Peter Donald is the true lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and 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 20 for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever.

And also, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid. AND 30 ALSO, that the said Peter Donald will warrant, secure and forever defend the said land and premises, unto the said party of the second part, 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 all manner of encumbrances whatsoever, except as aforesaid.

IN WITNESS WHEREOF, the said party of the first

Exhibits C-2 and 3.

part has hereunto set his hand and seal the day
and year first above written.

Signed, sealed and delivered
in the presence of

(Signed) James Bishop.

(Signed) PETER DONALD (L. S.)

—Acknowledgment—

10

February 10, 1910, before
James Bishop, New York Notary.

New York County Clerk's
Certificate annexed, dated Feb-
ruary 10, 1910.

Exhibit C-2.

Map in possession of the defendant.
(see p. 158).

Exhibit C-3.

20

February 7, 1910.

Erie Railroad,
50 Church Street,
New York City.

Gentlemen:

I am about to purchase the lot in Montclair
shown on the following diagram. I called at your
office some time ago and ascertained the fact
that you have no claim upon this lot.

30

Are you not willing, in order to set at rest
the gossip that exists in the neighborhood, to
write me a note stating that the road makes no
claim of any kind to this lot?

The City Map shows that a tunnel was located
under this lot in about 1871 or 1872. This was
the railroad that was projected to run from Mont-
clair to Caldwell, but was never finished.

There is nothing of record to show that you

40

Exhibit C-3.

have any interest in this lot, and your own records at your office indicate the same thing.

I don't want to buy the lot if you have any interest. It is important that I get a reply from you forthwith, and I would highly appreciate it if you would kindly send me a answer by return mail.

10 The information that I have in regard to the tunnel is that a tunnel was actually built under this lot in about 1871; that it was timbered; that the timbers rotted away and the tunnel caved in. There was water in the tunnel which came up and formed a stagnant, marshy place on this lot and about 20 years ago this marshy hole was filled up, and to-day the lot is about level with the street with no indications of any tunnel or depression.

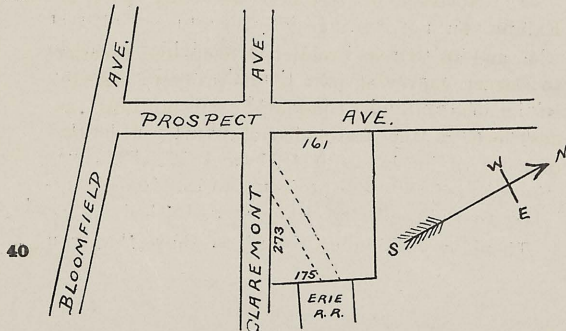
20 Peter Donald, who has owned the lot for over 40 years, is selling it to me. He tells me that he never gave the Road any right whatever, and that if they built a tunnel under the lot, he does not know it, and that they had no authority to do so.

Yours truly,

(SIGNED) HENRY V. CONDICT.

Dict. HVC/MEN.

30



"Talked with Mr. Condict today. Told him I could not commit myself to a decisive answer. He intimated he would bring friendly

Defendant's Exhibits.

Defendant's Exhibits 1 and 3 consisted of maps and blue prints.

No Exhibits were marked D-2 and D-4.

Exhibits 5 to 23 consisted of certain deeds of conveyance to the Montclair Railway Company, covering property along its filed right of way, but covering no property in *locus in quo*.

10

24 a survey.

25 to 37 certain deeds, mortgages, &c., showing the devolution of title of the franchises and property of the Montclair Railway Company, into the New York and Greenwood Lake Railway Company, as owner, and the Erie Railroad Company, as lessee.

38. Deed of *locus in quo* and other property—Warren to Peter Donald, dated April 1, 1869.

39. Deed Kittridge to Warren, same property as No. 38, dated March 1, 1869.

20

40, 41 and 42. Condemnation proceedings of Montclair Railway Company of property along its right of way, not affecting, however, *locus in quo*.

43. Deed Pratt to Montclair Railway Company of property along right of way, not in *locus in quo*.

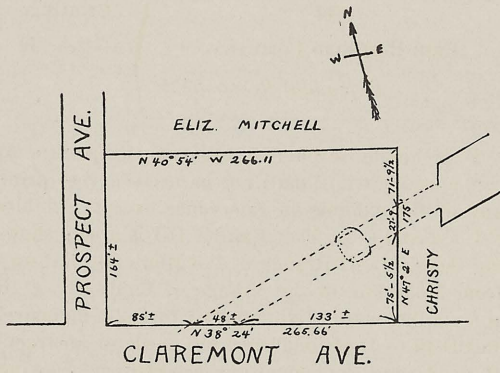
44. Abstract of Gould Deed—same sort as Exhibit 43.

30

45 and 46. Deeds Condict to Scott and Condict to Bogert, conveying part of the property described in the bill of complaint, substantially as described in the testimony of Walter H. Condict.

40

Exhibit C-2.



Stipulation as to Printing.

New Jersey Court of Errors and Appeals.

<p><i>Between</i></p> <p>HENRY V. CONDUCT and WALTER H. CONDUCT,</p> <p><i>Complainants-Appellants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>ERIE RAILROAD COMPANY,</p> <p><i>Defendant-Respondent.</i></p>	}	<p>On Appeal. 10</p> <p>Stipulation</p> <p style="text-align: center;">as to</p> <p>Printing.</p>
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It is hereby stipulated between the parties to this appeal that it shall not be necessary to print any of the exhibits in this cause except Exhibits C-1, C-2 and C-3. That Exhibit D-1 is a map showing the Caldwell Branch of the Montclair Railway from Montclair to the Village of Caldwell. C-10 is a similar map. Exhibits D-5 to D-23, inclusive, and D-40 to D-44, inclusive, are deeds or abstracts of deeds and condemnation proceedings showing that the Montclair Railway Company acquired title to various tracts of land on the Caldwell Branch of said Railroad and the consideration paid therefor. There were also offered in evidence by defendants various suits and proceedings in Chancery, produced by Thomas Haggerty, Sergeant-at-Arms, and not marked as Exhibits, which with Exhibits D-25 to D-37 show the transmission of title of the Montclair Railway Company to the Caldwell Branch from the Montclair Railway Company to the New York & Greenwood Lake Railway Company and Erie Railroad Company,

20

30

40

Stipulation as to Printing.

its lessees, and other papers regarding the organization of Companies interested in said Caldwell Branch. That D-24 is a survey or location by the Montclair Railway Company of part of the Caldwell Branch and its contents appears from the testimony. D-38 and 39 are deeds of the premises in question in this suit and other lands to owners
10 prior to the Complainants, and D-45 and D-46 are deeds from Walter H. Condict to William V. Bogert and Isbon B. Scott, Jr., of parts of the premises described in the Bill of Complaint in this cause.

Dated, February 2nd, 1912.

CONDICT, CONDICT & BOARDMAN,
20 Solicitors for Complainants-Appellants.

CORTLANDT & WAYNE PARKER,
Solicitors for Defendant.

30

40

New Jersey Court of Errors and Appeals.

Between

WALTER H. CONDUCT, et al.,

Complainants-Appellants,

and

ERIE RAILROAD COMPANY, et al.,

Defendants-Respondents.

On Appeal
from
Chancery.

10

BRIEF FOR COMPLAINANTS- APPELLANTS.

The bill in this case is a bill to quiet title, filed under the provisions of the Act, 4 Comp. Stat, 5399.

20

The most pertinent facts involved in this case appear in the letter from Mr. Henry V. Conduct, one of the complainants, to the Erie Railroad Company, one of the defendants, said letter being Exhibit C-3, found in the case at p. 155, reads as follows:

“February 7, 1910.

“Erie Railroad,
50 Church Street,
New York City.

30

“Gentlemen:

“I am about to purchase the lot in Montclair shown on the following diagram. I called at your office some time ago and ascertained the fact that you have no claim upon this lot.

“Are you not willing, in order to set at rest the gossip that exists in the neighborhood, to write me a note stating that the road makes no claim of any kind to this lot?

40

“The City Map shows that a tunnel was

located under this lot in about 1871 or 1872. This was the railroad that was projected to run from Montclair to Caldwell, but was never finished.

"There is nothing of record to show that you have any interest in this lot, and your own records at your office indicate the same thing.

"I don't want to buy the lot if you have any interest. It is important that I get a reply from you forthwith, and I would highly appreciate it if you would kindly send me an answer by return mail.

10

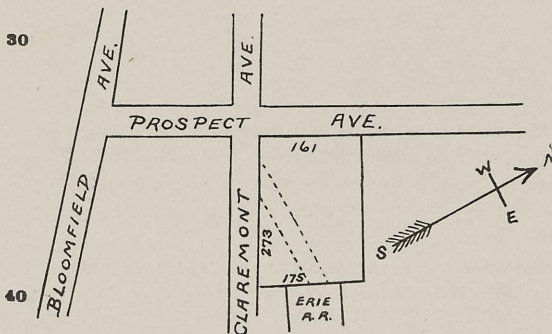
"The information that I have in regard to the tunnel is that a tunnel was actually built under this lot in about 1871; that it was timbered; that the timbers rotted away and the tunnel caved in. There was water in the tunnel which came up and formed a stagnant, marshy place on this lot, and about twenty years ago this marshy hole was filled up, and to-day the lot is about level with the street with no indication of any tunnel or depression.

20

"Peter Donald, who has owned the lot for over 40 years, is selling it to me. He tells me that he never gave the Road any right whatever, and that if they built a tunnel under the lot, he does not know it, and that they had no authority to do so.

"Yours truly,

"HENRY V. CONDUCT."



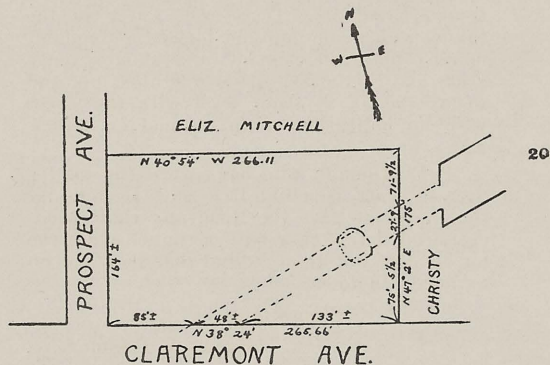
This Exhibit bears the endorsement in a marginal note as follows:

"Talked with Mr. Condict to-day. Told him I could not commit myself to a decisive answer. He intimated he would bring friendly suit to quiet title.

"H. W.

"8/2/10."

Exhibit C-2, in some respects, shows with more precision the exact situation of the *locus in quo* than does Mr. Condict's sketch.



30

The answer (p. 8) admits complainants' possession of all the property, except the possession of what is claimed by the defendants and a part of the property which has been sold by complainants since the bill was filed.

The part of the premises to which the defendants lay claim is described in the answer as a 40

tunnel extending from a point in the north side of Claremont Avenue, about fifty (50) feet east of Prospect Avenue to a point on the east side of said premises, described in the bill of complaint about fifty (50) feet northerly from Claremont Avenue.

The interest in the premises set up by the defendants in their answer is this (p. 11): That the Montclair Railway Company, their predecessors,
 10 filed a location of a branch from Montclair to Caldwell, and (p. 11, l. 33ff

“further began the construction of their railroad through the said hill, and actually built
 a tunnel underneath said premises described in said bill, which tunnel was of sufficient size to afford passage for a railroad passenger car and locomotive through the tunnel, and the centre line of said tunnel extended diagonally across said premises in an easterly direction
 20 from a point on the north side of Claremont Avenue about fifty feet east of Prospect Avenue to a point on the east line of said premises described in said Bill of Complaint about fifty feet northerly of Claremont Avenue.”

The defendants show no claim beyond what they assert in their answer. They show no title by deed or conveyance of any kind—no contract, no lease, no license, no mortgage, no condemnation proceeding,
 30 ing, not even the commencement of one, nor any offer to acquire any interest.

They claim no adverse possession, nor any actual possession within forty years.

Mr. Fred G. Stickel, Jr., an attorney-at-law in this State, in the employ of the solicitors for the defendant, called by the defendant, testifies (p. 119, l. 19) on cross-examination:

“Q. You have not said anything about the Donald property, the premises in question in this case. A. I did inadvertently skip that.
 40 We apparently do not own the Donald prop-

erty so far as I can ascertain from the deeds in our possession.

"Q. (By Mr. Parker.) You mean there is no deed of record of which you are aware for that property? A. Yes. None that I am aware of."

To the same effect is the testimony of John B. Rowe, title officer of the Essex Title Guarantee & Trust Company of Montclair (p. 135, l. 35) :

"Q. Did you examine to see whether they (the defendants) had any rights? A. I looked it up and found that the Montclair Railway Company had been incorporated under the laws of 1867, and had the right to run a railroad through by condemning the property if they could not buy it, but I did not find any deed or grant by Peter Donald or his grantors of this property. 10

"Q. Did you find any condemnation proceedings? A. No.

"Q. Did you find any documents in favor of the Railroad Company? A. No." 20

The only muniment of title existing upon any record is a survey filed by the Montclair Railway Company, in the Secretary of State's office, showing a proposed tunnel route through the property in question.

Some time in the year 1871, the Montclair Railway Company began a tunnel, which when abandoned after a few months' work, ran from a point about eighty feet to the southeast of the tract in question, northwesterly to and at least part way across a corner of the Donald property. 30

The defendants were at great pains to shew that the Montclair Railway Company purchased rights of way on both sides of this property from a considerable number of persons, and that condemnation proceedings were had against others. There is testimony that considerable sums of money were spent by some one in making the cut which led to the mouth of the tunnel. But in the excavation 40

of the tunnel itself, the railroad company apparently expended no money whatever for MacArthur Brothers' Company did the work and were never paid for it. Ninety odd thousand dollars remained due to the contractors at the time the work stopped and has never been paid (p. 94). The last work done was the tunnel work. The total cost of the tunnel work was estimated by defendant's witness at \$27,000 to \$30,000 (p. 103). So it is safe to say that none of the money of the

10

Railroad Company went into the tunnel.

Something more than twelve years ago, the tunnel caved in and a great hole appeared in the Donald tract. About twelve years ago, Donald filled up th's hole with earth (pp. 106-107). Today there is no visible sign of the existence of any tunnel apparent on the face of the tract in question (p. 106).

20

The only remaining visible sign of the tunnel anywhere is a sort of cave in the side of the hill, about eighty feet from our boundary line. It is an opening bearing no resemblance to a railroad tunnel. It is about three feet high at the highest point, and eighteen feet deep, and about fifteen feet wide at the face of the opening, and narrows at about three feet in, to nine or ten feet, and then narrows down to nothing at eighteen feet (pp. 26, 106).

30

The bottom of this opening is filled up with stones and water. It has been twenty or twenty-five years since any one could get into the tunnel under the Donald property (p. 110, l. 22).

To rebuild the tunnel. it would be necessary to use regular tunnel procedure, and that would be as costly as original work (p. 112). The open cut is grown up with shrubs and trees, large and small, one tree being at least sixteen inches in diameter (p. 38).

40

The deed to the complainant from Peter Donald contains the following clause:

"Subject, however, to the right, if any, of the Erie Railroad to a right of way across a portion of the above described land. The said Peter Donald covenants that he has not granted any such rights, or received any consideration for any such rights. Subject also to the use of Prospect Avenue as now laid out as an public highway."

The only testimony to charge Peter Donald with any knowledge of the work that was done under his land was the testimony of Robert B. Harris. It is to be remembered that the work was begun in eighteen hundred and seventy-one, and that the company was bankrupt in eighteen hundred and seventy-three, and that no work was done after that time. At p. 125, Mr. Harris testifies as follows:

"Q. Did you go with him to the property in 1869, when he purchased it? A. I did. 20

"Q. Can you tell us how frequently Mr. Donald came to the property, how many times in a year? A. I have no way of fixing that. I should say, perhaps three or four times during, it may have been, four or five years after his purchase of the property, that he was out.

"Q. That you knew of? A. Yes, that I know of.

"Q. Do you recollect ever talking to him about this Caldwell branch and its construction, anything of that sort? A. I have no recollection of any such conversation." 30

William J. Harahan, assistant to the President of the Erie Railroad, called as a witness on behalf of the defendants, testifies on p. 51, as follows:

"Q. You said that in 1909, there were certain arrangements with a certain party, you could not carry through? A. I said there were active negotiations with a certain party. 40

"Q. Are there any negotiations pending now with anybody? A. Not at the present time.

"Q. Those negotiations, I presume, related to the raising of funds to build that line? Is that it? A. Financing the proposition.

"Q. There is nobody at the present time attempting to finance it? A. No, not at the present time."

The evidence, then, can be summarized much as follows: Peter Donald was the owner of this property at the time this tunnel was built. He did not live in Montclair. He is shown to have visited Montclair three or four times in four or five years, from 1869 to 1874. He gave no deed or any other instrument conferring on the railroad any rights in the property. No condemnation proceedings were had against him. No money was paid to him for any right of way across his property. The only money expended upon the tunnel was the money of the MacArthur Brothers Company, and not that of the Montclair Railroad. It would be as expensive to tunnel under this land now as if this old tunnel had never been built. Neither the Railroad Company nor any of its successors have been in possession since 1873, almost forty years. The mouth of the so-called tunnel has been filled up for twenty or twenty-five years. A cave-in on the land in question was filled up by Peter Donald twelve years ago. Not only is there no possession in the Erie Railroad Company, but no one is now making any effort to build this old, once contemplated road.

The learned Vice Chancellor to whom the cause was referred below, after testimony had been taken under the old practice, held that complainants' proper remedy was ejectment. He offered, however, to retain the bill while such an action should be brought and litigated.

As we read the cases, this Court has repeatedly

held that if ejectment will lie, a bill of this sort cannot be sustained.

Jersey City vs. Lembeck, 31 Eq., 255.,
272;

*The American Dock and Improvement
Company v. Trustees for Public Schools*,
37 Eq., 266;

Sheppard v. Nixon, 43 Eq., 627, 632.

The statute was passed for the benefit of those 10
who had no remedy at law or other remedy in
equity.

“If a party in possession of land can throw
the hostile claim into a court of law, and thus
get rid of the cloud overhanging his estate,
why should he not do it?” Chief Justice Beas-
ley asked in the case first cited above.

The theory of this statutory action and the
action in ejectment are the exact opposites of each 20
other in one material point. This action will lie
only where the complainant is in possession, and
his possession is peaceable. The action of eject-
ment lies where the defendant is in possession. In
the one case, the plaintiff-complainant must prove
possession in himself as a jurisdictional fact. In
the other, he must prove possession in his adver-
sary, the defendant. How can it be possible, then,
for him, in two actions pending at the same time
(as the Vice Chancellor proposed), with the same 30
adversary, to prove in the one case, that he is in
actual peaceable possession, and in the other, that
his adversary, the defendant, is in possession of the
identical property?

Had we followed the suggestion of the Vice
Chancellor, and brought our action in ejectment,
the allegations of the declaration would not only
have been absolutely contrary to the truth, but
would have been admissions fatal to the mainte-
nance of this bill. The orderly and formal state- 40

ments of such a pleading very possibly might have involved the complainants in an admission of such a possession in the defendants as would have jeopardized complainants' title.

We refused to follow the practice suggested by the Vice Chancellor. We offered, however, to submit to an issue to be framed by him, and to be tried by a jury. The Vice Chancellor denied his jurisdiction to frame such an issue, and our bill was dismissed.

The Vice Chancellor's opinion is short. We reproduce it here for the convenience of the Court.

"It seems to me plain that complainant's proper remedy is ejectment. He claims to have the legal title to and to be in possession of a lot of land in Montclair through which, forty years ago, the predecessors of the defendant company constructed a tunnel. The possession which he proves is possession of the surface. The company does not deny possession of the surface, but by its amended answer to Complainant's amended bill says that since 1871, it and its predecessors have been the owners of the tunnel (forty feet below the surface) and in the open, notorious and exclusive possession thereof to the extent that it was capable of being owned and possessed. It does not pretend that it has a paper title.

"It appears that the tunnel was constructed through the land now owned by complainant, apparently without objection, in 1871, but because of the then company's pecuniary embarrassments, not through the whole of the Orange Mountain. It further appears that the tunnel has, to some extent, though not entirely, fallen in. The evidence does not show that complainant or his grantor ever entered upon the tunnel or that either complainant or defendant ever made any actual use of it. If defendant now has possession, it is because the possession thus had has never been taken away. It is obvious that these are questions within the exclusive jurisdiction of a court of law. There is nothing to prevent complainant

from trying them in a legal action. It is true that defendant in addition to its defense that the action is legal sets up certain equities. Those alleged equities may have to be passed upon hereafter, in this Court at defendants' instances, but the legal question, which is the only one raised by complainant, must first be determined by the law court. There is no cross bill. The bill may be retained till the action at law is decided."

I.

10

The complainant was entitled to have the court pass on the preliminary question of possession.

The fact of the complainants' peaceable possession of the *locus in quo* is the primary jurisdictional question in every action brought under this statute. The jurisdiction of the Court of Chancery to determine this question has been repeatedly recognized by this court.

20

In *Sheppard v. Nixon*, 43 Eq., 627, 632. Judge Depue said:

"The bill contains the necessary jurisdictional averment of possession. He, the defendant, having in his answer made denial of possession by the complainant, it was incumbent upon the complainant to establish that fact by proof."

In *Yard v. Ocean Beach Association*, 49 Eq., 306, 315, the same Judge, speaking from this court, said:

30

"The jurisdiction of the Court of Chancery to entertain this suit is disputed. Possession in fact as distinct from that constructive possession which arose simply in virtue of legal title, is essential to proceedings under the statute under which this suit was brought. The objection was taken in the answer and consequently the complainant was put to proof on the subject."

40

In the case of *Allaire v. Ketcham*, 55 Eq., 168, Vice Chancellor Emery, in a well considered case, said:

10 "A preliminary question of some difficulty has been raised. The statute confers the right to file a bill in equity to quiet title 'when any person is in peaceable possession of lands in this State, * * * claiming to own the same,' &c. Actual possession and peaceable possession are, on complainant's part, as has been settled, jurisdictional facts, and if denied, as has been done by the answer in this case, must be settled as the preliminary question."

We have found no case that has cast doubt upon the jurisdiction of the Court of Chancery to determine any and all questions relating to complainants' possession, nor any case that intimates that such questions are within the exclusive jurisdiction of a court of law.

20 The preliminary question presented to the Court in the present case was the possession of the whole tract—not merely the possession of the surface, but included therein the possession of the so-called tunnel.

This we were entitled to have the Court pass upon—this the Court has not done.

30 The learned Vice Chancellor evidently lost sight of the fact that this bill is a bill to quiet title. He evidently thought that the rule to be applied was that of *Todd v. Staats*, 15 Dick., 507, and *Mason v. Ross*, 7 Buch., 527.

It is to be noted that these cases were bills for injunction under the traditional equitable jurisdiction of the Court, not under the "Titles" Act. This distinction is pointed out in the case of *Sheppard v. Nixon*, supra.

40 Nor can we find any warrant in law for the position that the learned Vice Chancellor seems to take, that while the complainants' possession of the

surface is undisputed, the Court of Chancery cannot determine the question of possession of the subterraneous portions of this tract.

The theory of the defendant is that the Erie Railroad holds some possession in a cavern, which has been closed to daylight for twenty odd years, the existence of which cavern is inferential and problematical.

The argument in favor of its existence depends upon the suggestion that when Peter Donald filled up the hole that appeared upon his land, as many loads of dirt were not put in as had been previously taken out in the construction of the tunnel. From this they conclude that there must be a cavern to the westward. 10

The proofs in this case show that the only outward evidence of this so-called tunnel anywhere on the face of the earth is a small cave in the face of the hill, eighty feet distant from the *locus in quo*, this hole being about three feet high at the highest point, and about ten or twelve feet across, and running back about fifteen or sixteen feet, the height of this hole constantly decreasing until it becomes nothing. In other words, it is sort of a section of a cone cut off by a plane parallel to the base, or wedge shaped with one side circular. One of the witnesses testified that no one could get into it. This, it is to be remembered, extends from the side of the hill about sixteen or eighteen feet toward our land, but does not reach it by more than sixty feet. 20 30

As the Vice Chancellor says, the general possession of the complainants of the surface of the ground is not disputed. The fact that Peter Donald filled up so much of the tunnel as had become a cause of annoyance to him, and did it many years ago, is undisputed.

It would be difficult to suggest any act of possession more forcible that could be exercised over a 40

subterranean cavern than the act of filling it up. This testimony as to possession, besides that of the complainants and the admissions of the answer, is reinforced by a stipulation entered into between the parties to the effect (p. 145)

10 “2. That Peter Donald paid taxes on the property described in the bill of complaint for five consecutive years next preceding the filing of the bill, to the City of Montclair, and that the said property during said years was assessed for taxes to the said Peter Donald.”

Under the statute the facts admitted in the stipulation constitute *prima facie* evidence of possession in complainant in the absence of other proof.

It is respectfully submitted that there is nothing in the defendants' claim of possession to differentiate it from the ordinary dispute as to this jurisdictional fact that appears in many litigated
20 cases arising under this act.

II.

Would an action of ejectment lie in this case?

A.

It is submitted that the true test of whether this action can be maintained, or whether an action in ejectment or other action at law would lie, is suggested by Vice Chancellor Emery, in the case
30 of *Allaire v. Ketcham*, already cited, 55 Eq., p. 170:

“But I think the true construction of the statute is that the possession must be peaceable as against the defendant. And further, it seems to me that in determining whether the possession as to the defendant is peaceable, the test must be whether the defendant setting up a claim of title has interfered with complainant's possession by an act which is
40 sueable at law, and suit upon which will or may involve the title of the defendant.”

If the defendant has done any act "which is sueable at law, and suit upon which will or may involve the title of the defendant," this action will not lie. But it is apparent from a reading of the Vice Chancellor's opinion that the defendant has done nothing to interfere with the complainants' possession. The Vice Chancellor expressly says:

"The evidence does not show * * * that either complainant or defendant ever made any actual use of it (the tunnel). If defendant now has possession, it is because its predecessors once had possession, or because the possession thus had, has never been taken away." 10

There is, therefore, no suggestion in the case of any sueable act done by the defendant, or either of them. The contention of the complainants is that neither of the defendants have ever been in possession of this tunnel. There is no pretence on the part of the defendants that either of them has ever exercised any actual possession of it. The only possession they claim is this metaphysical possession which the Vice Chancellor mentions. 20

The defendants have no deed, no mortgage, no lease, no form of conveyance recognized at law, for the property. They endeavored to create some confusion in the court below by describing their interest as an easement, but they have no easement. An easement can be created in only one of two ways—either by prescription or by express grant. 30

Lawrence vs. Springer, 4 Dick., 289.

No claim is made and no evidence is introduced in this case upon which an easement by prescription could be founded to exist.

No express grant has been introduced. At most the defendants' claim is by way of acquiescence or estoppel, both of which are equitable interests. There can be no legal title of any kind to this so- 40

called tunnel in the defendants, and therefore, nothing upon which a court of law could act.

In passing it should be noted here that the defendants' answer nowhere states that the possession of the defendant has been adverse to the complainants or their predecessor. The theory of the answer is that the Montclair Railway Company maintained its possession of this tunnel through the acquiescence of Peter Donald (p. 12, l. 25); that
 10 that acquiescence had not been withdrawn at the time of bringing the suit.

It is to be noted that the claim of possession of the defendant upon which the Vice Chancellor bases his opinion is, that the defendants have been in "open, notorious and exclusive possession thereof to the extent that it was capable of being owned and possessed."

This is not any claim of adverse possession. Every tenant and licensee is "in open, notorious
 20 and exclusive possession of property to the extent that it is capable of being opened and possessed."

As the Vice Chancellor also states, the defendants do not pretend to have any paper title. The claim of ownership is either mere surplusage, or it must be predicated upon other facts stated in the answer. For the complainant has the right to call upon the defendant "to set forth and specify his title, claim or encumbrance, and how and by
 30 what instruments the same is derived or created." The defendant has neither set up any paper title, nor has it set up any condemnation proceedings, nor any adverse possession. Acquiescence is but another word for license, and a license gives no title, and may be revoked at any time.

Hetfield v. Central R. R. Co., 5 Dutch.,
 573.

How inappropriate the action of ejectment
 40 would be, is made clear by the following quota-

tions from the excellent work of Warvelle on Ejectment.

Warvelle on Ejectment. Section 44, Disseizin of plaintiff:

“To authorize the institution of an action of ejectment, the plaintiff must have been wrongfully disseized of the land in controversy, which at the time the suit is commenced must be held by another in hostile possession. * * * It is immaterial how the adverse claimant may have entered and it is enough that he wrongfully withholds possession. * * * In any event his wrongful detention of the possession is the gravamen of the action and when this is shown the right of the plaintiff to bring suit is established.” 10

Section 45. Defendant's possession:

“As previously stated, to maintain the action of ejectment it must be shown that the lands in controversy at the time the suit was commenced are in the hostile possession of another. This ancient rule has been much relaxed in modern times by legislative enactment as well as judicial construction, but the essential idea has been retained and still forms a salient feature of the action.” 20

Boro vs. Harris, 13 Lea (81 Tenn.) 36 (1884).
COOPER, J.:

“All that the action of ejectment could in any event determine was that Mary Harris had the better legal title. The equitable rights of the complainants, if they have any, as against Mary Harris, would remain unaffected by that recovery. These might be set up in chancery even after a judgment against them at law in an action of ejectment to which the complainants were actual parties.” 30

Kean vs. Cannovan, 21 Cal., at 305, 1863.

“The action of ejectment lies only against the occupant of the premises, and to him the 40

plaintiff must look for compensation for their use."

Beach vs. Beach, 20 Vt., 83 1847, HALL, J.:

"The substantive ground of the action of ejectment is the original dispossession of the plaintiff by the defendant".

Hawkins vs. Reichert, 28 Cal., 535 (1865).

RHODES, J.:

10 "The doctrine is very clear that as the action lies only to recover the possession of the premises wrongfully withheld from the plaintiff, it must be brought against the person who, at the commencement of the action, withholds the possession, that is to say the occupant * * * (p. 539). The court must be satisfied that the fact is as alleged in the complaint; that the defendant withheld the possession on the commencement of the action otherwise the plaintiff is not entitled

20 to a recovery for as we said in *Owen vs. Fowler*, 24 Cal., 194, 'in order to entitle the plaintiff in ejectment to recover, he must show a right to possession in himself and a possession in the defendant at the time the action is brought; and if he fails to establish either proposition, he cannot recover."

B.

Whether Ejectment Will Lie on the Theory That This Alleged Tunnel Was a Mine.

30 In discussing this question, we waive for the purposes of the discussion, the obvious defect discussed in the preceding section, i. e., that the defendant was not in such possession as to enable us to bring ejectment against it.

In the paragraph of defendants' answer that the Vice Chancellor cites, we find that the defendant claims to be "the owner of the soil underneath

40 the said land". (Case p. 19, line 31.)

Whether this claim to the soil, and the claim a few lines further on, to land, means that the defendants claim a right of way through our land, or whether it means that they claim to own the tangible earth, or whatever it may mean, it seems obvious that the ejection will not lie. Ejectment is not a proper remedy for the recovery of an easement or right of way. Ejectment will not lie for an incorporeal hereditament". *Farley vs. Craig*, 15 N. J. L., 191. 10

It is true it may be brought against a railroad in actual operation and in actual occupation of lands, but in such cases, the Court of Chancery will promptly enjoin the use of the writ. If, however, the tunnel is to be considered as a mine, the fact that the tunnel has been abandoned, and is not an open mine, is conclusive.

In *Beatty vs. Gregory*, 17 Iowa, 109, Judge DILLON says: 20

"But a distinction in many cases is drawn between an unopened and an opened mine."

Further on, he quotes Adams on Ejectment to the effect:

"But he cannot maintain ejectment either in respect of a mine * * * which he has not opened, or which, being opened, he has abandoned".

See also to the same effect Bainb. on Mines, 494; Collier on Mines, 18. 30

The reason why an ejectment will not lie is that ejectment will only lie for the recovery of a thing capable of livery of seizin.

The Sheriff cannot deliver possession of a mere right of way. It is to be noted that if the Sheriff should try to crawl into an open hole in the side of the hill, he could not get within sixty or seventy feet of our land in his progress into this tunnel. 40

If he should try to approach it from the surface, he is stopped by forty feet composed largely of trap rock. It would be impossible for a Sheriff to make any livery of seizin of this particular mine. And this has always been the test in ejectment cases.

C.

The Application of Todd vs. Staats.

10 The case of *Todd vs. Staats*, 15 Dick., 507, and all other cases in which proceedings in equity have been held up while an action at law was tried out in order to determine complainant's title, have been cases arising under the traditional jurisdiction of the Court of Chancery.

There are many cases in which the Court of Chancery has no jurisdiction to interfere until the title at law has been determined, but the
20 very intent and purpose of the act to quiet title was to work a change at this very point. Proceedings under this statute are not mere actions *quia timet*, such as were known to the traditional jurisdiction of the Court of Chancery.

The learned Vice Chancellor who wrote the opinion in this case has passed upon the constitutionality of this act at the very point now under discussion.

30 In the case of *Haley vs. Goodheart*, 58 Eq., at 369, he says:

“I think that the act (of 1896) as it now stands rests substantially upon the same foundation as the act to quiet titles. The latter act confers jurisdiction in cases over which, before its passage, equity did not take jurisdiction. Story Eq. Jur. §852; Pom. Eq. Jur. §1396. Mr. Justice DEPUE, in *American Dock Co. vs. Trustees*, 10 Stew. Eq., 272,
40 says: ‘It enlarged the jurisdiction of the

Court of Chancery in this respect. It gave a party who is in peaceable possession of lands, where his title is disputed, a right to come into chancery to settle the title, in advance of the determination of the title at law, where no suit to enforce or test the validity of the title is pending.' The same judge says, in *Sheppard vs. Nixon*, 16 Stew., Eq., 631: 'The foundation of the jurisdiction is the inability of the complainant to obtain relief by an action at law or the inadequacy of the legal remedy.' 'The purpose of the act,' said Chief Justice BEASLEY in *Jersey City vs. Lembeck*, 4 Stew. Eq., 255, 'is to relieve, not persons who had the power to test the hostile claim by a direct proceeding in the usual mode, but to aid those persons who had no such opportunity., See also *Yard vs. Ocean Beach*, 4 Dick. Ch. Rep., 306; *Southmayd vs. City of Elizabeth*, 2 Stew. Eq., 203, 650.

"These authoritative cases show that it is within the competence of the legislature to confer upon the Court of Chancery jurisdiction to determine legal questions, in cases so circumstanced that no relief can be given by action at law, at least, and this is as far as it is necessary for me to go in the present case, where it is provided that, on application of either party, an issue at law shall be directed."

We submit that the Court of Chancery had jurisdiction to make a final decree in this case fixing and settling the rights of the parties, and should have exercised such jurisdiction.

III.

On the facts the complainants were entitled to a decree quieting their title.

The only facts to which the defendants can point to sustain any shadow of claim against this property are:

- (1) The filed survey at Trenton;
- (2) The expenditure of money coupled with
10 the non-interference of Peter Donald with the work while it was being done.

A.

As regards the filed survey, this gives no title. It merely indicates the line along which the railroad company may buy or condemn a right of way.

On this point, Chancellor Magie, in the case of
20 *Ayres vs. Pennsylvania R. R. Co.*, 23 Vroom, 405, Court of Errors and Appeals, 1890, at p. 409 said:

“It is well settled in this State that the filing of such a survey confers on a railroad company no title whatever. It has been held by the Court of Chancery not even to be notice to subsequent purchasers. *Central R. R. Co. vs. Hetfield*, 3 C. E. Gr., 323. In this court the right of a subsequent purchaser to maintain an action of trespass against a
30 railroad company occupying lands within such survey was established. *Hetfield vs. Central R. R. Co.*, 5 Dutcher 571. What a railroad company acquires by a survey filed, is only the right to acquire title within its bounds, by purchase or condemnation.”

In *Hetfield vs. Central R. R. Co.*, Judge ELMER speaking for the Court of Errors and Appeals, 1862, 5 Dutcher, at p. 573 said:

40 “It is urged that the evidence of the owner’s consent or agreement is not required to

be in writing, and that the title is not acquired by such consent or agreement, or by payment of the damages, but by the condemnation alleged to be consummated by the filing of the survey. That the consent of the owner amounted to a leave and license to enter, and so long as it remained unrevoked took away the right of the owner to maintain trespass, is undeniable; but was it the intention of the legislature to make the filing of the survey a condemnation of the land, so as to vest it in the company? 10

"It has been the law of New Jersey, since the first settlement of the colony, that a title to land by purchase could only be acquired by a deed or will made by a person of full age and of sound mind, or for a time by a fine or recovery, and that a parol consent to enter upon land amounted only to a license, which could be at any time revoked".

B.

As regards the second point, it is to be noted in the first place that whatever money was expended by the Montclair Railway Company on property of Peter Donald, whether out of its own treasury, or out of the treasury of the MacArthur Brothers' Company, that expenditure has gone for naught. The property today is in no better condition for railroad purposes than if it were in its original state. 20

There is no pretence of any written license from Donald, nor is there any pretence on the part of the defendants that the courts of law are not open to them now, or will not remain open to them hereafter, if they desire to take condemnation proceedings. 30

This case is very similar to the case of *Lawrence vs. Springer*, 4 Dick., 289, in respect to the points under discussion. This case was decided in the Court of Errors and Appeals, March term, 40

1892, Chief Justice BEASLEY wrote the opinion. He says at p. 291:

10 "There was no contention that they possessed a deed or writing granting to them such right, but their contention was that the appellant had orally consented to the imposition of this burthen on her land, and that in reliance on such assent they had incurred certain expenses in erecting their bank and drains, and that, as a consequence, she would not in equity be permitted to recall her license. This view was sustained in chancery, and the appellant was enjoined from stopping the flow of this water over her land as she threatened to do". * * * (p. 297)

20 "Nothing is clearer or more settled than that in all cases in which any court has validated an encumbrance imposed upon land by force of a parol contract, that such contract has been required to be proved to the point of demonstration, and that the repudiation of it would work irreparable injury. Both these essentials are wanting to the affair before the court." * * * (p. 301). "It is not observed that any court has ever interfered in any instance unless upon the ground to protect the license from considerable and irreparable damage.

30 "This essential feature is wanting in the instance now in hand. The revocation of this assumed license could not operate disastrously to the interests of the respondents. The remedy was in their hands; all they had to do was to apply under the Meadow act and they would have obtained, in substance, all the relief that had been afforded them by force of the present decree. There was, on their own showing, no necessity to call a court of equity to their aid. Their remedy at law was complete; it has never heretofore been claimed that a parol license of this nature can be sustained and enforced in a case in which its revocation will work no essential damage to its possessor."

40

The evidence adduced in the present case to prove any acquiescence on Donald's part is of the flimsiest sort. No parole license is proved. Certainly no such license is proved to the point of demonstration as is called for in the case of *Laurence vs. Springer*. The defendant has still the right of condemnation. It cannot suffer any damage by an adverse decree in this case, certainly not irreparable damage.

The case of *Perkins vs. Moorestown & Camden Turnpike Company*, 3 Dick., 499, the language of Vice Chancellor Green at p. 506, is very much in point: 10

"It is urged that the conduct of the complainant amounted to a license, on the faith of which the defendants acted and expended money in the erection of the building and gate. But in the first place the evidence fails to show that the defendants were at all influenced in their actions by the conduct of the complainant. In the next place, if a license, it was by parole and without consideration and revocable. *Hetfield vs. Central R. R. Co.*, 5 Dutch., 571." 20

The defendant contends that this tunnel was constructed as a *public work* and is useless except it be continuous, and to give up this part, destroys the whole.

The case of *Hetfield vs. Central Railroad Company*, 5 Dutch., 571, above quoted, at p. 575, contains a satisfactory answer to this suggestion: 30

"As to the supposed danger that these great public works may be seriously injured, and the travel over them interrupted, by holding that the companies may acquire a title by a regular assessment and payment or tender of the damages, or by the same means that other corporations or individuals acquire one, it appears to me that it is rather imaginary than real. It was held by this court in the case 40

of *Costar vs. N. J. Railroad Co.*, 4 Zab., 730, that they may at any time take the necessary steps to acquire the land by means of an assessment; and it was then noticed that a delay to do so might happen because the owner had chosen tacitly to acquiesce in the occupancy of his land."

The language referred to in the above case is found in *Costar et al. vs. New Jersey Railroad and Transportation Company*, 4 Zabriskie, at p. 732:

10

"Many causes may require the companies to institute these proceedings after they have been in operation for years. In some cases the owner is unknown, and in others the occupant who claims the premises is not the real owner or is liable to be dispossessed by a mortgage or other lien; and again, in other cases, the owner chooses tacitly to acquiesce in the occupancy. Shall the companies who act in good faith, and do all they can to acquire a title, be precluded afterwards when the real owner asserts his rights or withdraws his consent from making adequate compensation to him, and thus acquiring a right to the land? When or how the plaintiffs acquired their title in this case does not appear. It may be that they had no right whatever to the property when the road was commenced. But whether they had or not, they are in no way prejudiced by the delay."

20

30 The defendants below relied quite largely upon the following three cases:

North Hudson Railroad Company vs. Booraem, 1 Stew., 450;
Paterson &c., Railroad Company vs. Kamlah, 15 Stew., 93;
New York & Greenwood Lake Railway Company vs. Stanley, 7 Stew., 55, and 8 Stew., 283.

40

In their brief, defendants' counsel say:

"In the cases of *Kamlah* and *Stanley*, the Court of Chancery enjoined ejectment proceedings against a railroad that had constructed their railroad with the acquiescence of, or without protest from the owner. In other words, it protected just such an *equity* as is set up in this case."

The distinction between an ejectment suit brought against a railroad company in possession and active use of a right of way, and a case such as the present, has obviously escaped the attention of the learned counsel for the defendants. 10

What the Court of Chancery protected in the *Kamlah* and *Stanley* cases, was not the defective title, but the possession of the railroad company, which was threatened by the ejectment suit. The possession of a railroad company of property which is in active use is a matter in which the public has an interest. Such possession this court may very properly protect. 20

The present suit is brought to quiet a title. No change of possession is sought. Ownership, not possession, is the subject matter of this statutory action. The force of this distinction is made evident by reference to these cases.

In the case of the *Railroad Company vs. Kamlah*, 15 Stew., 93, Chancellor Runyon says, at p. 97. 30

"Where possession has been taken of land for a public work, and the work has been constructed upon it, but no compensation has been made for the land, if the company in taking possession has acted in good faith under acquiescence of the owner or by mistake as to the property or as to the validity of the authority given it so to occupy, and *the property is in public use*, equity will not permit the company to be disturbed in its 40

possession, provided it make compensation if equity shall so require. (Citing cases). If in this case the company has power to condemn, it may, if necessary, take proceedings in condemnation to gain legal title, and it should, under the circumstances, be protected in its possession by this court until it shall have done so. *North Hudson County R. R. Co. vs. Booraem, ubi supra.* If it has not power to condemn and equity demands that it make compensation, this court should itself ascertain the compensation either by means of an issue or of a reference. And the compensation may thus be fixed, even if the company has power to condemn.'

In the *Stanley case*, 7 Stew. 55; 8 Stew., 283, the Railroad Company was in possession at the time the ejectment suit was brought under a written contract of consent. In the suit to enjoin the ejectment suit, the defendants answered. They alleged that the conditions mentioned in the agreement had not been performed, and protested against a decree for specific performance, but declared their willingness to convey on receiving compensation for their land and damages assessed as of the date of the Montclair Railway Company went into possession, with interest from the time.

It is apparent, therefore, that the question of jurisdiction was not at issue, but both the opinions of Chancellor Runyon in the Court of Chancery, and of Judge Depue in the Court of Errors and Appeals are wholly consistent with the position taken by the complainants in this case.

In the case of the *North Hudson County Railway Company vs. Booraem*, also referred to, the railroad company was in possession of property, and its possession was threatened.

The bill in that case was brought to foreclose a mortgage against the owner. The railroad company was in possession of part of the mortgaged premises.

The striking distinction between that case and this is shown by the language of Mr. Justice Depue on page 454, where he says:

“Whatever was done, was by the assent, if not procurement of Wood under an agreement with him founded on a valuable consideration, which might have been specifically enforced in equity.”

In that case then, not only was the railroad company in possession, but they were in possession under a license founded on a valuable consideration, which of itself would raise an equity.. 10

In the present case, there is neither possession nor valuable consideration upon which to base an equity. The distinction between a suit wherein the possession of a railroad company in its right of way is brought in question, and a suit wherein merely a question of title is to be decided, is further illustrated by the case of *Central R.R. vs. Hetfield*, 3 C. E. Green, 323, at 327. There was a suit brought for damages for an alleged trespass by the railroad, and this court refused to enjoin the suit or award damages in equity. 20

“No difficulty exists, and none is alleged to exist, preventing the company from acquiring title to the premises, in the way provided by their charter. The value of the land and the damages, can in this way be ascertained quite as readily and justly as by a reference to a master, or the making up of an issue in the Supreme Court. The propriety of either of the two latter methods may well be doubted.” 30

It cannot be seriously claimed by the respondents that the complainants by the form of their deed are estopped from denying the title of the defendants. The deed states that the title is conveyed subject to the rights of the Erie Railroad, *if any*. This does not constitute any admis- 40

New Jersey Court of Errors and Appeals.

Between

WALTER H. CONDUCT, *et al*,

Complainants below and

Appellants,

and

ERIE RAILROAD COMPANY, *et al*,

Defendants below and

Respondents.

*On Appeal
from
Chancery.*

Brief in Further Reply to Points Raised by Appellant's Brief.

To answer the appellant's brief by points, that brief says that:

I. The court did not determine who is in possession. The court did so determine. The railroad built the tunnel from an opening on lands which they owned and which they still own and hold and the appellant is kept out of that opening and tunnel and cannot enter it except by the assent of the railroad, who hold the key to the door. Even admitting that the lock is out of order, it is no less a room in their possession.

This tunnel was built through and under this property in 1871, and construction trains and engines ran on it (Owen, p. 111, ll. 22-25).

The railroad entered the tunnel and ran into the hill at a point 80 feet east of the property (Jas. Owen, p. 108). It ran 23 feet below the surface when it crossed the boundary and was forty feet below when it left at Claremont avenue (Owen, p. 102, l. 3).

It was completed for 500 feet of length with a heading over 20 feet further (Boller, p. 67, l. 15; Owen, p. 98, l. 38 and p. 100, l. 28).

It was through hard sandstone rock (Owen, p. 111, l. 12). It did no damage to the surface if roofed (p. 104, l. 22).

Owen went through it in 1876 (p. 100, l. 18), it had then fallen in at the mouth (do.) but further in it was intact (p. 103, l. 15).

This inspection was for the new railroad (Buchholz, p. 63, l. 33 and p. 53, l. 33).

After that the roof gave way in one spot on this property as defined by a circle on the map, printed on page 2 of appellant's brief. This made a sunken place on the surface which was filled about 12 years ago (James Owen, p. 107, l. 5).

Mr. Owen says, that no other cave on this property has developed or is likely (p. 110, l. 30).

The tunnel is now inaccessible because the mouth is choked. But it still exists on the Donald property (p. 110, l. 35), and it is mostly intact (p. 112, l. 20).

The land owner never went in the tunnel at all or disturbed the possession taken by the company all these years.

This route via. the tunnel is a better and shorter line and is likely to be completed by the company when they get the means (Buchholz, p. 59, l. 30).

Thus the railroad built and has had possession of a tunnel 40 years and their possession has never been disturbed.

Filling a depression in one spot over it is not taking possession of the tunnel, but repairing damage done by it.

The vice-chancellor determines beyond question that possession is in the defendant. He says that the complainant proves possession of the surface; that defendant says that since 1871, its predecessors have been owners of the tunnel forty feet below the surface and

in open, notorious and exclusive possession thereof to the extent that it was capable of being owned and possessed.

The vice-chancellor continues that the tunnel was constructed apparently without objection in 1871, but not completed. That it has to some extent fallen in; that the evidence does not show that complainant or his grantor ever entered on the tunnel and that neither party ever entered inside it.

He then says, "If defendant now has possession it is because the possession thus had was never taken away." But this taken with the context plainly means, "Defendant has possession because the possession thus had was never taken away."

The question he leaves is not whether defendants have possession, but whether they have a right to retain it, on an ejectionment.

II. A. If I understand this point it is that it is defendants' predecessors that did all that was done in the tunnel and therefore ejectionment would not lie.

But it is enough that the railroad took possession, built the tunnel, claim it and occupy the entrance to it so that the appellant cannot go and occupy it as his own.

II. B. The appellant says ejectionment will not lie for an incorporeal hereditament. This is true. It is so adjudged as to rents.

Ejectionment might lie as to the incorporeal hereditament or franchise of running trains.

But a railroad is much more than a mere incorporeal hereditament. It is land exclusively possessed for track, depots, bridges, tunnels.

In *White vs. White*, 16 N. J. L., 202, ejectionment was held proper for a *room*. Is not a tunnel a room? Occupation and ownership of a railroad and incidentally of its tunnel is of real estate. The complainant has

no authority for saying that there can be no legal title to this so-called tunnel in hereditaments which can be sued for in ejectment.

He cites *Farley vs. Craig*, 15 N. J. Law, 191. This case was an ejectment for rents; previously rents had been the subject of a writ of *assise* in which the judgment included the land, and it was held that rents could not be sued for in ejectment and that the right of ouster depended on the conditions of the lease.

White vs. White, 16 N. J. Law, 202, states that ejectment will lie for a room in a house—a tunnel is but a room.

This tunnel is a barrier against the appellant and always was. *ITS OPENING IS ON DEFENDANTS' PROPERTY BOUGHT OF OTHER PARTIES AND STILL HELD BY THE DEFENDANT.*

Possession of that property carries possession of the door to this room, the gateway to this tunnel.

So long as the defendants hold that door the tunnel is not abandoned.

The appellants brief insists that ejectment will not lie because the tunnel was abandoned. He can prove this as a fact for the jury if he can prove that the railroad have given up and no longer hold title to this right of way.

The railroad possession is adverse, they hold the gate and door of this tunnel and do not allow any entry there.

A mine is subject to ejectment. *Lehigh Zinc Co. vs. N. J. Zinc Co.*, 23 Vr., 351. A quarry is the subject of ejectment.

Appellant objects that the sheriff could not gain access on a writ of possession.

The same objections could be made as to all underground mining.

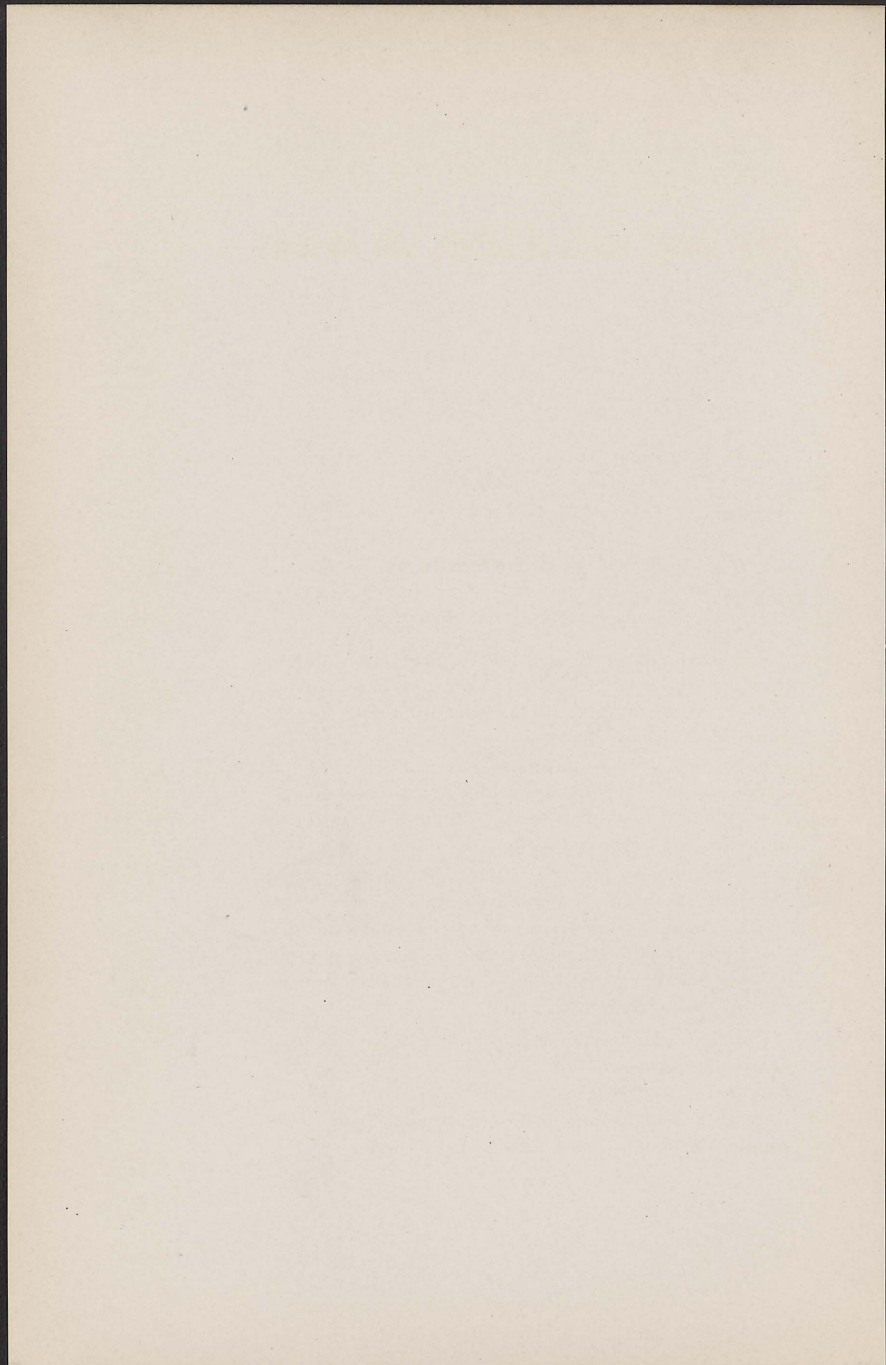
A railway has sufficient estate in its road to bring ejectment. It owns not a mere right to cross, but occupying land exclusively to lay tracks, bridges, etc. A

railway track is not an incorporeal hereditament, nor is a railway bridge or a tunnel. They are most corporeal. The right to run trains may be incorporeal and not the subject of ejectment. The way the track and the structures are corporeal real property of the railroad company so long as their charter lasts.

This part of the railroad is partly constructed and waiting funds for completion and held as railway property for that purpose.

Let the appellant sue in ejectment if he thinks the railroad have no right there.

RICHARD WAYNE PARKER,
Of Counsel.



New Jersey Court of Errors and Appeals

Between

WALTER H. CONDUCT, *et als*,
Complainants—Appellants.

and

ERIE RAILROAD COMPANY, *et als*,
Defendants—Respondents.

On Appeal

from

Chancery.

Brief for Defendant.

STATEMENT OF CASE.

Complainants brought a bill to quiet title alleging that on February 10th, 1910, they purchased of one Peter Donald, a tract of land in Montclair, rectangular in shape, on the northeast corner of Claremont avenue and Prospect avenue, being 295 feet on the north line of Claremont avenue by 161 feet on the east side of Prospect avenue. They allege and prove that the deed contained a clause as follows:

“Subject however, to the right, if any, of the Erie Railroad Company to a right of way across a portion of the above described land; the said Peter Donald covenants that he has not granted any such right or received any consideration for any such right.”

Complainants say that they are and have been in peaceable possession of the land since the time of purchasing and that they then believed and still believe they bought and acquired a good title in fee simple and claim to own the same accordingly.

They further allege that the above named defendants claim some interest or right in the lands and pray that they discover the same to the end that the rights of all parties may be fixed and settled, and that the defendants be decreed to have no estate or interest in or encumbrance on the lands.

The answer admits the execution of the deed from Donald to Condict "subject to the right, if any, of the Erie Railroad Company to a right of way across a portion of the premises in question" and claims that complainants took the premises subject to this burden and cannot now relieve themselves of it.

The answer says and the proof shows that the complainants have conveyed away part of the land and no longer have paper title to or pretend to have possession of such part.

The answer then proceeds to set up the claims of the defendants which are that the Montclair Railway Company was incorporated by laws 1867 p. 357 with power to construct a branch railroad from Montclair to Caldwell and when a survey had been adopted had the right to build the branch railroad. That such survey was filed extending over part of said lands and it was necessary to construct the railroad by a tunnel extending partly under the lands in question. That such branch was partly completed and a tunnel constructed underneath the premises in question. That the construction of such tunnel was notorious and well known to Peter Donald. That the railroad spent very large amounts of money and acquired equitable rights, if it did not obtain title, to construct the tunnel. In any event the right to obtain compensation has been lost by lapse of time.

The defendants claim that the tunnel was a necessary part of a public work on which large amounts of money have been spent and that they are entitled to the protection of the court from being deprived of it. The branch railroad was partly constructed on both sides of the mountain and is partly operated.

Defendants also say that though the construction of the tunnel has been prevented by financial reasons it is not abandoned and merely waits for the time when it can be completed.

The defendants trace down the title of the Montclair Railway Company to the defendants and claim to own and possess the right to the tunnel and to have open, notorious and exclusive possession—to the extent that it was capable of possession.

On September 9th, 1911, the learned Vice-Chancellor to whom this case was submitted, filed his opinion. He held that the complainants had not proven the preliminary question necessary to give the court jurisdiction, viz., actual and peaceable possession of the tunnel, and that under the evidence before him the questions as to the possession of the tunnel were within the exclusive jurisdiction of a court of law, but that he would retain complainants bill until a decision of the action at law, if complainants desired. Complainants did not accept the Vice-Chancellor's offer and a decree of dismissal was entered from which complainants have appealed to this court.

I.

THE COMPLAINANTS FAILED TO ESTABLISH THE PRIMARY JURISDICTIONAL QUESTION NECESSARY TO SUPPORT THEIR BILL.

The bill in this case is filed under and by virtue of the provisions of an act to quiet titles, 4 Comp. Stat. 5399. Under this act both actual and peaceable possession are, on complainants' part, jurisdictional facts and, if denied by defendant must be settled as the preliminary question. *Allaire v. Ketcham*, 55 N. J. E., 168; *Sheppard v. Nixon*, 43 Eq. 627, 632; *Yard v. Ocean Beach Ass'n*, 49 Eq., 306, 315.

“Where the defendant denies the jurisdictional facts of peaceable possession by the complainant and non-

pendency of any test suit and incapacity of complainant to bring a test suit at law or in equity, the practice is settled that the court will try, in the first instance, the issue of jurisdiction thus presented, and will not go into the question of the respective titles of the parties until the jurisdictional question has been decided." *Fittichauer v. Metropolitan Fire Proofing Co.*, 4 Rob. 429, 433; *Blakeman v. Bourgeois*, 59 N. J. Eq., 473.

Possession in fact, as distinguished from constructive possession arising merely by virtue of the legal title, is essential to confer jurisdiction on the court to try such action *Elliot v. Atlantic City*, 149 Fed., 849.

But the act to quiet title does not give the complainants the right to bring this suit, if there is a complete remedy at law and the ejectment act gives that remedy.

In *Jersey City v. Lembeck*, 4 Stewart, 255, Beasley, C. J. delivering the opinion of the Court of Errors held that the statute of 1870 did not give a party in possession the right to bring a suit when there was a remedy at law and it was decided that when there was a cloud on title such as an assessment, which could be removed by certiorari the statute of 1870 could not be invoked. The court says page 272:

"The inequity that was designed to be remedied grew out of the situation of a person in the possession of land as owner, in which land another person claimed an interest which he would not enforce, and the hardship was that the person so in possession could not force his adversary to sue and thus put the claim to the test. The title of the act indicates that this is its purpose for it is an act 'to *compel* the determination of claims to real estate.' In the present instance the complainant had it in his power, by one of the customary processes of the land, to bring to judgment the claim he wished to contest, and it would therefore seem to be going out of the way to

maintain that this statute is applicable in aid of his inaction. If a party in possession of land can throw the hostile claim into a court of law, and thus get rid of the cloud overhanging his estate, why should he not do it? And what reason is there to say that this act was designed to hold a party who was in no strait but of his own choosing."

The court then instances cases where the statute would be applicable such as doubtful claims on land arising under a will &c.:

"In my view the act was intended for the relief of such cases of hardship as that and other cases of a similar nature; but it was not intended to aid those who have no need of its aid."

In consonance with this decision the Court of Errors held in *Sheppard v. Nixon*, 16 Stewart 627 (1887) that the act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same (Rev. p. 1189), was designed for the relief of a class of persons, who~~re~~ being in peaceable possession had no means of contesting the adverse claim by a suit in due course of law. Possession, in fact, as distinguished from that constructive possession which arises in virtue of the legal title, is essential to a proceeding under this statute.

2. The suit being retained as a bill *quia timet*, irrespective of the statute, held.

(1) That the foundation of the jurisdiction of the equity court is the ~~ability~~^{inability} of the complainant to obtain relief by an action at law, or the inadequacy of the legal remedy.

(2) That the exception to this rule is when the case presents some special ground for equitable jurisdiction such as fraud, accident or mistake, requiring the setting aside or reformation of deeds or instru-

ments of conveyance. If these elements be wanting, a bill to establish the complainant's title is an ejectment bill, pure and simple and, if the situation of the parties be such that the complainant may have an action at law, to establish his title, his remedy is in a court of law.

(3) By the ejectment act (Rev. p. 326), a party claiming the legal title to premises, and out of possession may, by an action or ejectment, put to a final determination the title of an adverse claimant who is in possession if the premises are occupied, or who, if the premises are unoccupied, exercises acts of ownership over the same, or claims title thereto. In such situation there is no inadequacy of the legal remedy which will lay the foundation of a suit in equity to quiet the title.

The above cases of *Jersey City v. Lembeck*, and *Sheppard v. Nixon* were quoted with approval by Vice-Chancellor Van Fleet in the case of *Albro v. Dayton*, 5 Dick. 50 N. J. Eq., P. 574 (1892) which hold that the remedy given by the statute of 1870, to compel the determination of claims to real estate, can only be resorted to when the landowner, whose title or right is subject to an adverse claim, is in a position where it is beyond his power to put such claim to the test by any ordinary process of the law.

In *Allaire v. Ketcham*, 10 Dickinson p. 168 (1896), Vice-Chancellor Emery says:

“Under act of 1870 (Gen. Stat. p. 3486), which provides for a bill to quiet title ‘when any person is in peaceable possession of lands, claiming to own the same’ &c. both actual and peaceable possession are, on complainant's part, jurisdictional facts, and if denied by defendant, must be settled as the preliminary question.”

What evidence have complainants given of peaceable and actual possession of the tunnel? None whatso-

ever. There isn't the slightest evidence of entrance into or use of the tunnel by complainants or their predecessors in title.

Complainants proof of possession is only that constructive possession which follows paper title, and proof of the possession of the surface, which is not proof of the possession of the sub-surface.

Caldwell v. Copeland, 87 Pa. St., 427. 78 Am. Dec., 436.

It was vacant land when purchased of Donald and still remains so p. 24. Complainants possession of surface consisted only in walking over the land and putting up a sign for sale (p. 31).

The existence of the tunnel was well known to Donald while he owned the premises and to complainants before and after they purchased Donald's title.

Mr. H. V. Condict testifies that Donald knew of the tunnel after the company had failed (this was about 1873) and did nothing about it because the defendants could not respond in damages (pp. 45 and 46).

Mr. H. V. Condict writes, Feb. 7th, 1910, before he took the deed. "The city map shows that a tunnel was located under this lot in or about 1871 and 1872. This was the railroad that was projected to run from Montclair to Caldwell but was never finished * * * the information I have in regard to the tunnel is that a tunnel was actually built under this lot about 1871; that it was timbered; that the timbers rotted away and the tunnel caved in. There was water in this tunnel which came up and formed a stagnant marshy place on this lot and about twenty years ago this marshy hole was filled in and to-day the lot is about level with the street with no indications of any tunnel or depression."

Annexed to this letter is a sketch map showing by little dotted lines what must be the tunnel.

With this knowledge of the tunnel neither complainants, or their predecessors, ever made any attempt to use or enter the tunnel which they now claim.

Defendants on the other hand have proved the construction and occupancy of the tunnel for a number of years. The proof shows that work on the tunnel under this land was begun in 1870 or 1871 and the same was constructed for 700 feet altogether (Owen 100), that in 1876 Owen went into it and measured it and made a map (pp. 100-101), that it was fully constructed for 500 feet and partly constructed for 270 feet more. It was full width of excavation and height through the Donald land (pp. 101, 102, 111). It was some twenty-five to forty feet under the surface (p. 102). Though partly caved in a great deal of the tunnel remains (p. 110). It is probably intact for half its distance under the Donald property (p. 112).

McArthur (p. 93) describes the work which continued through 1870, 1871 and 1873 blasting, drilling, teaming, excavating, &c.

It is quite plain that in 1871, 2 and 3 the Montclair Railway was in actual, notorious and adverse possession of this tunnel, while in 1876 they were surveying and measuring it evidently for the purpose of continuing the construction.

With these facts before him and with the burden on complainants of proving peaceable and actual possession of the tunnel, as a condition precedent to the consideration of defendant's claims and interests, the learned Vice-Chancellor held that "the evidence does not show that complainant, or his grantor ever entered upon the tunnel or that either complainant or defendant ever made any actual use of it."

The Vice-Chancellor having found and decided that the complainants had not sustained the allegations of their bill and that they had not proven the preliminary jurisdictional requisites of actual and peace-

able possession of the tunnel, complainants case necessarily fell and the Vice-Chancellor could have dismissed the bill at that point. But he chose to express an opinion upon the affirmative proof of defendants title and to say that "if defendant now has possession, it is because its predecessors once had possession or because the possession thus had has never been taken away. It is obvious that these are questions within the exclusive jurisdiction of a court of law. There is nothing to prevent complainant from trying them in a legal action." And he chose further to give to complainants the option of retaining the bill pending a decision of the law action. This *privilege* the complainants declined, and now complain of in their brief on appeal.

They also take exception to the portion of the court's opinion last quoted.

They are far afield. The crux of the case is, and the question to be decided by the learned Vice-Chancellor was, Have complainants made out their case? Have they brought themselves within the class of persons entitled to prosecute a bill to quiet title?

These questions the Vice-Chancellor was compelled to decide first—if he decided them in the affirmative, defendants would have been compelled to establish their title by affirmative proof. The act to quiet title is an act to *compel* the determination of claims to land. If he decided them in the negative the bill would fall and there could be no contest. And that is the situation in this case. That is the gist of the Vice Chancellor's opinion, viz., that complainants had failed to make out their case.

We contend further that the complainants have lost any right to clear the land from the tunnel by laches.

It has stood there without dissent from Donald for nearly forty years. The principles as to prescriptive right to easements set forth in *Lehigh Valley R. R. v. McFarlan*, 14 Vr., 605, apply.

Donald, as far as we know, did not object to the tunnel *per se* but to its not being paid for. Complainants testimony shows alleged statements of Donald's agent that the damage had not been paid for (p. 32) and as the railroad had failed Donald thought there was no use in suing.

This practically shows acquiescence in the construction of the tunnel. He might have sued during twenty years for the damage in taking the easement and recovered his damage, past and future—*Lehigh Valley R. R. v. McFarlan, supra*, 612-3-4, or he could bring his action in ejectment against the successor of the defendant railroad. He does nothing for nearly forty years and sells subject to our rights, if any.

It appears that for forty years Donald might have brought this action or any ejectment suit. That Condict purchased with full knowledge. They are bound by their grantors laches. They pretend by their bill that they did not know and could not know what our claims are. The fact is they know all about them—so did Donald.

Can a suitor delay for twenty years to bring his action? Is he not estopped by his delay from seeking equity which only helps the vigilant?

The complainants took title subject to the rights of the Erie Railroad Company to a right of way. By the deed complainants accepted title subject to these rights. Our easement was the paramount and the complainants the servient tenement.

This court cannot change the rights established by the deed and give him a better title than he bought.

II.

The act of 1870 is an extension of the *quia timet* jurisdiction of the Court of Chancery.

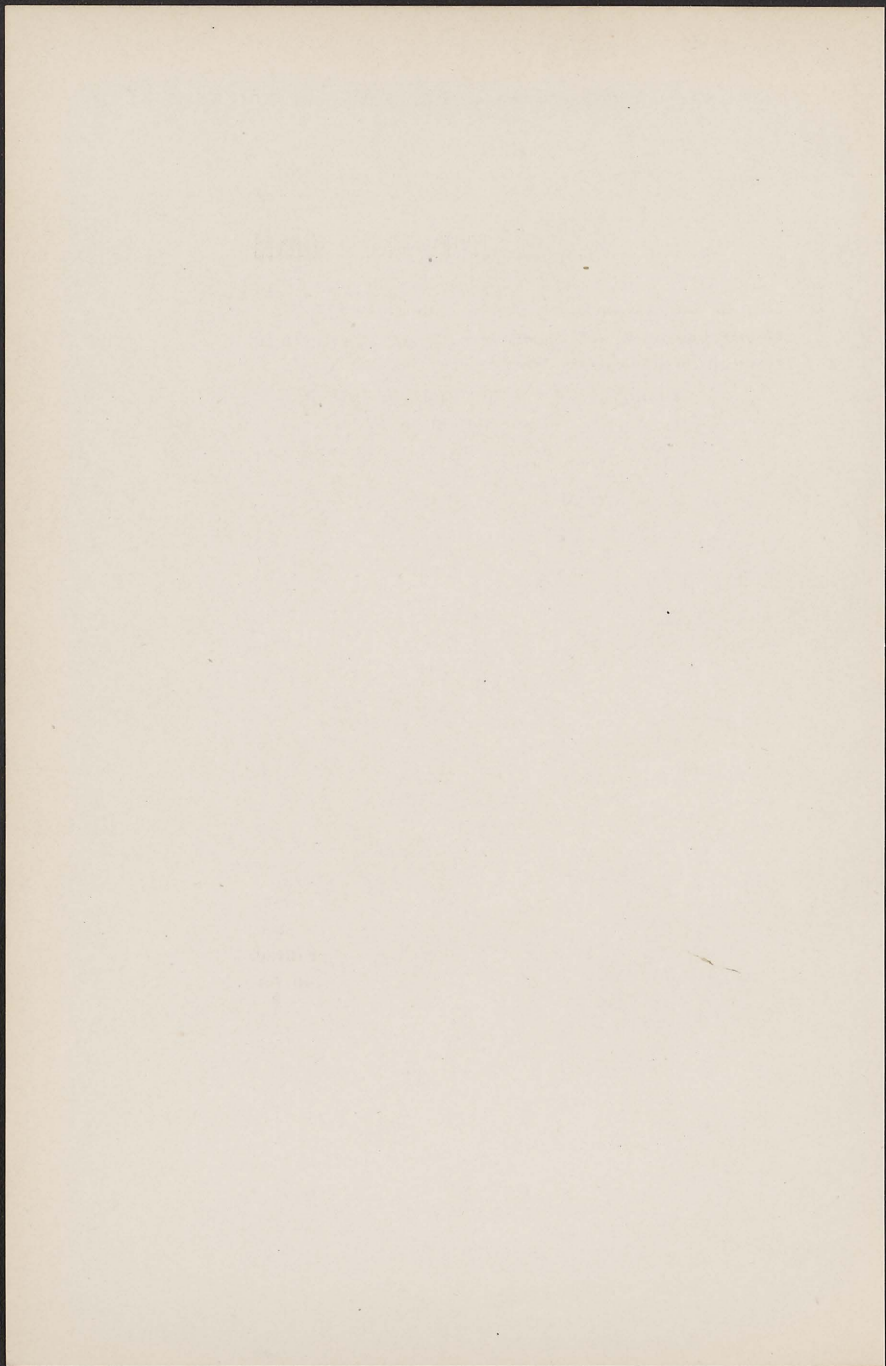
McAndrews v. Camden, 78 Atl., 233.

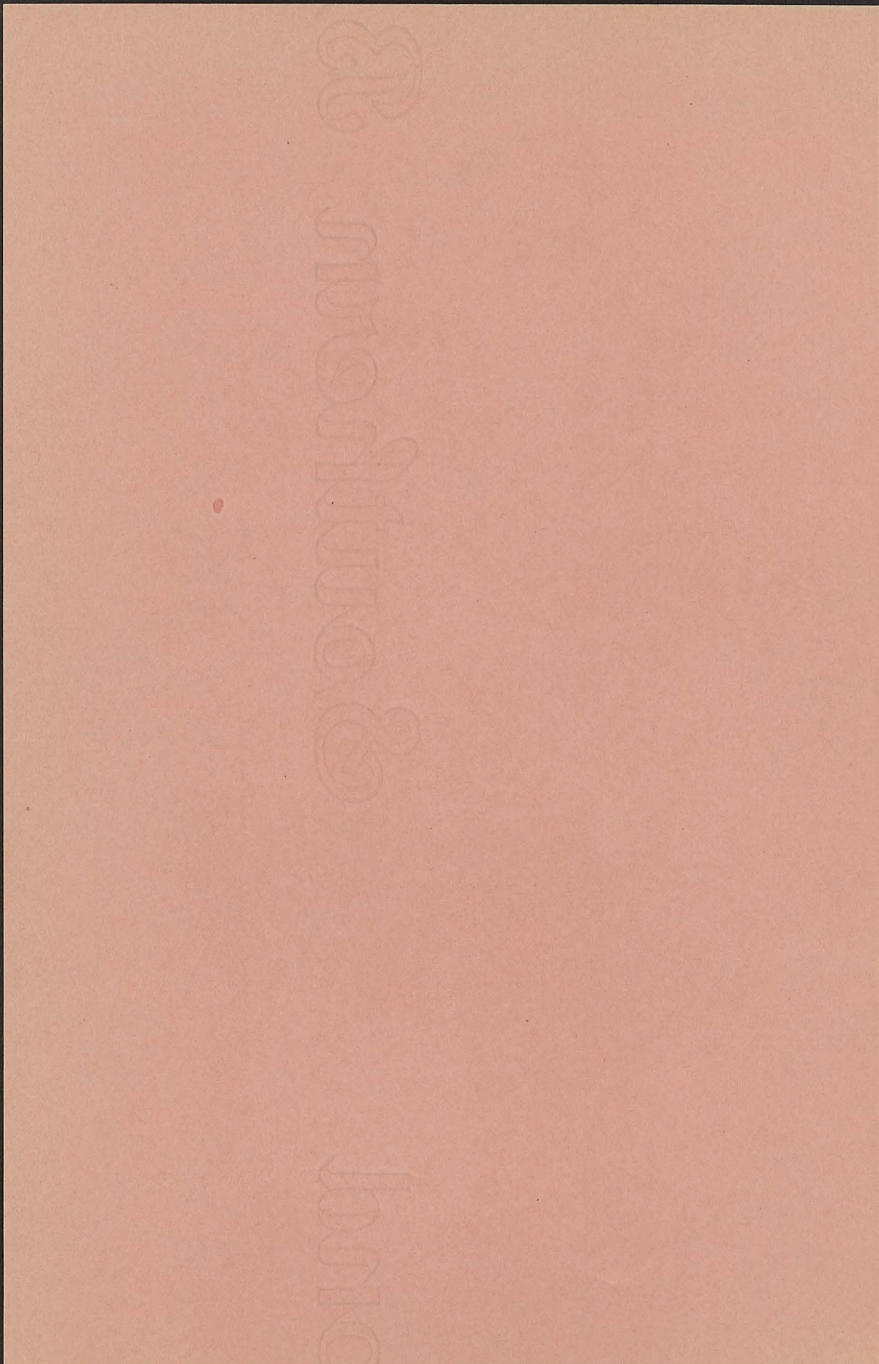
The right of the Court of Chancery in *quia timet* bills to send the parties to law is too well established to be questioned. It therefore had the same right in relation to proceedings under the act of 1870.

CORTLANDT & WAYNE PARKER,

CORTLANDT PARKER,

Of Counsel with Defendants.





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Southern

and