INDEX

Duncan Hood Corporation Case

Cullis and Lewis Case

TESTIMONY

City of Summit, Respondent-Appellant's:

EXHIBITS

NEW JERSEY

Court of Errors and Appeals

NOTICE OF APPEAL TO UNION COUNTY CIRCUIT COURT

UNION COUNTY CIRCUIT COURT

(*Served August 2, 1927. Filed August 4, 1927.*)

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the CITY OF SUMMIT.

Property of DUNCAN HOOD CORPORATION, a corporation of the State of New Jersey, in the City of Summit, Union County, New Jersey.

ON APPEAL FROM AWARD AND ASSESSMENT ON ESTABLISHMENT OF BUILDING LINES.

To the City of Summit or Clement K. Corbin, its Attorney:

NOTICE IS HEREBY GIVEN that an appeal has been taken by Duncan Hood Corporation to the Union County Circuit Court, the Circuit Court of the County wherein the lands and property herein described are situate, from the award to it for damages and the assessment against it for benefits, accruing from the establishing of building lines on

Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit, Union County, New Jersey, of the Board of Tax Assessors of the City of Summit of March 15th, 1927, as altered and amended by the Common Council of the City of Summit, and as so amended and altered, adopted and confirmed by said Common Council of the City of Summit by its resolution duly passed at its regular meeting on June 7th, 1927, and approved by the Mayor.

Said property being known and designated at Lot seven (7) Block One Hundred and fifty-one (151) on map dated Oct. 1925, by J. P. Broome, City Engineer, entitled "Summit, N. J. Buildings affected. Proposed Building Line. Springfield Avenue, Woodland Ave. to K. P. Boulevard" and situated on the southerly side of Springfield Avenue, Summit, N. J. and being One Hundred and eight (108) feet in width in front, One Hundred and ninety and five tenths (190.5) feet deep and irregular at the rear, be the said several dimensions more or less.

And that on the 21st day of September, 1927 at 10:00 o'clock in the forenoon at Middlesex County Court House at New Brunswick, N. J. said appellant will apply to the Hon. Peter F. Daly, Judge of the Union County Circuit Court, to frame the issue on said appeal, and to fix a day for striking a jury, and to fix a day for the trial of the appeal and the award for damages and the assessment for benefits, anew.

DUNCAN HOOD CORPORATION,
By Edward G. Pringle,
Its Attorney,
Appellant.

ORDER FRAMING ISSUE

(*Filed September 21, 1927. Amended May 15, 1928.*)

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the CITY OF SUMMIT.

Property of DUNCAN HOOD CORPORATION, a corporation of the State of New Jersey, in the City of Summit, Union County, New Jersey.

An appeal having been taken by Duncan Hood Corporation to the Union County Circuit Court from the award to it for damages and the assessment against it for benefits accruing from the establishing of building lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit, Union County, New Jersey, of the Board of Tax Assessors of the City of Summit of March 15th, 1927, as altered and amended by the Common Council of the City of Summit, and as so amended and altered, adopted and confirmed by said Common Council of the City of Summit by its resolution duly passed at its regular meeting on June 7th, 1927, and approved by the Mayor, by notice filed with the clerk of the Union County Circuit Court pursuant to statute in such case made and provided; and there having been stated in said Notice of Appeal that said appellant would apply on this day to said Union County Circuit Court or a

Judge thereof to frame the issue on said appeal and to fix a day for striking a jury and a day for the trial of said appeal, and said Notice of Appeal having been served as required by law, and the parties hereto having stipulated and agreed that the jury in this matter shall be drawn from the regular panel and that each side shall have twelve challenges,

It is on this 21st day of September 1927, on application of Edward G. Pringle, attorney for said appellant, Duncan Hood Corporation, and Clement K. Corbin, appearing as counsel for the City of Summit.

Ordered that the issue on said appeal be and it is hereby framed as follows:

What is the damage or benefit if any sustained by or accruing to said appellant by reason of the establishment of building lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit, New Jersey, as described in said Notice of Appeal, to be paid by the City of Summit to the owner of the lands and property therein described and all persons interested therein or to be paid by such persons to the City of Summit, said property being described as follows:

Said property being known and designated at Lot seven (7) Block One hundred and fifty-one (151) on map dated Oct. 1925, by J. P. Broome, City Engineer, entitled "Summit, N. J. Buildings Affected. Proposed Building Line. Springfield Avenue, Woodland Ave. to K. P. Boulevard" and situated on the southerly side of Springfield Avenue, Summit, N. J. and being One hundred and eight (108′) feet in width in front, One hundred and ninety and five tenths (190.5′) feet deep and irregular at the rear, be the said several dimensions more or less; and it is also further

Order Framing Issue

Ordered that this matter shall be tried by a jury which shall be drawn from the regular panel and that each side shall have twelve challenges; and it is further

Ordered that the 24th day of October 1927 at ten o'clock in the forenoon before said Union County Circuit Court at the Court House in Elizabeth be and it is hereby fixed as the time and place for the trial of said appeal.

PETER F. DALY,
Judge.

Entered
On Motion of
Edward G. Pringle,
Attorney for Duncan Hood Corporation.
Appellant.

I consent to the making and entry of the foregoing order.

CLEMENT K. CORBIN,
Attorney for Appellee.

RULE FOR JUDGMENT

UNION COUNTY CIRCUIT COURT

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the CITY OF SUMMIT.

Property of DUNCAN HOOD CORPORATION, a corporation of the State of New Jersey, in the City of Summit, Union County, New Jersey.

This appeal having been brought on for trial in accordance with the statute in such case made and provided at the Union County Circuit before Honorable Peter F. Daly, Circuit Judge, and a jury on the 14th, 15th and 16th days of May, 1928, and the jury having returned a general verdict for the damages sustained by the appellant Duncan Hood Corporation as of the date of the adoption of the Building Line Ordinance in the sum of $10,781.00, and the court having calculated the interest at the lawful rate on said verdict from the date of the adoption of the Building Line Ordinance to the date of the verdict at the sum of $2,231.67;

It is ordered that judgment final be entered in favor of the appellant Duncan Hood Corporation and against the respondent City of Summit, in the sum of Thirteen thousand twelve dollars and sixty-seven cents ($13,012.67) with appellant's costs to be taxed. Costs $176.00.

PETER F. DALY,
Circuit Court Judge.

NOTICE OF MOTION TO VACATE JUDGMENT

(Served May 28, 1928.)

UNION COUNTY CIRCUIT COURT

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the CITY OF SUMMIT.

Property of DUNCAN HOOD CORPORATION, a corporation of the State of New Jersey, in the City of Summit, Union County, New Jersey.

To Edward G. Pringle, Attorney for Appellants.

SIR:

Take notice that we shall move before Honorable Peter F. Daly, Judge of the Union County Circuit Court on May 31st, 1928, at 9:30 a. m., daylight saving time, at the Court House, in Elizabeth, for the vacation of the judgment in this matter, on the ground that there is included therein the sum of $2231.67, as interest on the amount found by the jury, calculated from the date of the adoption of the Building Line Ordinance, the inclusion of which interest is without warrant or authority of law.

Dated May 28, 1928.

CLEMENT K. CORBIN,
Attorney for City of Summit.

NOTICE OF APPEAL TO COURT OF ERRORS AND APPEALS

(Served and filed August 18, 1928.)

UNION COUNTY CIRCUIT COURT

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit.

DUNCAN HOOD CORPORATION, a corporation of the State of New Jersey,

Appellant,

v.

CITY OF SUMMIT, a municipal corporation of the State of New Jersey,

Respondent.

To Edward G. Pringle, Esq., Attorney of Duncan Hood Corporation, Appellant.

Take Notice that the respondent, City of Summit, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The trial judge erroneously overruled the following question on direct-examination of Herman de Selding, a witness for respondent:

> "Q. Assuming that there is a public sidewalk between the fronts of the Cullis and Lewis property and the Duncan Hood prop-

erty on Springfield Avenue to the curbline, what, in your opinion, would be the damage to those two properties by the establishment of that building line?"

2. The trial judge erroneously overruled the following question on direct-examination of Herman de Selding, a witness for respondent:

"Q. Assuming, Mr. de Selding, that the public passed (used the land) in front of the front walls of the Duncan Hood building and the Cullis and Lewis building for sidewalk purposes, what, in your opinion, was the damage to those two buildings by the establishment of the present building line?"

3. The trial judge erroneously overruled the following question on direct-examination of Frank H. Taylor, a witness for respondent:

"Q. Mr. de Selding testified to the sale in 1924 to Cullis and Lewis of the property now occupied by them, having a frontage of 31.38 feet with some rights in the alleyway adjoining, for $21,500; also to the sale of the adjoining property in the year 1925 by Hicks to Walter, having a frontage as shown on the map of 73.33 feet, for a price of $31,000. He also testified to a sale of property on the same side of Springfield Avenue but down near the corner of Kent Place Boulevard in the year 1924 by Burroughs to Christiansen, having a frontage of 42.88 feet, for a certain consideration; and to a sale by Reed to J. and L. Murphy of vacant land on the opposite side of Springfield Avenue between Woodland Avenue and Kent Place Boule-

vard, having a frontage of 50 feet, for a price of $10,000; and also to the sale in the year 1924 by Brody to Heller Construction Company of a plot 117.47 feet wide for $23,750; and of another plot 94.72 feet wide for a price of $23,750. In view of those sales, would you say that the property of the Duncan Hood Company and Cullis and Lewis have any greater value than $400 a front foot for the first hundred feet of depth?"

4. The trial judge erroneously permitted the following question on direxT-examination of John D. Hood, a witness for appellant:

"Q. Do you know whether or not the building up of the buildings to the eastward of you out to the existing street line has had any effect on your rentals?"

5. The trial judge erroneously refused to strike out the answer of John D. Hood, a witness for appellant, to the following question on direct-examination:

"Q. From your experience? A. My experience, one of them has already been rented for $125 a month where it was bringing $150 a month."

6. The trial judge erroneously permitted the following question on direct-examination of John D. Hood, a witness for appellant:

"Q. What other tenants did you ever have, or did you have any other changes of the rentals with any of your other tenants?"

7. The trial judge erroneously permitted the fol-

lowing question on direct-examination of John D. Hood, a witness for appellant:

> "Q. State in detail what other changes you had in your rentals."

8. The trial judge erroneously charged the jury, upon request of appellant, as follows:

> "The owners of the land in these cases had the right, before the adoption of the building line ordinance, to erect or to extend and maintain their buildings out to the line of the property which they owned under their deed."

9. The trial judge erroneously charged the jury, upon request of appellant, as follows:

> "The effect of the building line ordinance is to prevent these owners from erecting or extending and maintaining their buildings or structures upon that part of their land lying between their present buildings and the newly established building line of the southerly side of Springfield Avenue."

10. The trial judge erroneously charged the jury upon request of appellant, as follows:

> "You may also take into consideration the effect of setting back the curb lines and widening the vehicular roadway in front of these properties, in order to determine whether these changes favorably or adversely affect the value of the property of these appellants."

11. The trial judge erroneously charged the jury as follows:

"You are to say what kind of street there was here before this change and what kind of sidewalk was here before this change."

12. The trial judge erroneously refused to charge the jury, upon request of respondent, as follows:

"It appears from uncontradicted testimony that the sidewalk extending from the front lines of the present buildings of the Duncan Hood Company and Cullis and Lewis to the curb line had been used by the public continuously for over twenty years prior to the date of establishment of the building line, and, therefore, neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages because they are prevented by the building line from extending the fronts of their buildings."

13. The trial judge having refused to charge the last mentioned request, erroneously refused to charge the jury, upon request of respondent, as follows:

"If the jury find that the sidewalk extending from the front lines of the present buildings of the Duncan Hood Company and Cullis and Lewis to the curb line had been used by the public continuously for over twenty years prior to the date of establishment of the building line, neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages because they are prevented by the building line from extending the fronts of their buildings."

14. The trial judge erroneously refused to charge the jury, upon request of respondent, as follows:

Notice of Appeal to Union County Circuit Court

"Neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages to their porperties caused by changes in the curb line or sidewalk in front thereof."

15. Said judgment erroneously includes certain interest on the verdict of the jury.

Dated, July 23, A. D. 1928.

CLEMENT K. CORBIN,
Attorney of the City of
Summit, Respondent.

NOTICE OF APPEAL TO UNION COUNTY CIRCUIT COURT

(*Served August 2, 1927. Filed August 4, 1927.*)

UNION COUNTY CIRCUIT COURT

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit.

Property of GEORGE H. CULLIS and CLIFFORD H. LEWIS, copartners doing business under the firm name and style of Cullis and Lewis in the City of Summit, Union County, New Jersey.

To the City of Summit or Clement K. Corbin, its Attorney:

Notice is hereby given that an appeal has been taken by George H. Cullis and Clifford H. Lewis,

copartners doing business under the firm name and style of Cullis and Lewis to the Union County Circuit Court, the Circuit Court of the county wherein the lands and property herein described are situate, from the award to it for damages and the assessment against it for benefits, accruing from the establishing of building lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit, Union County, New Jersey, of the Board of Tax Assessors of the City of Summit of March 15th, 1927, as altered and amended by the Common Council of the City of Summit, and as so amended and altered, adopted and confirmed by said Common Council of the City of Summit by its resolution duly passed at its regular meeting on June 7th, 1927, and approved by the Mayor.

Said property being known and designated at Lot six (6) Block One hundred and fifty-one (151) on map dated Oct. 1925, by J. P. Broome, City Engineer, entitled "Summit, N. J. Buildings Affected. Proposed Building Line, Springfield Avenue, Woodland Ave. to K. P. Boulevard" and situated on the southerly side of Springfield Avenue, Summit, N. J. and being Thirty-one and thirty-eight hundredths (31.38) feet in width in front, One hundred and ninety and five tenths (190.5) feet deep and irregular at the rear, be the said several dimensions more or less.

And that on the 21st day of September, 1927 at 10:00 o'clock in the forenoon at Middlesex County Court House at New Brunswick, N. J. said appellant will apply to the Hon. Peter F. Daly, Judge of the Union County Circuit Court, to frame the issue on said appeal, and to fix a day for striking a jury, and to fix a day for the trial of the appeal and the

award for damages and the assessment for benefits, anew.

CULLIS and LEWIS,
By Edward G. Pringle,
Its Attorney.
Appellant.

ORDER FRAMING ISSUE

(*Filed September 21, 1927. Amended May 15, 1928.*)

UNION COUNTY CIRCUIT COURT

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit.

Property of George H. Cullis and Clifford H. Lewis, copartners doing business under the firm name and style of Cullis and Lewis in the City of Summit, Union County, New Jersey.

An appeal having been taken by Cullis and Lewis to the Union County Circuit Court from the award to them for damages and the assessment against them for benefits accruing from the establishing of building lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit, Union County, New Jersey, of the

Board of Tax Assessors of the City of Summit of March 15th, 1927, as altered and amended by the Common Council of the City of Summit, and as so amended and altered, adopted and confirmed by said Common Council of the City of Summit by its resolution duly passed at its regular meeting on June 7th, 1927, and approved by the Mayor, by notice filed with the clerk of the Union County Circuit Court pursuant to statute in such case made and provided; and there having been stated in said Notice of Appeal that said appellants would apply on this day to said Union County Circuit Court or a judge thereof to frame the issue on said appeal and to fix a day for striking a jury and a day for the trial of said appeal, and said Notice of Appeal having been served as required by law, and the parties hereto having stipulated and agreed that the jury in this matter shall be drawn from the regular panel and that each side shall have twelve challenges,

It is on this 21st day of September 1927, on application of Edward G. Pringle, attorney for said appellants, Cullis and Lewis, and Clement K. Corbin, appearing as counsel for the City of Summit.

Ordered that the issue on said appeal be and it is hereby framed as follows:

What is the damage or benefit if any sustained by or accruing to said appellants by reason of the establishment of building lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit, New Jersey, as described in said Notice of Appeal, to be paid by the City of Summit to the owner of the lands and property therein described and all persons interested therein or to be paid by such persons to the City of Summit, said property being described as follows:

Said property being known and designated at Lot six (6) Block One hundred and fifty-one (151) on map dated Oct. 1925, by J. P. Broome, City Engineer, entitled "Summit, N. J. Building Affected. Proposed Building Line. Springfield Avenue, Woodland Ave. to K. P. Boulevard" and situated on the southerly side of Springfield Avenue, Summit, N. J. and being Thirty-one and thirty-eight hundredths (31.38′) feet in width in front, One hundred and ninety and five tenths (190.5′) feet deep and irregular at the rear, be the said several dimensions more or less, and it is also further

Ordered that this matter shall be tried by a jury which shall be drawn from the regular panel and that each side shall have twelve challenges; and it is further

Ordered that the 24th day of October 1927 at ten o'clock in the forenoon before said Union County Circuit Court at the Court House in Elizabeth be and it is hereby fixed as the time and place for the trial of said appeal.

PETER F. DALY,
Judge.

Entered
On Motion of
Edward G. Pringle,
Attorney for Cullis and Lewis,
Appellants.

I consent to the making and entry of the foregoing order.

CLEMENT K. CORBIN,
Attorney for Appellee.

RULE FOR JUDGMENT

UNION COUNTY CIRCUIT COURT

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit.

Property of George H. Cullis and Clifford H. Lewis, copartners doing business under the firm name and style of Cullis and Lewis in the City of Summit, Union County, New Jersey.

This appeal having been brought on for trial in accordance with the statute in such case made and provided at the Union County Circuit before Honorable Peter F. Daly, Circuit Judge, and a jury on the 14th, 15th and 16th days of May, 1928, and the jury having returned a general verdict for the damages sustained by the appellant Cullis and Lewis as of the date of the adoption of the Building Line Ordinance in the sum of $2,868.00, and the Court having calculated the interest at the lawful rate on said verdict from the date of the adoption of the Building Line Ordinance to the date of the verdict at the sum of $593.67;

It is ordered that judgment final be entered in favor of the appellant Cullis and Lewis and against the respondent City of Summit, in the sum of Three thousand four hundred sixty-one dollars and sixty-seven cents ($3,461.67) with appellant's costs to be taxed. Costs $176.00.

PETER F. DALY,
Circuit Court Judge.

NOTICE OF MOTION TO VACATE JUDGMENT

(*Served May 28, 1928.*)

UNION COUNTY CIRCUIT COURT

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the CITY OF SUMMIT.

Property of GEORGE H. CULLIS and CLIFFORD H. LEWIS, copartners doing business under the firm name and style of Cullis and Lewis in the City of Summit, Union County, New Jersey.

To Edward G. Pringle, Attorney for Appellants.

SIR:

Take Notice that we shall move before Honorable Peter F. Daly, Judge of the Union County Circuit Court on May 31st, 1928, at 9:30 a. m., daylight saving time, at the Court House, in Elizabeth, for the vacation of the judgment in this matter, on the ground that there is included therein the sum of $593.67, as interest on the amount found by the jury, calculated from the date of the adoption of the Building Line Ordinance, the inclusion of which interest is without warrant or authority of law.

Dated May 28, 1928.

CLEMENT K. CORBIN,
Attorney for Cty of Summit.

NOTICE OF APPEAL TO COURT OF ERRORS AND APPEALS

(*Served and filed August 18, 1928.*)

UNION COUNTY CIRCUIT COURT

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit.

GEORGE H. CULLIS and CLIFFORD H. LEWIS, copartners doing business under the firm name and style of Cullis and Lewis,

Appellants,

v.

CITY OF SUMMIT, a Municipal Corporation of the State of New Jersey,

Respondent.

To Edward G. Pringle, Esq.,

Attorney of George H. Cullis and Clifford H. Lewis, copartners doing business under the firm name and style of Cullis and Lewis, Appellants.

Take Notice that the respondent, City of Summit, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The trial judge erroneously overruled the following question on direct-examination of Herman de Selding, a witness for respondent:

"Q. Assuming that there is a public sidewalk between the fronts of the Cullis and Lewis property and the Duncan Hood property on Springfield Avenue to the curbline, what, in your opinion, would be the damage to those two properties by the establishment of that building line?"

2. The trial judge erroneously overruled the following question on direct-examination of Herman de Selding, a witness for respondent:

"Q. Assuming, Mr. de Selding, that the public passed (used the land) in front of the front walls of the Duncan Hood building and the Cullis and Lewis building for sidewalk purposes, what, in your opinion, was the damage to those two buildings by the establishment of the present building line?"

3. The trial judge erroneously overruled the following question on direct-examination of Frank H. Taylor, a witness for respondent:

"Q. Mr. de Selding testified to the sale in 1924 to Cullis and Lewis of the property now occupied by them, having a frontage of 31.38 feet with some rights in the alleyway adjoining, for $21,500; also to the sale of the adjoining property in the year 1925 by Hicks to Walter, having a frontage as shown on the map of 73.33 feet, for a price of $31,000. He also testified to a sale of property on the same side of Springfield Avenue but down near the corner of Kent Place Boulevard in the year 1924 by Burroughs to Christiansen, having a frontage of 42.88 feet, for a certain consideration; and to a sale by Reed to J. and

L. Murphy of vacant land on the opposite side of Springfield Avenue between Woodland Avenue and Kent Place Boulevard, having a frontage of 50 feet, for a price of $10,000; and also to the sale in the year 1924 by Brody to Heller Construction Company of a plot 117.47 feet wide for $23,750; and of another plot 94.72 feet wide for a price of $23,750. In view of those sales, would you say that the property of the Duncan Hood Company and Cullis and Lewis have any greater value than $400 a front foot for the first hundred feet of depth?"

4. The trial judge erroneously permitted the following question on direct-examination of John D. Hood, a witness for appellants:

"Q. Do you know whether or not the building up of the buildings to the eastward of you out to the existing street line has had any effect on your rentals?"

5. The trial judge erroneously refused to strike out the answer of John D. Hood, a witness for appellants, to the following question on direct-examination:

"Q. From your experience? A. My experience, one of them has already been rented for $125 a month where it was bringing $150 a month."

6. The trial judge erroneously permitted the following question on direct-examination of John D. Hood, a witness for appellants:

"Q. What other tenants did you ever have, or did you have any other changes of the rentals with any of your other tenants?"

7. The trial judge erroneously permitted the following question on direct-examination of John D. Hood, a witness for appellants:

> "Q. State in detail what other changes you had in your rentals?"

8. The trial judge erroneously charged the jury, upon request of appellants, as follows:

> "The owners of the land in these cases had the right, before the adoption of the building line ordinance, to erect or to extend and maintain their buildings out to the line of the property which they owned under their deed."

9. The trial judge erroneously charged the jury, upon request of appellants, as follows:

> "The effect of the building line ordinance is to prevent these owners from erecting or extending and maintaining their buildings or structures upon that part of their land lying between their present buildings and the newly established building line of the southerly side of Springfield Avenue."

10. The trial judge erroneously charged the jury upon request of appellants, as follows:

> "You may also take into consideration the effect of setting back the curb lines and widening the vehicular roadway in front of these properties, in order to determine whether these changes favorably or adversely affect the value of the property of these appellants."

11. The trial judge erroneously charged the jury as follows:

> "You are to say what kind of street there was here before this change and what kind of sidewalk was here before this change."

12. The trial judge erroneously refused to charge the jury, upon request of respondent, as follows:

> "It appears from uncontradicted testimony that the sidewalk extending from the front lines of the present buildings of the Duncan Hood Company and Cullis and Lewis to the curb line had been used by the public continuously for over twenty years prior to the date of establishment of the building line, and, therefore, neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages because they are prevented by the building line from extending the fronts of their buildings."

13. The trial judge having refused to charge the last mentioned request, erroneously refused to charge the jury, upon request of respondent, as follows:

> "If the jury find that the sidewalk extending from the front lines of the present buildings of the Duncan Hood Company and Cullis and Lewis to the curb line had been used by the public continuously for over twenty years prior to the date of establishment of the building line, neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages because they are prevented by the building line from extending the fronts of their buildings."

14. The trial judge erroneously refused to charge the jury, upon request of respondent, as follows:

> "Neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages to their properties caused by changes in the curb line or sidewalk in front thereof."

15. Said judgment erroneously includes certain interest on the verdict of the jury.

Dated July 23, A. D. 1928.

CLEMENT K. CORBIN,
Attorney of the City of
Summit, Respondent.

TESTIMONY

UNION COUNTY CIRCUIT COURT

May Term, 1928.

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the CITY OF SUMMIT.

Property of GEORGE H. CULLIS and CLIFFORD H. LEWIS, Copartners doing Business under the Firm Name and Style of Cullis and Lewis, in the City of Summit, Union County, New Jersey.

In the Matter of the Award for Damages and the Assessment for Benefits accruing from the Establishment of Building Lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit.

Property of DUNCAN HOOD CORPORATION, a Corporation of the State of New Jersey in the City of Summit, Union County, New Jersey.

Transcript of stenographer's notes of evidence in the above entitled causes, taken before Hon. Peter F. Daly, Circuit Court Judge, and a Jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the fourteenth day of May, A. D. 1928, at 9:30 a. m.

Appearances:

Edward G. Pringle, Esq.,

Maximillian M. Stallman, Esq., Counsel for the Property Owners.

Clement K. Corbin, Esq., City Solicitor,

Robert J. Bain, Esq., Counsel for the City of Summit.

(By agreement of counsel, in the absence of Hon. Peter F. Daly, Circuit Court Judge, a jury was duly empaneled and sworn before Hon. Alfred A. Stein, Common Pleas Court Judge.)

Judge Stein: Members of the Jury: You gentlemen will be taken in a conveyance to view the property which is the subject matter of this litigation. You are sitting in an appeal from the award made by Commssioners in condemnation proceedings, who have fixed certain damages.

Now, when you go with the officers and the counsel in the case you are not to discuss anything of this matter at all. View the premises; see just what the situation is there; and that will then afterwards help you when you hear the testimony in determining what you shall do in the matter. You are just going there to look at the property. Take your time and become familiar with the lay-out and the whole situation there, but do not discuss the case. You cannot do that of course until you hear all the evidence, and you will hear that tomorrow.

After you have finished with a view of the premises you will be relieved from further service today. You are to reappear here tomorrow morning at nine o'clock, when the counsel will introduce the evidence which they have prepared in the matter.

Mr. Bain: May I ask your Honor to tell the jury that the case involves the establishment of a build-

ing line and that it is not the ordinary condemnation case? The damages and the benefits the jury are to determine flow from a mere change in the building line; nothing more. I think the jury ought to understand that. Of course we can not open before your Honor and go ahead before Judge Daly.

Judge Stein: I suppose counsel between themselves ought to agree to indicate to the jury as nearly as possible just what is involved; nothing further. I mean you can show them that on the ground.

Mr. Bain: I think we can agree to that.

Judge Stein: You should do that.

You have already heard from counsel that it involves a building line and is therefore somewhat different from the ordinary condemnation. That line will be pointed out to you by counsel. There will be no further discussion except the pointing out to you of what is involved in this issue.

When you get on the ground you gentlemen can do that, and in that way aid the jury very nicely. There should not be any objection to that. They want to have an intelligent idea of what is going on there.

The testimony as to what damages there will be, if any, will be for you to decide after you hear the evidence. If you gentlemen will all repair to the sheriff's office and wait there the sheriff will convey you to the premises.

Adjourned until tomorrow morning, Tuesday, May 15, 1928, at 9:30 a. m.

Testimony

Tuesday May 15, 1928.

(Mr. Bain opens the case for the City of Summit.)

(Mr. Stallman opens the case for the Property Owners.)

Mr. Corbin: If your Honor please, before testimony is taken this would seem to be the proper time to make a motion in these cases on behalf of the city to amend the order framing issue, by striking out the following clause. Among other things the two orders framing issue include the following: "Said issue to include consideration by the jury as to any benefits to be assessed of what proper area of property should be included in the assessment of benefit."

Now, we claim that that has no proper part in the order framing issue, because the issue in this case is as to the amount of damages and the amount of benefits suffered or received by this piece of property, the Hood property in one case and the Cullis and Lewis property in the other.

Whether the assessors erred in any way in the area over which benefits were distributed is entirely immaterial so long as benefits with respect to this particular property are properly assessed.

Now, in the second place, if I read the section 23, the Home Rule Act, correctly, this jury takes the matter up de novo. This is a new trial, and what was done before is not part of this case.

Mr. Stallman: We will consent to it.

Mr. Corbin: Then I have a couple of orders here.

The Court: The amendment of the issue asked for is granted since said amendment is agreed to by all parties in interest.

Mr. Bain: I offer in evidence an ordinance, certified copy of an ordinance entitled, "An ordinance to establish building lines on Springfield Avenue from Woodland Avenue west to Kent Place Boulevard in the City of Summit, and to establish restrictions between such building lines and the street, and to assess the benefits or award damages against the lands or real estate benefited or damaged by the establishment of such building lines."

The paper referred to was received in evidence and marked Exhibit P-1.

Mr. Bain: I also offer in evidence a map entitled "Summit, N. J. proposed building line, Springfield Avenue, Woodland Avenue, and Kent Place Boulevard, October 1924; signed by John C. Brigham, City Engineer."

The map referred to was received in evidence and marked Exhibit P-2.

EDWARD B. TWOMBLEY, a witness produced on behalf of the City of Summit, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Bain:

Q. Where do you reside? A. Summit, New Jersey, 23 Fernwood Road.

Q. How long have you lived in Summit? A. Since 1891. I was born in Summit.

Q. You have lived all your life in Summit? A. Always.

Q. What was your first place of residence in Summit that you remember? A. On Woodland Avenue just about DeForest Avenue, opposite the Episcopal

Church there. I don't remember the number. I don't believe there was a number at that time.

Q. How far away from Springfield Avenue? A. About a block and a half.

Q. Then am I right in assuming that you first resided about a block and a half from the Hood property? A. That is right.

Q. And from the Cullis and Lewis property? A. That is right.

Q. What is your first recollection of those properties? A. I guess my recollection goes back to about 1896 or 1897.

Q. You were then how old? A. In 1897 I was six years old.

Q. How do you recall the properties at that time? What fixes them in your mind?

Mr. Stallman: I object to it on the ground it is immaterial and incompetent.

Maybe I had better raise this question right now, if the Court please. This is an ordinance adopted in December of 1924 for the establishment of a building line, and the maps which have been offered in evidence show that the proposed building line runs through the fronts of the two properties here in question, and establishes the building line about seven feet back of the property line. These proceedings were then had—that is, in December, 1924, and down to the present time—upon the theory that this property was the property of these property owners, and damages have been awarded on that theory.

I now object to the introduction of any testimony which would tend to impugn or question the title of these parties to that land. I do not think this is the kind of case

in which the title of the Duncan Hood Corporation or Cullis and Lewis can be mooted or tried.

This whole case has proceeded on the theory that this property does belong to these property owners, and award has been made on that theory. Now, upon appeal in this court under the statutory direction as to what those damages amount to, the question of title, the question of loss of title, of rights by prescription of the City of Summit, I certainly think cannot enter into the case. We are injecting into this case something that was never in it before. In fact, if there was any question of the right of the City of Summit to occupy this area, these proceedings would never have been had, and there could not have been any award. In other words, a person does not start to litigate over property which he already possesses, and I am speaking of that both as a public easement, of course, and as private property. If the city claims that there was an easement over the property of these private owners, these proceedings would never have been instituted or carried through these four years in this way.

So I submit that the history of these properties twenty or twenty-five years ago is incompetent, irrelevant and immaterial, and certainly cannot be brought out in this case at this time.

Mr. Bain: Do you wish me to reply?

The Court: Yes, sir.

(Argument.)

The Court: I will allow the question. You

may have an exception.

Mr. Stallman: I would like to have an exception noted for the purpose of appeal.

(The last question was read by the stenographer, as follows:)

Q. How do you recall the properties at that time? What fixes them in your mind? A. The property now occupied by Messrs. Cullis and Lewis was then occupied by a grocery store which was run by a Mrs. Reimann, I think, and my family traded at that store. I used to go down there with my mother, and I also remember distinctly going down there for the satisfaction of my childish desires in buying animal crackers, so that that store stands out very clearly in my recollection.

Q. Is that the store now occupied by Cullis and Lewis? A. It is.

Q. So that you can recall the building on the Cullis and Lewis property from the year 1897 down to date? A. Yes.

Q. What can you say as to whether the front wall of that building is the same now as it was in the year 1897? A. There has been no change in the line of the front wall.

Q. Do you recall whether or not there was a sidewalk in front of that property in 1897? A. There was.

Q. How far in from the curb line did the sidewalk extend?

Mr. Stallman: I object to that, if the Court please, because that I think calls for a conclusion of law.

Mr. Bain: I will withdraw the "curbline."

Q. What was the nature of the sidewalk? A. There was a flagstone sidewalk extending from the then existing curb plumb to the front of the store.

Mr. Stallman: I move to strike out the statement, "there was a sidewalk extending from the curb to the front of the store," on the ground that that states a conclusion of law.

The Court: Your objection is sustained.

By the Court: Q. Just tell us what character of physical structure there was from what appeared to you as the curb right into the building itself. A. There were a series of flags which were laid from what appeared to be the curb to the front wall of the building.

By Mr. Bain: Q. Was the whole space between the front of the Cullis and Lewis building and the existing curb covered by flagstones? A. It was.

Q. Was there any step or steps extending from the building out into the sidewalk? A. There was a small wooden step, as I recollect it, extending from the door of the building perhaps twelve inches to eighteen inches, something like that, into the sidewalk.

Q. How wide is that step? A. About the width of the doorway, perhaps a little more.

Q. What was the width of the doorway, approximately, as nearly as you can state it? A. I should say about four feet.

Q. Have there been any changes in the sidewalk in front of that building since the year 1897, to your recollection? A. Why, there has been a concrete sidewalk laid.

Q. The only change has been replacement of the old flagstones by concrete sidewalk? A. That is right.

Q. Do you recall when the present building on the Duncan Hood property was constructed? A. To the best of my recollection it was about the time

of the Spanish War.

Q. That was in 1898. Do you recall at that time whether there was any sidewalk in front of the building on the Duncan Hood property? A. Why, before it was built there was a single flag sidewalk there. It was an open lot.

Q. That is, before the Hood building was put up? A. That is right.

Q. There was an open lot where the building now stands, and there was a single stone flag in front? A. That is right.

Q. I suppose that single stone flag is about four feet wide, something of that sort? A. Four or five feet. I don't recall that.

Q. After the building was put up on the Duncan Hood property, what was done to the sidewalk in front of that property? A. A sidewalk was laid, as I recollect it. The concrete sidewalk was laid at that time from what appeared to be the curb to the front line of the building.

Q. Do you recall about the year when that concrete sidewalk was laid? A. To my recollection it was laid approximately at the same time the building was built.

Q. Would you say or could you say that the sidewalk in front of the Duncan Hood building was laid in the year 1900 or sometime prior thereto? A. It was laid prior to 1900.

Q. Have there been any changes in the sidewalk in front of the Duncan Hood building since 1900 that you recall? A. None that I recall. The sidewalk has always remained there. Whether it has been relaid or not I don't know.

Q. Can you say whether or not there has been a sidewalk in front of the Duncan Hood property and the Cullis and Lewis property and extending

from the front walls of this property to the curb, continuously since the year 1900? A. There have.

Mr. Stallman: I object to the form of the question, if the Court please. I think he should ask whether there was a pavement in front of these buildings and these properties.

Q. Has there been any change in the pavement in the front of these buildings since 1900? A. The sidewalk, do you mean?

Q. Yes. A. Why, the flags in front of Mrs. Reimann's store were taken up about that period and a new concrete walk put down.

Q. For what purposes were the original flagstones in front of these two buildings, and subsequently the concrete pavement, used? A. Used by the public.

Q. As a sidewalk? A. As a sidewalk.

Mr. Bain: Cross-examine.

Juror No. 2: Your Honor, may I ask a question?

The Court: You may.

By Juror No. 2: Q. In the description of this property the witness states this sidewalk was used by the public. May I ask if that sidewalk was ever used by tenants of Cullis and Lewis for the showing of goods, such as vegetables or any produce? A. I don't recollect.

The Witness: May I answer that, your Honor?

The Court: Yes.

A. (Continuing) I don't recollect that there was ever any stand of any kind or description or any display in front of either of those stores. They are unobstructed flags at all times, as far as I can recollect.

Juror No. 2: Thank you.

CROSS-EXAMINATION by Mr. Stallman:

Q. Did you ever see any goods being unloaded in front of these buildings? You are on the present Common Council? A. That is right.

Q. And your recollection goes back to the time you were six years old when you went there to buy animal crackers? A. Yes, sir.

Q. At a grocery store? A. Yes.

Q. Those stores certainly get their supplies in, don't they? A. Yes.

Q. You won't stand on this witness stand and say that in all the time you have been living in Summit they never unloaded goods in front of these buildings. A. I do not say. I say I don't remember. I assume the wagons were backed up to the curb, unloaded, and the goods carried into the store.

Q. How many stores are in there? A. In where?

Q. In these properties, Duncan Hood and the Cullis and Lewis. A. Today?

Q. Well, over the time you are testifying about. A. Why, there have been a number of changes made in those buildings. In the old Larned building, which is the Duncan Hood building now—

Q. There are four or five stores, aren't there? A. There are three or four, yes. I don't know how many there are there exactly now.

Q. Am I to gather and the jury to gather from your testimony that you never paid very particular attention to these properties or to the use of the walk in front of them? A. Not at all.

Q. And you couldn't say that you have ever seen any goods being unloaded in front of these stores? That is your recollection? A. I don't recollect whether I have or not. I have seen goods unloaded

all along Springfield Avenue in front of the various stores. I assume that I have seen them, but as for my distinct recollection of anyone unloading, I can't answer that.

Q. Have you any absolutely distinct recollection of seeing people walking along in front of these stores? A. I certainly have. I have a recollection of walking along there myself.

Q. Just tell me somebody that you saw walking in front of that building in 1900. A. My mother.

Q. Yes. A. My mother. I have seen her walking in front of there.

Q. Yes. A. I have seen Mrs. Skidmore, if that is any information to you.

Q. When was that? A. Various times. She used to shop there. I have seen Mrs. Besty, who lived across the street, who lived there a great many years. I have seen her there.

Q. More than twenty-five years ago? A. More than twenty-five years ago?

Q. Yes. A. I have seen them twenty-five years ago and twenty years ago.

Q. I said, did you see them there more than twenty-five years ago? A. That would be 1897.

Q. No, that would be about 1903. A. 1903. Yes, I have seen them before twenty-five years ago.

Q. Did you ever see any packing cases, boxes or anything, piled up on that space in front of these buildings? A. Not for storage purposes.

Q. I didn't ask you what the purpose was. Did you ever see anything piled up there? A. I suppose so.

RE-DIRECT-EXAMINATION by Mr. Bain:

Q. Mr. Twombley, are there any alleys leading from Springfield Avenue into the properties of the Duncan Hood Company and Cullis and Lewis? A. There are.

Q. Do you know whether or not those alleys were used for taking any stuff from trucks? A. They were.

Q. Have you actually seen that done? A. Yes.

Q. Do you know whether the occupants of the stores on the Hood property and the Cullis and Lewis property used the land at the rear of their properties for storing stuff that was delivered there? A. Yes, they did.

By the Court: Q. About what is the length of this block that these properties were on? A. One side is a very long block, your Honor.

Q. The side that these properties were on between cross street and cross street—what is about the length of that block? A. The block runs from Maple street clear through to the railroad. There are two intersecting streets on the other side. I should say that it was three hundred yards.

Q. About nine hundred feet. About how many buildings were on that block? A. Today?

Q. Yes. A. Well, I can't be accurate about that, your Honor. I should say there were sixteen or seventeen.

Q. You say your recollection goes back about how many years? A. About thirty years.

Q. About how many buildings were in that block then? A. A great many fewer. I should say about eight or ten.

Q. How were they located one as to the other, and particularly with reference to these buildings?

A. In 1897 there was a Mrs. Reimann's store—that is now the Cullis and Lewis store—was standing without the Larned building or the Duncan Hood building. That was built a year or so later. There was an open lot there, and in back of the open lot was an old stable. The alley there was used as the entrance way to the stable. That was the Flood stable. Then next door to that was an old harness shop. The building is still standing. It was occupied by a man named Powers. Beyond that were one or two more stores. I remember an old cobbler's shop was right along in there, owned by a man named Carrigan. I used to go down there and watch him put heels on shoes. And beyond that was an open lot, now all filled with stores, across which diagonally ran a beaten path which was used by my father and other commuters who went from their houses on Woodland Avenue diagonally across to go down to the railroad station. Then beyond that was a store. Beyond this open lot was a store occupied by a man named Long, who had a furniture shop. Then came a shop which was occupied, I believe—it was a hardware store. It was an old brick store on the corner. On the other side of the Cullis and Lewis building were one or two old buildings, and they ran off into shacks right down toward the railroad. I don't recollect just how many of those shacks there were, because my recollection runs more the other way. Across the street—

Q. No, I didn't ask for across the street. In this block about 900 feet long was there the same kind of flagging and same width of flagging throughout the whole 900 feet? A. No, sir. Opposite the vacant lots there was a narrow—well, a single flag walk, but where there were stores the flagging ran

up to the store line.

Q. But in the vacant lots there was a single flag walk even in 1897? A. That is right.

Q. That is about thirty or thirty-one years ago. How wide was that single flagging? A. Oh, I don't know how wide that flag stone was—about five feet, I should say.

Q. About how far from the curb? A. There was a dirt space of three or four feet, I suppose.

Q. Then every building that was there had a flagging solidly placed, entirely covering all the space between the curb and the building itself? A. No, I won't say that. I won't say that every building. There were some of the shacks. For instance I remember the old cobbler's; I don't believe—at least my recollection is that there was a space of dirt there. It didn't apply in every case. There were some of the old shacks, as I call them, which had dirt in front of them; but the bigger stores were flagged complete.

Q. I think you have mentioned that there were about six or seven buildings in this 900 feet in 1897. A. Well, more than that.

Q. Was every one of these buildings the same distance back from the curb? A. No.

Q. There was a curb, was there, throughout the whole length of this 900 feet even then? A. Yes, sir.

Q. Were there other buildings nearer the curb than these buildings? A. The harness shop of Powers, which was across the alley from the Duncan Hood property alongside of it, I think extended a little farther toward the street than the Duncan Hood property, although I believe there has been a change. My recollection is that there was a change in the front of that building a long time ago,

which may have altered that. My recollection is not clear on that point.

Q. In the case of those properties that then existed where the flagging did not extend and was not solid from the curb into the building, did you have a condition of the dirt or earth between the flagging and the building, especially in wet weather? A. My only recollection of it, your Honor, is that it was pounded hard dirt. I suppose it was muddy.

Q. What is that? A. There is plenty of mud sometime. It must have been muddy in wet weather.

Q. Then to get into a building in 1897 if there was not a flag all the way up to the building, there was plenty of mud sometimes, and you would have to go through mud in order to get into the store? A. Unless it had been pounded down hard.

The Court: That is all I have.

By Mr. Stallman: Q. You were speaking, Mr. Twombley, of the Powers building which adjoins the Duncan Hood building on the east. A. Yes.

Q. Don't you know that the front line of the Powers building was substantially even with the front line of the Duncan Hood building? A. When?

Q. Well, up to the time that Powers extended his front out to the street line. A. I say I don't remember how much difference there was, if any.

Q. Well, now, the next door neighbor of this property here, the Duncan Hood property, has extended their building out to the street line, haven't they, Powers?

The Court: Just what do you mean by that Mr. Stallman?

Mr. Stallman: That the fence of the Powers building as originally constructed was on the same line as the Duncan Hood property,

but that Powers before the establishment of this building line had already extended his building out to the street line.

Q. That is true, isn't it?

Mr. Bain: I object on the ground there is no proof there was ever any street line.

The Court: That is the weakness of that question. I haven't any proof before me as to where the street line is.

Mr. Stallman: Then I will change my question.

By the Court: Q. How much nearer the curb was that building extended than the particular building involved here? A. I can't answer that. I know there was a change in the front, and I know it was extended.

Q. About how long before that time, before these proceedings were taken, was that done? A. Well, it was a good many years ago.

By Mr. Stallman: Q. How many years would you say? A. I don't know. I was out of town for a long period of time after 1907. I was away for about ten years off and on.

Q. Now, the next building to Powers is Walter Brothers? A. That is right.

Q. That was set out farther than the Duncan Hood building, wasn't it? A. I think that is on a line with the Powers building now.

Q. Yes. The Powers building as extended? A. That is right.

Q. And the next is the Walter Realty Company. You know that property sets out to what we may assume to be the street line, doesn't it? A. That is on a line. All of those buildings along there are on a line.

Q. And so far as the Irish Realty Company, if you know what that is. A. No, I don't know what that is.

Q. You know the Baker property or the Kerns property? A. Yes, I know the Kerns property.

Q. They all stand out on a line, do they not, on the same line? A. Approximately.

Q. Do you know the Long estate? A. Yes.

Q. And the Weeks; do you know that? A. I know where the building is. I don't know it as the Weeks.

Q. And the Jacobs? A. I know where the Jacobs is.

Q. Do you know that those buildings set back to a point behind the line of these other buildings? A. That is true.

Q. And they have been extended out to meet the other buildings, have they not? A. That is right.

Q. When was that done? A. A long time ago.

Q. What do you call a long time ago? A. I can't give you the exact year it was done. I can tell you a condition, but I can't tell you the exact year it was done.

Q. Haven't those buildings that were behind the established line, or whatever it was, haven't they all been extended out in the last ten years? A. Some of them have.

Q. Let me show you a picture and ask you whether that would refresh your recollection as to how much that Powers building was extended next to the curb.

Mr. Bain: What is the number of the picture?

Mr. Stallman: Four.

A. Well, here is the extension. How far that is I can't answer now, but it runs from the old slab

building (indicating).

Q. Have there been any new buildings erected in that block between Maple street and the Duncan Hood property in the last ten years? A. The block has all been filled up. I can't say whether there has been any building within the last ten years. There has been considerable reconstruction, I know along there.

Mr. Stallman: That is all.

DAVID B. MELROY, a witness produced on behalf of the City of Summit, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Bain:

Q. Where do you live, Mr. Melroy? A. At 40 Beauvoir Avenue, City of Summit.

Q. For how long a time past have you lived in Summit? A. I came to Summit in the spring of 1892.

Q. Have you lived in Summit continuously since that time? A. Continuously since that time.

Q. Are you familiar with the properties on Springfield Avenue in Summit now occupied by Cullis and Lewis and the Duncan Hood Company? A. I was employed in the present Cullis and Lewis store by Reimann, and McNeil afterward, for a little over seventeen years.

Q. When were you first employed in that store? A. In 1892 I came there.

Q. For how long a period of time did you continue to work in the store? A. For seventeen years about.

Q. So that you worked in the store from 1892 until 1909? A. Yes, continuously.

Q. And after that where did you go to work? A. I worked in the schools for about a year. I had a store in the Larned block for a little over a year.

Q. Which is the Larned block? A. The present Hood building.

Q. You had a store of your own in the present Hood building? A. Yes.

Q. When was that? A. That was about two years after I went away from McNeil.

Q. That was about 1911? A. Yes.

Q. How long did you continue to have the store in the Larned building, the present Hood building? A. It was a trifle over a year.

Q. That is from 1911 to 1912 approximately? A. Yes.

Q. Where did you go from there so far as your business was concerned? A. I was employed as janitor in the schools for about a year, and then I went in the insurance business.

Q. Your business has always been in the City of Summit? That is, since 1892? A. No, after I went in the insurance business I worked in Newark, but I lived in Summit for six years.

Q. Have you had occasion from time to time since 1892, to go through Springfield Avenue between Woodland Avenue and Kent Place Boulevard? A. Yes, almost daily.

Q. That is, you went along that block almost daily? When you worked in the Reimann store, which was where the Cullis and Lewis store now is, what was there between the front wall of the store and the curb? A. Stone flagging.

Q. Did that stone flagging cover the entire width between the store front and the curb? A. From the

curb to the store front was all flags.

Q. Was there any step in front of the entrance to the Reimann store at that time? A. Yes, there was a wooden step.

Q. How far out did that step extend into the land in front? A. Guessing at it I would judge it about eighteen inches wide, the step. It was a good, comfortable step.

Q. Was it one step or two? A. One.

Q. As you observed, for what purpose was the flagging between the front of the Reimann store and the curb used? A. Well, used for the people to walk on.

Q. Did you see people passing to and fro over it? A. Yes, certainly.

Q. Every day? A. Every day.

Q. Do you recall when the present building was constructed on the Duncan Hood property? A. I do.

Q. When was that? A. I can't give you the exact year, but I think it was about the time of the Spanish War.

Q. That was about 1898? A. Yes, sir, as near as I can remember.

Q. Can you fix any particular year when you remember the present building having been on the Duncan Hood property? A. Oh, it wasn't where it is now when I came to Summit. I used to drive across from the alley that goes in by Powers into the store in the back.

Q. That is, the Duncan Hood building wasn't on its present site in 1892? A. No.

Q. What fixes in your mind the time when the Duncan Hood building was constructed, if anything? A. Well, the only thing I can remember when the Spanish War was, and I think it was

about that time it was built.

Q. You recall the year 1900? A. Yes, sir.

Q. Can you say whether or not the present Duncan Hood building was in existence at that time? A. In my own mind I feel positive it was there.

Q. In 1900? A. Yes.

Q. What was there between the front of the Duncan Hood building and the curb in 1900? A. Cement sidewalk.

Q. Did that cement sidewalk cover the entire space between the front of the building and the curbline at that time? A. Yes, it ran from the curbline up to the edge of the building.

Q. Have there been any changes in the sidewalks in front of the Cullis and Lewis property and the Duncan Hood property during the past twenty-four years so far as you know? A. When Springfield Avenue was graded there was a new sidewalk put in front of Cullis and Lewis.

Q. When was that? A. I can't give you the date of that.

Q. Approximately, as near as you can remember. A. I wouldn't venture the date on it. If you look up when the avenue was graded.

Q. You don't recall that date? A. No, I don't.

Q. Was that the only change made in the sidewalk so far as you know? A. The only change was when the flags were taken up and a cement walk put there.

By the Court: Q. What does that apply to? Just the front of this property or throughout the whole 900 feet of the length of this block? A. I am speaking now of the sidewalk in front of the Cullis and Lewis property.

By Mr. Bain: Q. For what purpose was the concrete pavement in front of the Duncan Hood prop-

erty used since 1900? A. It was used by pedestrians for to walk on.

Q. Did you see people walking to and fro over that sidewalk? A. I did.

Q. Almost daily? A. Daily almost, yes.

Mr. Bain: Cross-examine.

CROSS-EXAMINATION by Mr. Stallman:

Q. Did you see people using it to get into the store? A. Yes.

Q. Did you see people standing there looking in the store windows? A. Yes, sir.

Q. Did you see any groceries in front of the store piled up on the sidewalk? A. I don't remember any groceries being piled in front. We had a back entrance for that purpose.

Q. Did you see any trucks stop there in front of that building? A. Yes, wagons and trucks.

Q. You had to send out a great many goods from your store too, by wagon, didn't you? A. Certainly. When a customer came in front and stopped, we took the package out to them.

Q. Yes, but your delivery wagons used to start from the front of the store, didn't they? A. Very rarely.

Q. Well, they did, didn't they? A. They might have, yes, but not as a custom.

Q. Isn't it a fact that the delivery trucks employed by this store, the delivery wagons, were standing in front of that store and would start off from there? A. Only on very rare occasions. There was a back entrance was used for that purpose. They might have stopped in front occasionally. I couldn't say.

Q. Don't you recall ever having any groceries, goods, standing on this flag or paved way in front of this store? A. I do not.

Q. How long were you in that store? A. About seventeen years.

Q. And you don't ever recall seeing any groceries out there on that sidewalk? A. Only in packages which was carried out, and the carriages that came to and fro; or a delivery truck might have come from Newark and carried in packages and passed over the sidewalk.

Q. So you do remember the handing of groceries out in front of that building. A. Yes, in packages carried to the carriages.

Q. Didn't you have a vegetable store there at one time? A. I did.

Q. Didn't you display stuff out there outside of the building? A. No. That wasn't allowed by the city.

Q. I didn't ask you whether it was allowed. Didn't you do it? A. No, sir, I didn't.

Mr. Stallman: That is all.

By the Court: Q. On this block of 900 feet were there any private dwellings twenty years ago? A. No.

Q. I mean exclusively used as private dwellings twenty years ago. A. Not unless the Duncan Hood property.

Q. I am not talking about the Duncan Hood property. Somebody has said that this flag so-called, runs from a certain street to the railroad. Does that identify it to you? A. Yes.

Q. What street is that? A. Springfield Avenue.

Q. I mean the side street. It runs from a certain side street to the railroad, doesn't it? A. It is only a lane, which has no name.

Q. That is about 900 feet long? A. Yes, sir.

Q. And twenty years ago there wasn't a single building used exclusively as a dwelling on that side

of the street, was there? A. There was an old livery stable at that time was run by Mr. Flood, and he lived over the top.

Q. He lived over the top? A. Yes.

Q. About how many buildings were there on that block of 900 feet in length, about twenty years ago? A. There was none up to the present building that Powers owns.

Mr. Stallman: The witness is not answering your Honor's question. Your Honor is asking for the length of Springfield Avenue from Maple Avenue.

The Court: Well, he may be confused about it.

Q. That whole length of that block 900 feet, about how many buildings were on it twenty years ago? Not exactly, just about. A. Well, I should judge about five.

Q. About five? A. Yes, four or five.

Q. How near was the nearest building to this particular property, this particular building? What space was there between this building and the next nearest building? A. There is an alley runs between Mr. Hood's property, and then comes the building owned by Powers.

Q. Well, how much space is there? A. There is a roadway, say fifteen feet, by guessing at it.

Q. Well, on the other side what space was there between that and the nearest building? A. There was an empty lot.

Q. How wide was that empty lot? A. It must have been—I guess at it—three hundred feet, maybe more.

Q. In width? A. No. It ran back to the railroad.

Q. In frontage how much was there on that

street? How much was the empty lot that was next to this particular property? A. Guessing at it, it is 300 feet.

Q. In width of frontage on that street? A. Yes.

Q. Was that flagged from the curb in all the way? A. No, there was a single flag all the way.

The Court: That is all.

RE-DIRECT-EXAMINATION by Mr. Bain:

Q. In answer to one of his Honor's questions you said that there were five buildings on Springfield Avenue between the railroad and Maple Street. What particular section of Springfield Avenue did you have in mind when you answered that question? A. From the Hood building on up to the corner of Maple.

Q. Only from the Hood building to Maple Street? A. Yes.

Q. You didn't consider the distance from the Hood property down to Kent Place Boulevard? A. No, I didn't.

Q. Now, in answer to another question you said that there was an open lot three hundred feet wide on the southerly side of Springfield Avenue between Maple Street and Kent Place Boulevard. What was the lot to which you referred? A. I refer to the lot where Walters and Kern—the lot between Powers and Long's furniture store at the present time. That is what I had in mind. That was vacant.

Q. That was the other side of Powers from the Duncan Hood property? A. That was on the east side.

Q. To what year does that refer? Is that 1892 that you were speaking of with respect to that lot? A. In 1892 that lot was there, the open one.

Mr. Bain: That is all.

The Court: Of course I have not seen the property, but I want to tell you what is in my mind with respect to this; and that is that it is certainly not giving the public any prescriptive right, and indeed it is included in your deed lines where you flag from the curbline to your property line, if it is done simply for the benefit of this business. We know as a matter of common practice where there are sidewalks, especially in a newly developed section, there is an ordinary sidewalk of say four or five feet, and when it comes to business property they will flag clean from the curb right into their building. Simply because the pedestrians walk on that which was intended for the benefit of the property, the business property, does not give a prescriptive right to anybody else, and the title to the land that is underneath the flagging when that land is within the property lines as described in the deed. That is why I have been asking whether or not there was a fixed sidewalk and whether or not there was a certain, positive sidewalking so far as use. I am not taking it as a matter of legal conclusion, now, but so far as the use is concerned all along the line of this block.

By the Court: Q. Do you understand what I said? A. Yes, sir.

Q. Now, there was one witness who said that on this 900 foot block there was a single flagging running throughout the whole length, of about five feet in width, four or five feet in width. Is that so? A. Yes, sir.

Q. And some of the properties have the flagging extend beyond that between the curb and this four

or five feet, and then between that four and five feet and the building itself; is that so? A. That is correct.

Q. And that was the case so far as this particular property was concerned? A. Yes, sir.

Q. Was it the case of any other property there within that 900 feet? A. No. It was only in front of the stores that were then in existence that the flags were laid.

Q. How many stores were then in existence? A. There is Powers and Long, Norton's hardware store and Mrs. Rappelyea's dry goods store, and Dr. Taylor's drug store that was on the corner; and then there was a small building in between Long's and Power's where they mended shoes—I think Carrigan; I won't be positive of that, but I think his name was Carrigan at that time. But that was sort of a one-story—a small building. That wasn't curbed to it.

Q. That wasn't flagged all the way to it? A. No.

Q. Were all of those buildings that were there twenty years ago the same distance from the curb? A. The building itself is the same distance, but there has been additions building in front.

Q. I mean twenty years ago, as the situation was twenty years ago. Were they all the same distance from the curb? A. As I remember it they were, yes.

Q. When were these extensions built that you are talking about? A. I can't give you the date of that.

Q. I don't want the date. About how many years ago? A. Guessing I would say ten or fifteen years, between ten and fifteen years.

Q. And they are nearer the curb than this particular building, are they? A. Yes, they are.

Q. About how many feet? A. Well, that I could-

n't answer direct, but I would say five feet more or less.

The Court: That is all I have.

By Mr. Bain: Q. Mr. Melroy, let me ask you, since 1900 have there been any buildings on the southerly side of Springfield Avenue between Maple Street and Kent Place Boulevard used for any purposes other than business purposes? A. Not to my knowledge.

Mr. Bain: That is all.

By Mr. Stallman: Q. That is, there have been apartments above the stores though. A. Yes, there is living apartments above the stores, all of them.

Q. The property was used both for business and for residential purposes? A. Yes, sir.

Q. I think you said you don't remember when Powers building was built out to the street line, do you? A. I cannot give you the exact date, no, sir.

Q. The Court asked you whether or not all of these buildings were back the same distance from the curb. Is it or is it not a fact that the buildings on the Long lot, the Weeks lot, and the Jacobs lot, set back some five or six feet back of these on either side? A. The original building is back, but there was a small space built in front, was added to the store.

Q. They were built out? A. Yes.

Q. Now, you say the original buildings were back? A. Yes.

Q. Next door we come down to the Kerns lot. That building was built out to the street line, wasn't it? A. Yes.

Q. So that as between the Kerns building and the Long building they set different distances from the curb? A. Yes.

Mr. Stallman: That is all.

DAVID J. FLOOD, a witness produced on behalf of the City of Summit, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Bain:

Q. Where do you live, Mr. Flood? A. 62 Mountain Avenue, Summit.

Q. How long have you lived in the City of Summit? A. I was born there in 1890.

Q. Have you lived all your life in Summit? A. Yes, sir.

Q. Do you still live there? A. Yes, sir.

Q. Did you, at any time, occupy any part of the property now owned by the Duncan Hood Company? A. Why, I lived in the rear of 446 Springfield Avenue. That is right in the back of the Hood property.

Q. That is, you lived in a building on the rear of the present Duncan Hood property? A. Yes, sir.

Q. When was that? A. I was born there in 1890. I lived there for about nine years, I should imagine.

Q. You lived in that building from 1890 to 1899? A. Yes, sir.

Q. Was there any building on that property at that time other than the building in which you lived? A. Not at that time, no, sir.

Q. Do you recall when the present Duncan Hood building was constructed? A. Faintly, yes. I don't just remember the year, but I know it was built while I was living in 446.

Q. That is, while you were living in the rear portion of the Duncan Hood property the present building was put up on the front portion? A. Yes.

Q. You left that property in 1899? A. About 1899, yes.

Q. So that the present Duncan Hood building must have been constructed sometime prior to 1899 is that right? A. Yes.

Q. Since 1899 have you had occasion to go through Springfield Avenue where the Duncan Hood building is located? A. Yes, sir.

Q. How often? A. Well, I should say for the last seven years I have had a store in Summit, and I have been going back and forth, I wouldn't say every day, but every once in a while during the week.

Q. Going through it three or four times a week anyway? A. At least, yes, sir.

Q. What was there on the land between the front of the Duncan Hood building and the curb? A. Why, as far as I can recall there was a sidewalk from the curb to the building.

Q. Extending all the way from the curb to the building? A. Yes, sir.

Q. Are you familiar with the property occupied by Cullis and Lewis, adjoining the Hood property? A. Yes.

Q. How long have you known that property? A. Well, ever since I can remember, from 1899.

Q. Now, in 1899 what was there on the land between the front of the present Cullis and Lewis property and the curb? A. There was a sidewalk all the way from the curb back to the building.

Q. Did that sidewalk connect with the sidewalk in front of the Duncan Hood property? A. Yes, sir.

Q. Did you see from time to time since 1899 people passing over the sidewalk in front of the Duncan Hood property and the Cullis and Lewis

property? A. Yes, sir.

Mr. Bain: Cross-examine.

CROSS-EXAMINATION by Mr. Stallman:

Q. Did you see any other use made of that concrete walk? A. Not that I can remember, no, sir.

Q. People used it to get in the store, didn't they? A. Yes. I used to drive a carriage for my father, and I used to leave people off to go into the store that way.

Q. Did you ever see the delivery wagons there in front of that store? A. I can't remember. I couldn't say that I ever did.

Q. The storekeepers used to use that part of the sidewalk in front of these stores, didn't they? A. They used to use it for what purpose?

Q. Well, for their goods. A. I couldn't say that. I don't ever remember seeing it.

Q. Did you see people standing there in front of the store? A. Yes, sir.

Q. Looking in the show window? A. Yes, sir.

Q. They had show windows, I suppose? A. Yes.

Q. Are you sure of that? A. Yes.

Q. They had goods in the show windows? A. Yes, sir.

Q. Then what you call a sidewalk in front of the Duncan Hood and Cullis and Lewis properties is very much wider than any other sidewalks in that neighborhood, isn't it? A. Well, Cullis and Lewis and Duncan and Hood property sidewalk, as far as I can remember, were the widest sidewalks along there.

Q. If you went east or west the sidewalks narrowed down about ten feet? A. Yes.

Q. And it was just in front of these two properties that set back opposite Woodland Avenue that

you say that it was paved from the curb to the building? A. Yes.

Q. And the curbline, however, all along there was a perfectly straight curbline, wasn't it? A. As far as I can remember, yes.

Q. In other words, walking from Maple Avenue down toward Kent Place Boulevard on that side of the street, you could walk straight along parallel with the curbline all that distance, couldn't you? A. I believe you could, yes.

Q. When you got down in front of the Duncan Hood building you didn't have to go around a corner and walk close to that building and then come out again toward the curb after you got out past the Cullis and Lewis property? A. No, sir, not that I can recollect.

Q. So that anybody traversing this block from Maple Avenue to Kent Place Boulevard would use no more sidewalk in front of these two properties than they would anywhere else in that block, would they? A. They wouldn't have to, not that I can remember.

Mr. Stallman: That is all.

RE-DIRECT-EXAMINATION by Mr. Bain:

Q. You said that the sidewalk here extended all the way from the fronts of the Hood building and the Cullis and Lewis building to the curb. Were there other places along Springfield Avenue between Maple Street and Kent Place Boulevard where there were flagstones only in the center of the space between the fronts of the buildings and the curb? A. The only place I remember where there was just the sidewalk running in the center was out in that vacant lot between Long's and the Walter's property there.

Q. That was the only place that you recall where there was only a strip of flagging in the center and not complete flagging between the fronts of the buildings and the curb? A. In front of Long's store I couldn't say that it ran all the way out to the curb. I think there was a small space of about say two or three feet.

Q. But even in that instance the flagging extended all the way to the front of the store. A. Well, in Long's particular case there was a sort of porch in front of their store. The porch came out from the building as far as I can recollect.

Q. The flagging extended all the way to the porch? A. All the way to the porch.

Q. Was there any other instance along that portion of Springfield Avenue where the flagging or concrete sidewalk did not cover the entire space between the curb and the front of the building? A. No, not that I can remember.

Mr. Bain: That is all. Thank you.

RE-CROSS-EXAMINATION by Mr. Stallman:

Q. Let me ask you this question. You say that in coming from Maple Avenue down to Springfield Avenue that pedestrians can go in a straight line past the Duncan Hood property and the Cullis and Lewis property and all the other properties, is that right? A. They could, yes.

Q. Did you ever see any pedestrians going down that street, that after they got past the Powers store, they turned in and walked on that portion of the sidewalk immediately in front of the show windows in the Duncan Hood property? A. I did myself. I would walk in there to look at the store windows. You wouldn't have to walk in there.

Q. In order to get from Maple Street down to

Springfield Avenue, when you got down in front of these buildings you didn't change your course, did you, in order to walk in front of the buildings? A. No.

Q. Did you ever see anybody else do that? A. I wouldn't say that I did. I probably did.

Q. You are under oath now? A. Well, I can't say that I did.

CHESTER C. HENRY, a witness produced on behalf of the City of Summit, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Bain:

Q. Where do you live, Mr. Henry? A. Where do I live at present? In Morristown.

Q. Did you, at any time live in the City of Summit? A. I did.

Q. For how long a time did you live in Summit? A. I lived in Summit from 1895 to 1907.

Q. Have you lived in Summit at all since 1907? A. I have had no residence there since 1907.

Q. Are you in business in Summit? A. I am.

Q. How long have you been in business in Summit? A. Since I have been in business for myself in the real estate business, for the past four and a half years.

Q. Prior to that time were you in business in Summit? A. Prior to that time I was in the automobile business for two years. I have been there since 1920.

Q. You have been in Summit continuously since 1920? A. I was there from 1895 to 1913. Then I left Summit until 1920, and have been there since

1920 to the present time.

Q. Are you familiar with conditions along Springfield Avenue in Summit between Maple Street and Kent Place Boulevard? A. I am.

Q. For how long a time past have you been familiar with conditions along that part of Springfield Avenue? A. Since 1895.

Q. Was the building on the Cullis and Lewis property, the present building, in existence in 1895? A. Yes.

Q. Do you recall that building particularly? A. I do.

Q. What fixes it in your mind, Mr. Henry? A. The building itself, and the fact that I was in business almost across the street from it.

Q. Oh, your business was across the street? A. Yes, diagonally.

Q. For what purpose was the Cullis and Lewis building used in 1895? A. Grocery store.

Q. What was there in the space between the front of the Cullis and Lewis building and the curb in 1895? A. About the same as at present.

Q. Were the flagstones there or what? A. My recollection is there was a single flag curb.

Q. Curb? A. Or single flag walk.

Q. That was in 1895? A. That was in 1895.

Q. At the present time there is a pavement extending from the front of the Cullis and Lewis building to the curb? A. Yes.

Q. For how long a time past has there been a paving from the front of the Cullis and Lewis building out to the curb? A. To the best of my recollection since the construction of the Duncan Hood building.

Q. When was that, Mr. Henry? A. About 1897 or 1898.

Q. Do you recall the construction of the building on the Duncan Hood property? A. I do.

Q. Is that building the same now as when it was originally constructed in 1897 or 1898? A. Well, there have been some changes in the show windows, but the building itself is the same. The building lines are the same.

Q. No changes in the front wall of the building? A. No changes in the front wall.

Q. That is, so far as the line of the wall is concerned. Since the Duncan Hood building was constructed what has there been between the front of that building and the curb? A. A flag and cement walk.

Q. Did that flag and cement walk extend over the entire distance between the front of the Duncan Hood building and the curb? A. Since its construction, yes.

Q. And for what purpose was the flagging and cement pavement in front of the Duncan Hood building and the Cullis and Lewis building used? A. Well, for the general uses of approaching the show windows and pedestrians passing up and down.

Q. You actually saw that, did you? A. Oh, yes.

Mr. Bain: That is all.

CROSS-EXAMINATION by Mr. Stallman:

Q. Mr. Henry, is it a fact that the curbline along the south side of Springfield Avenue from Maple Street down to Kent Place Boulevard was practically a straight, uniform line? A. In 1895, yes.

Q. Well, at all times from 1895 down to 1925? A. Yes.

Q. So that when you come down to the Duncan Hood Corporation property and the Cullis and

Lewis sidewalk, the space between the curbline of those buildings happened to be wider in front of those buildings than they were any place else in that block, is that so? A. I didn't quite get that question.

Q. The space between that curbline—A. Which curbline?

Q. The one I spoke of along the south side of Springfield Avenue between Maple Street and Kent Place Boulevard. You say that was a uniform curbline? A. Yes, sir.

Q. Is it a fact that when you get down in front of the Duncan Hood building and their next door neighbor, Cullis and Lewis, that just in front of those two buildings the sidewalk paving was wider than it was east of that point or west of that point? A. Yes.

Q. So that pedestrians in using this street for a thoroughfare to pass between Maple Avenue and Kent Place Boulevard, could move in a straight line parallel with the curb the entire distance, if they desired? A. Yes.

Q. And when you got down in front of the Duncan Hood building or Cullis and Lewis building, the extra width of the sidewalk so-called was right in front of the stores, and a pedestrian would have to change his course in order to get over on that part of the sidewalk, wouldn't he? A. Yes.

Q. Did you ever see anybody traveling down that street between Maple Avenue and Kent Place Boulevard, that when they got in front of the Duncan Hood building or the Cullis and Lewis building, changed their course of their walk and changed their walk over to nearer the stores? A. There was no reason for their so doing except looking in the windows.

Mr. Stallman: That is all.

RE-DIRECT-EXAMINATION by Mr. Bain:

Q. Is it not a fact, Mr. Henry, that because of the width of the sidewalk in front of the Cullis and Lewis property and the Duncan Hood property, the sidewalk would accommodate more people than the sidewalk on other portions of Springfield Avenue on that block? A. Yes, indeed. It was much wider.

Q. And three or four people could walk abreast on the sidewalk in front of the Cullis and Lewis property and the Duncan Hood property when they could not on the sidewalk in front of some other of the other properties? A. They could do that.

Mr. Stallman: I think that is immaterial.

The Court: It is argumentative anyhow.

Mr. Bain: That is all.

By the Court: Q. You talk about a flag sidewalk and a concrete sidewalk. Just what do you mean by that? A. I mean originally there was a flag walk, and later concrete, and I don't remember just when it was changed from one to the other.

Q. Did the flag walk stay there after the concrete walk was also added? A. No.

JOHN G. CARLSON, a witness produced on behalf of the City of Summit, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Bain:

Q. What is your occupation, Mr. Carlson? A. Carpenter and builder.

Q. Where do you live? A. Summit.

Q. How long have you lived in Summit? A. Thirty-two years.

Q. How long have you been following the business of carpenter and builder? A. Twenty-five years.

Q. What has been the nature of your work? A. Building private residences.

Q. Also business buildings? A. Business buildings, very few.

Q. Have you had occasion to make changes in buildings? A. Occasionally.

Q. Did you examine the building of Cullis and Lewis on Springfield Avenue in Summit? A. Yes.

Q. For what purpose? A. To remove the steps which was out on the sidewalk.

Q. Did the steps in front of that building extend out from the front of the building? A. Yes.

Q. How far? A. Eighteen inches.

Q. What was the width of those steps? A. Well, it was eighteen inches, the width of the step, and the length of it was nine feet four.

Q. Was it one step or were there two steps? A. It was one step.

Q. Assuming that the building line ran along the front of the Cullis and Lewis building, would there be any changes necessary in those steps? A. Why, that step—that step was on the sidewalk, would have to be taken off and put inside the building line.

Q. And did you estimate the cost of making that change? A. Yes.

Q. What was your estimate? A. $366.

Q. What did that include? A. That includes to bring that step inside the building line and to protect—I mean to put it inside the building line so it would be substantial and firm.

Q. That is, put the step inside the entrance to the building? A. Yes.

Q. Did you also examine the building of the Duncan Hood Corporation? A. Yes.

Q. Were any changes in that building necessary because of the building line? A. Yes, there was a similar step there. That went about in the same width, but about thirty-five feet in length.

Q. How long? A. About thirty-five feet in length.

Q. By eighteen inches high? A. No, eighteen inches in width. The height varied. In some places it was two or three inches, and in some places it was seven inches in height.

Q. Did you estimate the cost of taking off the step in front of the Hood building and putting it inside the building line? A. Yes.

Q. What was your estimate? A. It was $210.

Q. What did that include? A. It includes to remove this step, which was outside, and to put it inside, and there was a doorway, was two doorways, and just lower that stone flag step in the two doorways. Then you have the step taken out of the sidewalk.

Q. As far as you could observe did the establishment of the building line in front of the Cullis and Lewis property and the Duncan Hood property necessitate any other changes in the front walls of the buildings? A. No.

Q. Or to any other part of the building? A. No.

Mr. Bain: Cross-examine.

CROSS-EXAMINATION by Mr. Stallman:

Q. Wasn't there some plumbing work to be done in connection with the Cullis and Lewis property? A. Yes, there was some pipe which had to be removed and cut in the cellar.

Q. Did you include that in your estimate? A. Yes.

Q. How much was your estimate for the changes in the Duncan Hood property? A. Duncan Hood property was $210. The Duncan Hood building was $210.

Q. What did that latter figure include? The changes on how many store fronts? A. It incluled to take out the old steps which was on the sidewalk, and to cut down base or the stone flag in two doorways. There was only two doorways on that strip.

HERMANN de SELDING, a witness produced on behalf of the City of Summit, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Bain:

Q. What is your occupation? A. Past thirty-seven years I have been in the real estate business as a broker, agent, appraiser, in the city of New York; and for the last fifteen or twenty years I have lived in Summit and have made sales and made appraisals of property in the city of Summit as an expert real estate man.

Q. Have you had occasion from time to time to make appraisals of properties? A. I have.

Q. Have you been a member of any real estate boards? A. I am a member of the Real Estate Board of New York. I am a licensee to practice in the state of New Jersey, and have appeared in legal proceedings, or at least sold or bought property in the city of Summit; on Hobart avenue south of Springfield avenue. I bought and sold a piece of property on Hobart avenue adjoining the one first mentioned. I have sold the southwest corner of Whittredge Road and Waldron avenue, 193 Summit

Avenue, 212 Summit Avenue, southeast corner of Summit Avenue and Ridge Road. I have appeared in legal proceedings in behalf of the Delaware, Lackawanna and Western Railroad Company, Pennsylvania Railroad, Erie Railway, Central Railroad of New Jersey, West Shore Railroad Company.

Q. As appraiser of properties? A. Appeared in legal proceedings on appraising in order to get the valuation, and in order to appear in such legal proceedings.

Q. Have you made appraisals for others, for the railroads? A. Also for the Baltimore & Ohio Railroad, for the War Department, United States Government, Manufacturers' Railroad Company in Hoboken; for the North German Lloyd Steamship properties; on behalf of the New Jersey and Interstate Commerce Commission in what is called the rate cases. These last three have been in water front properties.

Q. Are you familiar with property along Springfield Avenue between Woodland Avenue and Kent Place Boulevard in Summit? A. I am.

Q. For how long a time past have you known the property on that block? A. I should say approximately twenty years.

Q. Do you know whether or not within the year prior to December 2, 1924, and the year after December 2, 1924, there were any sales of property on that block? A. I will get the stenographer to repeat that question.

(The last question was read by the stenographer.)

A. There have been several.

Q. Will you just state the sales without giving the details, and mention where the properties sold are located? A. In 1922 there has been a sale of

469 Springfield Avenue, Grant to Ginsburg. Do you wish me to give the rate?

Q. Just give the names of the grantors and the grantees and the location. A. Again the same property in 1925 from E. Ginsburg to M. and N. Ginsburg. In 1922 there was a sale of the northwest corner of Woodland Avenue and Springfield Avenue immediately opposite the property of the Duncan Hood Company; and again in 1924 the same property, having a front of 117 feet plus on Springfield Avenue. In 1923 there was a sale of a vacant property on the north side of Springfield Avenue nearly opposite the property of Cullis and Lewis, from Reed to J. L. Murphy. In 1924 there was a sale of 478 Springfield Avenue on the same side of the street as Cullis and Lewis and Duncan Hood to the west, from Burroughs to Christiansen. In 1925 there was a sale of property on the same side as above quoted from Zeigner to Zeigner, Inc. In 1925 there was a sale of property known as 462 and 8 from E. P. Hicks to David Walter, and in 1924 a sale of 458, almost adjoining the one above quoted, to Cullis and Lewis; and in 1922 there were sales of 446 to 456 immediately to the east of Cullis and Lewis and adjoining same to Duncan Hood Company.

Q. Let me ask you, Mr. de Selding, between the first of January, 1924, and the first of January, 1926, how many different parcels of property on Springfield Avenue between Woodland Avenue and Kent Place Boulevard were sold? A. All of the properties above quoted cover that period of space and time.

Q. You gave me some sales in 1922. A. One sale. I stand corrected. One sale, the one of Grant to Ginsburg of 469 Springfield Avenue on the north

side was sold in 1922.

Q. Did you also give me a sale in 1923? A. Sale in 1923 of vacant property of Reed to Murphy, 1923.

Q. You did give me one? A. Yes.

Q. Confine yourself, please, to the period between the first of January, 1924, and the first of January, 1926, and tell me how many sales of property there were on Springfield Avenue between Woodland Avenue and Kent Place Boulevard. A. Six.

Q. Are you familiar with the building line established by the city of Summit on Springfield Avenue between Woodland Avenue and Kent Place Boulevard, on December 2, 1924? A. I am.

Q. Do you know where that building line is located? A. I do.

Q. Assuming that there is a public sidewalk between the fronts of the Cullis and Lewis property and the Duncan Hood property on Springfield Avenue to the curbline, what, in your opinion, would be the damage to those two properties by the establishment of that building line?

Mr. Stallman: I object to that question on the ground that it is evidently intended to imply that the space between the old curbline and these buildings was all public sidewalk; so I think the opinion of the witness as to any damages based on that state of facts is immaterial for the reason that the city has failed to show that the entire width of the sidewalk is subject to public easement.

The Court: Are you going to put in any more evidence as to prescription?

Mr. Bain: I think not, your Honor.

The Court: All right, then. I am going to hold right now that you have not proven any title to the lands within the property lines as

described in the deed, by prescription.

Mr. Bain: Will your Honor kindly allow me an exception and objection to that ruling?

The Court: Certainly. But I do not say it is not evidential for other reasons.

Mr. Bain: Perhaps I haven't made my question clear. It is a hypothetical question based on the assumption that there is a public sidewalk at that place.

The Court: I am holding that there is no evidence in this case to justify any such hypothesis, but I am also saying to you that I think that evidence as to actual conditions here is not only competent but necessary to an intelligent determination by this jury of what the damage to the property was, if any. Go on.

Q. May I ask one more question? Assuming, Mr. de Selding that the public passed in front of the front walls of the Duncan Hood building and the Cullis and Lewis building for sidewalk purposes, what, in your opinion, was the damage to those two buildings by the establishment of the present building line?

Mr. Stallman: I object to that question.

The Court: Sustained.

Mr. Bain: Will your Honor kindly note an objection and exception?

The Court: Certainly.

Q. What, in your opinion, Mr. de Selding, assuming that there is no public sidewalk in front of the Cullis and Lewis building and the Duncan Hood building, was the damage to those two buildings by the establishment of this building line?

Mr. Stallman: If the Court please, we will admit that there was a sidewalk in front of

this property at one time, and I do not think that counsel ought to assume that there was no sidewalk there. The sidewalk was evidently of some value to the property. I object to that question.

Mr. Bain: Of course, your Honor, I do not know yet what the property owners claim was the actual sidewalk. They haven't placed it anywhere.

Mr. Stallman: Ten feet. We said that in the opening.

Mr. Bain: The opening does not prove anything. That is not evidence.

The Court: I am going to allow that question. I asked you before why you are taking the affirmative.

Mr. Bain: Perhaps I can frame it a little differently.

Q. Assuming that the Duncan Hood Corporation and Cullis and Lewis own a fee to the lands between the fronts of their buildings and the curbline subject to some public easement for sidewalk purposes, what in your opinion was the damage to those properties because of the establishment of this building line? A. A partial loss would have been sustained, in my opinion.

Q. Will you give us your opinion as to the damage in figures? A. Taking the properties of the Duncan Hood Company and the Cullis and Lewis Company, and estimating the value—

Q. Never mind. Just a moment, Mr. de Selding. Will you please state in figures your estimate of the damage to the Duncan Hood Corporation property because of the establishment of this building line? A. My net damage for the property of D. E. Hood & Company, owing to the changes as intimated,

amount to $1,811.

Q. Is that your estimate of damage after having made an allowance for benefits? A. It is.

Q. What is your opinion as to the damage before allowing anything for benefits? A. $5,153.

Q. Now, is that to the property of the Duncan Hood Corporation alone? A. That was the Duncan Hood property alone, which had a frontage of 108 feet on the south side of Springfield Avenue.

Q. Before making allowance for benefits you estimate damage at $5,153, and after making allowance for the benefits you make the damage $1,811; is that correct? A. That is correct.

Q. Now, in arriving at that estimate of damage did you have in mind property values along that block of Springfield Avenue as indicated by the sales? A. I did.

Q. What was the highest price paid for any property on Springfield Avenue between Woodland Avenue and Kent Place Boulevard immediately prior to December 2, 1924? A. I should say a property having a frontage of 31.38 feet, bought by Cullis and Lewis, was the highest property in point of front foot value that was sold within that time.

Q. Did the width of 31.38 feet along the front of the Cullis and Lewis property include the alleyway belonging to that property alongside of it? A. It did not.

Q. When was that property sold? A. That property was sold May 1, 1924.

Q. What was the condition of the property at the time it was sold? What did it have upon it? A. Very much what it has now.

Q. What is that, Mr. de Selding? A. A frame building having a frontage of 31.38 feet, running back to approximately between sixty and seventy

feet, and in the rear an open lot used for various purposes, access to which is obtained from an alleyway of eleven feet plus .75 to the west of the property.

Q. What was the price paid for that property at that sale? A. The price paid on May 1, 1924, was $21,500.

Q. At what rate was that per front foot, including the building? A. That included the building that was then on the property and that is on the property now.

Q. What was the rate paid for that property per front foot, including the building? A. I haven't it including the building, but by taking the assessed value of the building from the total amount of the sale, land and building, I have a figure of $15,500 as being the consideration for the land, which is at the rate of about $500 per front foot.

Q. That doesn't include the alley at all? A. That doesn't include the alley at all.

Q. And the alley is part of the Cullis and Lewis property, isn't it? A. All the alleys except Cullis and Lewis are merely driveways and can be closed and built upon at any time.

Q. But the price paid for the Cullis and Lewis property included the alleyway, didn't it?

Mr. Stallman: I object to that.

Q. Do you know? A. It included the use of that alleyway, which gave access to the rear property. The fee was for the frontage of 31.38 feet, as I have described it.

Q. And in your opinion does the right to use that alleyway add anything to the value of the Cullis and Lewis property? A. It certainly did.

Q. In your opinion, making an allowance for that use of the alleyway, wouldn't the rate for the Cullis

and Lewis property be somewhat less than $500 a front foot? A. It would without the alley.

Mr. Stallman: I object to that as argumentative. If counsel wants to bring it out they ought to show the alley.

Mr. Bain: I submit not, your Honor.

The Court: Go on. Of course that it all giving his opinion.

Q. Now, was there any sale of property shortly after December 2, 1924, on Springfield Avenue between Woodland Avenue and Kent Place Boulevard? A. Your first two words were absolutely befogged in my head.

Q. Was there any sale of property on Springfield Avenue between Woodland Avenue and Kent Place Boulevard shortly after December 2, 1924? A. Yes.

Q. What was that sale? A. That sale was a frontage of 73.33, which was sold on the thirtieth of April, 1925, the deed however being drawn in February, 1925, from E. P. Hicks to David S. Walter. The property was sold for $31,000. The building was assessed, the buildings because these are lots 5 and 5-A, the buildings were assessed for $5,200, leaving a land consideration of $25,800, which is at the rate of $352 per front foot.

Q. Were there any sales of vacant land on Springfield Avenue between Woodland Avenue and Kent Place Boulevard shortly before or shortly after December 2, 1924? A. There was.

Q. Where? A. Almost, well, diagonally opposite the property of Cullis and Lewis.

Q. What was the date of that sale? A. The date of that sale was in 1923, January 11, a vacant property, having a frontage of fifty feet with an excess depth; sold by L. Reed to D. and L. Murphy for the sum of $10,000, which is at the rate of $200 per

front foot.

Q. Was that the only piece of vacant land sold in that block? A. That is the only piece of vacant land sold on that block either north or south side.

Q. When did the Heller Construction Company buy its property? A. That is a piece of property having a frontage of 117.47 on the northwest corner of Woodland Avenue and immediately opposite the property of Cullis and Lewis and the Duncan Hood Company. Two sales were reported, one by E. P. Larned to the Summit Building Corporation in December, 1922, and from Brody to Heller Construction Company, August 1, 1924, for the sum of—the latter sale the sum of $23,750, which shows a rate per front foot of $251.

Q. Now, to summarize these sales, Mr. de Selding, will you please state what prices were paid for lands on the block between January 1, 1924, and January 1, 1926? A. The sale of Brody to the Heller Construction Company.

Q. Never mind stating the names. Just give me the prices paid per front foot for the land. A. You want the front foot value of the land?

Q. Yes, in that period. A. 1924, a sale of $203 per front foot. In 1924, a sale at $309 per front foot. In 1925 a sale at $193 per front foot. In 1925 a sale at $352 per front foot. A sale in 1924, $500 per front foot.

By the Court: Q. In figuring up that sale of $500 a front foot, you took the selling price and deducted the assessed valuation of the buildings. Where did you get the assessed valuation of the buildings? A. I got it from a consultation with the assessors and the reading of the assessment book, which describes them as stated.

Q. Then if you did that and were basing your

figure upon what the local assessors did, why didn't you also base your figures as to the value of the land on what the local assessors did? A. Because I thought that in the case of land the assessors were assessing below the real value of the property. In case of the building I erred on the other side. I don't think that any of these buildings were worth the assessments that were then put upon them. The buildings were old.

Q. I know, but as an experienced real estate man in getting at actual market value, don't you know you can't rely upon the assessment that is made simply for taxation purposes? A. That is true, to rely alone, but I take it as one of the elements to be taken into consideration.

Q. I know, but you took it as an element so far as the assessment on the buildings was concerned, but you didn't take it as an element as to what those same people put as an assessment on land. A. Pardon me, your Honor. I considered both separate.

The Court: Well, I won't insist on it, but it wasn't objected to. He should not have been permitted to give their assessed values of buildings unless he also gave their assessed value of lands. Go on. How can any man give as a basis for assessed values of lands by taking a selling price and deducting the assessed value of the building from it?

The Witness: I did, if you will pardon me, your Honor. I did do that, and I gave as my appraisal of the land a value of $400, although these figures that I have quoted as emanating from the assessors are half that in many cases.

By the Court: Q. Yes, but you are now giving

us a value; you are giving these gentlemen of the jury a value of $500. A. For one piece of property.

Q. And now for the first time you are telling us that your own valuation of those lands is $400. A. It is because more have sold for less than $400 than above that figure. In the last piece of property a sale at $500.

The Court: He cannot give valuations in that way. If he is going to take into consideration in making a valuation the assessed valuation that the local assessors put on the buildings as distinguished from the lands, so that the jury may intelligently give whatever value they care to give to his opinion, he should also give the valuation that those same assessors put upon the land.

(Argument.)

By Mr. Bain: Q. Now, Mr. de Selding, in view of those sales that you have mentioned, what in your opinion was the value of the Duncan Hood property and the Cullis and Lewis property per front foot? A. $400 a front foot.

Q. That is for the land alone? A. That is for the land alone.

Q. What depth? A. I have taken it at a hundred feet deep each.

Q. Did you give the value of $400 per front foot for the first hundred feet of depth, or for the whole depth? A. I have given an appraised value for a lot merely one hundred feet in depth. I have taken into consideration not at all the additional depth for the reason that I do not think that the rear lots to either of these properties has been affected one way or another by the action which we are here to settle today.

Q. Let me ask you: When you value the Duncan

Hood Corporation property and the Cullis and Lewis property at $400 a front foot, did you not consider those properties as having a depth of 190 or 200 feet? A. 200 feet in the case of Hood and about 181 in the case of Cullis and Lewis.

Q. So that your valuation of $400 per front foot was for the entire depth, was it not?

Mr. Stallman: I object to counsel cross-examining his own witness.

The Court: Oh, he is under some handicap because of the hearing of this witness.

A. Yes, in that sense, of course.

Q. Now, in making an estimate of the damage to the Cullis and Lewis and the Duncan Hood property, what elements did you consider? Do not give us figures; just give us the elements that you considered. A. In the case of the Duncan Hood property my damage elements were for a portion of the plot affected when taken under these proceedings of the building line, for the effect on the property by reason of shortening that lot, for the further effect on one building, the one to the east of the row and the Hood property, occasioned by the jog in the street of some six feet, seven inches, or 6.7, to the east of the alleyway, and to the alteration occasioned by the building line to put the building in the same shape after as it was in before, and for which a bid was made as testified by Mr. Carlson.

Q. What were the elements of benefit for which you made an allowance? A. The elements in both properties were a permanent building line had been established, which prevented adjoining property owners from building out beyond the line of the plot under review, and the establishment of the building line has resulted in a decided improvement in the appearance of the buildings adjoining.

Q. What, in figures, was your estimate of the benefit to the property? You stated your opinion as to the damages before an allowance for benefits, and your opinion as to the damages after an allowance for benefits. What was your allowance for benefits in figures? A. Speaking of the Hood property, my benefits amounted to $3342.

Q. Now, referring to the Cullis and Lewis property, what in your opinion was the damage to that property by the establishment of the building line, assuming that Cullis and Lewis owned the fee out to a property line subject to a semi-public easement for sidewalk purposes? A. My total damages for the Cullis and Lewis property were $1,323.

Q. Was that before or after an allowance for benefits? A. That is after the taking of the property by an establishment of the line, and as of date December 2, 1924.

Q. But was that figure for the damages before an allowance for benefits or after an allowance for benefits? A. That is before I allowed for any benefits.

Q. What did you allow for benefits? A. I allowed for benefits five per cent of the value of the property remaining, which amounted to $861, leaving a credit to the owner of the property of $462.

Q. Did that $462 represent your opinion as to the net damage sustained by the Cullis and Lewis property by reason of the establishment of the building line after allowing for benefits? A. I make that statement.

Mr. Bain: Cross-examine.

CROSS-EXAMINATION by Mr. Stallman:

Q. Tell us, Mr. de Selding, how you arrive at the figure of $5,153 on the Duncan Hood property. A.

Speaking of the Duncan Hood property, I found that a square foot area had been affected by the establishment of the building line, to which I had given a value on a basis of $400 a front foot or $4 a square foot; 724 square feet by $4 makes $2,896. As the owners retained the above area and had the light, air, and access to their property, only losing a portion of the occupation, I concluded that such loss of occupation had a value of fifty per cent, or $1,448. Taking the lot depth of a hundred feet, to which I had given a value of $400 a front foot, the Hood property represented a value of $43,200. After deducting six feet and .7 occasioned by the widening of the street, it left me not a hundred foot lot; a depth of 93.3. I multiplied this by the decimal, which is in practice in the several courts among real estate men, known as the Davis rule, and I found that my remaining hundred foot lot had a value of 41,385, leaving a loss of $1,815. The easterly building on Springfield Avenue of the Hood row of four buildings and having an alleyway of twelve feet on its easterly line, by reason of a jog which prevented the full view from passers-by to the east of the alleyway on Springfield Avenue, I concluded that such lot and building had been damaged the extent of ten per cent. As I considered that the value of the lot and building at that point was worth $16,800, my damage item amounted to $1,680. The alteration which was made necessary by the change in building line I had figured as $210, such having been the bid of the builder, Mr. Carlson, who has testified here today. That makes a total of $5,153.

Q. How many items is that composed of now? Give me just your items again in figures. A. Items of damage were four in number.

Q. In all of your explanation Mr. de Selding, I lost the amounts attributed to the particular items. A. Will I repeat them?

Q. Just your items in figures. A. The first one was $1,448. The second was $1,815. The third was $1,680. The fourth was $210.

Q. Now, your first item of $1,448 you say was fifty per cent of the value of the area itself? A. Fifty per cent of the value of the area itself taken, partially taken.

Q. And you say that you took the value of the area involved and reduced it fifty per cent because the owners retained possession and occupation of it? A. The owners retained all the rights pertaining to a lot; that is, except the full use of occupation. They didn't lose their light, their access, or air.

Q. So you think that the deprivation of the use of the area itself only means about fifty per cent in value. A. It is a partial use, Mr. Stallman, not a full use. They didn't lose the full use.

Q. What use do they have? A. They have the use, every use except of a permanent character.

Q. What kind is that? A. Suppose that they wish to put a display of their goods on a movable upright in front of their store window. They could do that.

Q. You mean set it out on the sidewalk? A. So I am advised, yes.

Q. Do you know that that sidewalk is now only ten feet wide? A. I do.

Q. Do you know that this area that you are speaking of, 724 feet, is now all used by the public for sidewalk purposes? A. It is used as the sidewalk. The passers-by desire to use it, look into the windows of the store.

Q. Now, you told Mr. Bain that you figured some benefits amounting to, I think, some $3,000. A. $3,342.

Q. And you described that benefit as having the adjacent buildings set back to a building line. Is that the way you put it? A. That is right. That is one of the benefits.

Q. How did you arrive at this 3,000 odd dollars? What was your method of computation? A. I found what in my opinion the value of the property affected was and gave it a five per cent benefit, which in my judgment represented the amount that the property had increased in value by the reason of the great change in the street.

Mr. Stallman: That will be all, Mr. de Selding.

By the Court: Q. How much land did you estimate was taken? A. 724 feet.

Q. What does that represent in length and depth? What frontage and what depth? A. That represented a frontage and depth taken from the engineer's maps in the case of Cullis and Lewis, on its westerly end a depth of 6.97 feet, and on its easterly end 6.71 feet. The mean of those two multiplied by the frontage of 31.33 produced this number of feet; and in the case of the Hood property, having a frontage of 108 feet by 6.7 feet, made the 724 square feet.

Q. Where did you get the depth from? A. I got the depth from the old line.

Q. Where did you get the old line from? A. Got the old line from the engineer's offices, who had taken it from the tax maps.

Q. Which engineer? The city engineer? A. The city engineers, the authoritative engineers.

The Court: Do you agree with that?

Mr. Stallman: As to the depth?

The Court: Yes, as to what was taken as you claim from your actual deed.

Mr. Stallman: Yes, we accept the figures shown on the city engineer's map of 6.7.

By the Court: Q. That is what you took, what was shown on the city engineer's map? A. That is right, sir.

FRANK H. TAYLOR, a witness produced on behalf of the City of Summit, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Bain:

Q. What is your occupation, Mr. Taylor? A. I am a real estate agent, broker, and appraiser; known as a realtor.

Q. Where is your office located? A. 520 Main Street, East Orange; 314 Bloomfield Avenue, Montclair.

Q. How long have you been in the real estate business? A. 43 years the first day of July next.

Q. Has your office during all of that time been in Orange? A. East Orange.

Q. Are you familiar with the property in the City of Summit generally speaking? A. Generally speaking I am.

Q. Have you bought and sold any property up there? A. I have.

Q. You heard Mr. de Selding testify as to sales of properties along Springfield Avenue between Woodland Avenue and Kent Place Boulevard? A. Yes, sir.

Q. For whom have you acted as appraiser? A. I have been employed by the Delaware, Lackawanna Railroad for over twenty-five years as expert appraiser in obtaining and taking rights of ways of lands for rights of ways. The City of East Orange.

The Court: Do you admit the qualifications of the witness?

Mr. Stallman: I have used Mr. Taylor, so I believe I will have to.

Q. Have you examined the property of the Duncan Hood Corporation and Cullis and Lewis on Springfield Avenue in Summit? A. I have, yes, sir.

Q. When? A. I examined it yesterday and twice last week; I believe Thursday and Friday of last week.

Q. Are you familiar with the condition of those two properties? A. From that observation I am, yes, sir.

Q. Do you know where the curbline is in front of the two properties? A. I do, yes, sir.

Q. Have you had brought to your attention the establishment of a building line in front of those properties by the City of Summit in the year 1924? A. I have, yes, sir.

Q. Do you know where that building line is located? A. I do, yes, sir.

Q. Where does the building line run with respect to the Duncan Hood building and the Cullis and Lewis building? A. The building line runs from an alleyway of the adjoining property on the east, 108 feet of the Duncan Hood property fronting along Springfield Avenue, running in a westerly direction to the adjoining property of—

Q. Well, is that building line coincident with the

front lines of the buildings of the Duncan Hood Corporation and Cullis and Lewis? A. The property on the east is.

Q. Let me make myself plain, Mr. Taylor. Does the new building line run along the front, the faces, of the Duncan Hood Corporation building and the Cullis and Lewis building? A. It does, yes.

Adjourned until 1:30 p. m.

Afternoon Session 1:30 p. m.

DIRECT-EXAMINATION (resumed) by Mr. Bain:

Q. Have you had experience with changes in street lines? A. I have, yes, sir.

Q. And damages caused thereby and benefits resulting therefrom? A. I have.

Q. Mr. de Selding testified to the sale in 1924 to Cullis and Lewis of the property now occupied by them, having a frontage of 31.38 feet with some rights in the alleyway adjoining, for $21,500; also to the sale of the adjoining property in the year 1925 by Hicks to Walter, having a frontage as shown on the map of 73.33 feet, for a price of $31,000. A. Pardon me. May I ask whose property you say that was?

Q. That was the sale of property by Hicks to Walter. That is the property immediately adjoining the Cullis and Lewis property on the west. He also testified to a sale of property on the same side of Springfield Avenue but down near the corner of Kent Place Boulevard in the year 1924 by Burroughs to Christiansen, having a frontage of 42.88 feet, for a certain consideration; and to a sale by Reed to J. and L. Murphy of vacant land on the

opposite side of Springfield Avenue between Woodland Avenue and Kent Place Boulevard, having a frontage of fifty feet, for a price of $10,000; and also to the sale in the year 1924 by Brody to Heller Construction Company of a plot 117.47 feet wide, for $23,750; and of another plot 94.72 feet wide for a price of $23,750. In view of those sales would you say that the property of the Duncan Hood Company and Cullis and Lewis have any greater value than $400 a front foot for the first hundred feet of depth?

Mr. Stallman: I object to the question on the ground that an expert witness or an opinion witness in his evidence cannot be given—that is, any real estate matters based upon the testimony of some previous witness who may have knowledge of the facts. I think that in valuing real estate or in giving opinion on real estate or damage to real estate, requires the knowledge of some person who knows values of the property in the immediate vicinity. Mr. de Selding properly qualified to give an opinion based on his knowledge of sales, but where this witness is merely told what a previous witness has testified to without showing any personal knowledge of values of the property itself, I think the question now asked by counsel for this witness to draw a conclusion as to the statements given by some other witness is entirely improper.

(Argument.)

The Court: I do not care to argue it. If you do not prove this man's knowledge I will not allow him to testify. Has he looked at

the property? Has he looked at the other property to make his contrast?

Mr. Bain: I think he has testified that he examined these properties. I will ask him again.

By Mr. Bain: Q. Mr. Taylor, did you examine the properties on the entire block of Springfield Avenue between Woodland Avenue and Kent Place Boulevard? A. I made an exterior inspection of them.

Q. You went over them yourself? A. I didn't go onto the premises themselves, but I went along Springfield Avenue.

Q. But you actually looked at all these properties on that street? A. I noticed where the lines were, but I couldn't tell you where the properties were.

Q. But you did examine the Duncan Hood property and the Cullis and Lewis property? A. Yes.

Q. And you went over these two properties thoroughly? A. Yes.

Mr. Stallman: May I ask the witness a question or two on preliminary cross-examination?

The Court: Certainly you may.

SPECIAL CROSS-EXAMINATION by Mr. Stallman:

Q. Mr. Taylor, this Duncan Hood property and the Cullis and Lewis next door are practically in the middle of the block between Maple Avenue and Kent Place Boulevard, are they not? A. Yes.

Q. Now, have you any personal knowledge of any sales in that neighborhood? A. No, sir.

Q. Have you any personal knowledge of conditions locally? A. I presume you mean by personal knowledge, knowledge that I have taken myself.

Q. Knowledge that you have acquired as a realtor. A. I have acquired knowledge from Mr. de Selding since I have been called in on this case. I got the knowledge that way.

Q. Back in 1924 when this ordinance was adopted, had you then any personal knowledge of the values of any properties that had been sold within just the last year or two? A. No, sir.

Q. Had you any knowledge such as real estate men ordinarily have of local conditions which affect the selling price of lots or lands in that section? A. No, sir.

Q. All the information that you have upon which to base your answers to the questions of Mr. Bain has been facts which have recently been given to you by Mr. de Selding? A. As to the value of land only, yes, sir.

Q. And as to any of the properties that have been sold, as to their condition and their desirability or any competitive features in the market, or any local conditions, you had no knowledge as to that. A. No, sir.

Mr. Stallman: That is all.

Mr. Bain: May I ask the witness one question?

The Court: Yes.

DIRECT-EXAMINATION (resumed) by Mr. Bain:

Q. Have you obtained information as to the property along Springfield Avenue between Woodland Avenue and Kent Place Boulevard? A. Yes, sir.

Mr. Bain: Will your Honor permit the question?

The Court: You have not as yet shown

that this witness has any familiarity with the other values from which he is going to make a contrast or comparison with this property. That is the point. I have already said that he does not have to have knowledge from actual experience and sales.

Mr. Bain: Now my point is this, your Honor. The witness has said that he has information as to sales of property there. Is that not enough for him to base his opinion on? If his information is wrong, then that can be shown and the weight of his opinion challenged, but so long as he has information, and even though he did not have that information, if I want to give it to him as the basis of a hypothetical question and ask him to express an opinion based upon that hypothesis, would he not as an expert have the right to give that opinion?

The Court: Absolutely no. I thought that I made myself clear. Evidently I have not. From whence arises the competency of a real estate witness? From his experience it is true. From his knowledge it is true. But his opinion or expression of opinion has no weight at all unless he gives the reasons upon which it is based. In these cases the test is to show an opinion based on comparison with like property or properties; as the decisions put it, of a substantial similarity, in the same neghborhood. And I say that you have not qualified him yet or shown that he has a familiarity with the other properties upon which he is going to base his value on this property.

Mr. Bain: Well, of course I understand what your Honor has in mind, and I take it my question has been overruled.

The Court: Yes, I have overruled it.

Mr. Bain: I ask your Honor to note an objection and exception.

By the Court: Q. What familiarity have you with the other properties, the prices of which have been spoken of? A. I haven't had any.

Q. Did you make any contrast or comparison between those properties and this particular property? A. No, sir. I endeavored to find out the fee value of the strip taken, and then from that I took the easement, arrived at the easement value of the strip taken, and then the damages to the buildings that were affected, and I took as my base the values that properties that had been sold in the neighborhood; but I first found out—

Q. Why did you take that as your base? A. Because it was given to me as a base value for property 100 feet deep, and a certain value for 200 feet deep.

Q. Why did you take that as your base if you didn't make any comparisons between these other properties and this? A. Well, certain sales, perhaps I didn't quite make myself clear, your Honor. Naturally I used it as a base. I found that property in the neighborhood had sold for a certain price per front foot for a certain depth.

Q. What comparison was there between those properties and these properties? A. I make a comparison by reason of the increase up to the time of the sales in 1924. I worked it out on a percentage basis from the date of the last sale to the date of 1924, and I used it as a basis, a certain figure for a certain depth.

Q. How do you know that one property was worth as much as another property, for example? A. I know the land was right next to it and similar in character and so many feet front, and it sold for a certain amount per front foot, and it was right adjoining it.

Q. That is the point precisely. With reference to these properties of which you were told so far as values were concerned, the selling prices, rather, were concerned, what do you know with reference to the substantial similarity between those properties and this particular property? A. I know the property is adjoining and very similar except as to depth and width.

Q. That is just what we are trying to get at; at least the Court is. You used the prices that you were given as the selling prices for these other properties, and those prices were mentioned to you as one of the elements in arriving at valuation in this case; is that right? A. Yes.

Q. You couldn't do it hardly unless you knew these properties were of substantial similarity, could you? A. No.

Q. Do you know that? A. I know they are the same excepting as to plottage. They are adjoining, rather.

By Mr. Stallman: Q. When did you first look at them, Mr. Taylor? A. I beg your pardon?

Q. When did you first see them? A. Thursday, I believe. I can tell you that in a moment.

Mr. Stallman: I asked that, if your Honor please, because we are establishing these values as of December 1924.

The Witness: Wednesday, last Wednesday, May 9; and I was there again on Thursday and on Friday and yesterday.

The Court: I am going to allow the question. You may have an exception.

(The previous question was read by the stenographer as follows: "Q. Mr. de Selding testified to the sale in 1924 to Cullis and Lewis of the property now occupied by them, having a frontage of 31.38 feet with some rights in the alleyway adjoining, for $21,500; also to the sale of the adjoining property in the year 1925 by Hicks to Walter, having a frontage as shown on the map of 73.33 feet, for a price of $31,000. That was the sale of property by Hicks to Walter. That is the property immediately adjoining the Cullis and Lewis property on the west. He also testified to a sale of property on the same side of Springfield Avenue but down near the corner of Kent Place Boulevard in the year 1924 by Burroughs to Christiansen, having a frontage of 42.88 feet, for a certain consideration; and to a sale by Reed to J. and L. Murphy of vacant land on the opposite side of Springfield Avenue between Woodland Avenue and Kent Place Boulevard, having a frontage of fifty feet, for a price of $10,000; and also to the sale in the year 1924 by Brody to Heller Construction Company of a plot 117.47 feet wide, for $23,750; and of another plot 94.72 feet wide for a price of $23,750. In view of those sales would you say that the property of the Duncan Hood Company and Cullis and Lewis have any greater value than $400 a front foot for the first hundred feet of depth?")

The Court: No, I wouldn't allow any such question as that. You have got to reframe it.

Mr. Bain: That is the question that was overruled, your Honor.

The Court: I am overruling it for another reason now. Of course that is not a proper question. Besides that, it is offensively leading, and this is your witness.

By the Court: Q. What did you value this property at per front foot so far as the land alone was concerned? A. I valued it $400 a front foot, 100 feet depth, and $533 a front foot for approximately 200 feet depth.

Q. How did you arrive at that value? A. I based it on the sales that I heard and have been informed were made in the neighborhood, plus a reasonable allowance from the date of the sales up to the time the building line ordinance was set.

Q. Why didn't you base it upon the sales that have been referred to of a vacant lot where it was sold for $200 a front foot? A. In the first place it was across the street, and I did consider that sale in making up my mind, but the sale was—it was considerably different in a way. The property was across the street, and I considered it was better to take into consideration the adjoining property that was similar in character.

Q. But you knew nothing about the circumstances in that sale, did you? A. No, sir. I knew nothing about the sale except I understood it wasn't sold under duress. People wasn't compelled to sell and the party wasn't compelled to buy; so I was informed.

The Court: Well, it is exercising a very wide discretion on the part of the Judge to let this witness testify. The jury will give it whatever weight it is worth. He is now figuring on his estimate of a land value of

$400 a front foot.

By Mr. Bain: Q. Based upon your opinion as to the value of the Duncan Hood Corporation property, what would you say was the damage to that property by the establishment of the new building line in front of it, without regard to any use by the public of any part of the property.

Mr. Stallman: I object to the question on the ground that the witness has not shown himself qualified to testify to the damage to this particular property in Summit. I think that he has to include local conditions, local situations, and only some person who is thoroughly familiar with the local situation there can testify as to damage to a particular piece of property by reason of establishing of a building line in this locality.

The Court: There is a good deal of merit in what you say, but I am going to allow it. You may bring that out on cross-examination.

Mr. Stallman: Your Honor will allow me an exception?

The Court: Yes, certainly.

A. I placed the value, including the damage to the building, for a plot 108 by 100 feet in depth, at $2,216; and the value to the entire plot, value including damage to building—I say entire plot, all full depth—amount $2,063, using as a base the values that I have already mentioned.

Q. Now, in your opinion, was there any damage to the rear portion of that property? A. No.

Q. Then am I right in assuming that your opinion as to the damage sustained by the property by reason of the establishment of the building line was $2,210? A. Yes, sir.

Q. In your opinion, were there any benefits to that property because of the establishment of that building line? A. Yes, sir.

Q. For what reason? A. Increased parking, traffic facilities, general improvement to the property; establishing a permanent building line I consider always an improvement to property.

Q. What is your estimate as to the value of the benefit to the Duncan Hood property because of the establishment of the building line? A. I think it is one per cent. of the value of the property a hundred feet deep.

Q. How much? A. $805.64.

Q. What, in your opinion, was the net damage to the Duncan Hood property by reason of the establishment of the building line? A. I haven't figured it up. The difference between the benefits of $805.64 and the value of the property taken with damages at $2,216, and that is $1,411.

The Court: $1,410.36.

Q. What, in your opinion, was the damage to the Cullis and Lewis property by the establishment of the building line, without regard to the use of any part of that property by the public for a sidewalk? A. $219.60. By damages I mean the—I do not consider they were all damages. I mean the value that I place upon taking the so-called easement rights. That is the way I have computed my value.

Q. That is, your estimate of $219.60 was based upon what? A. Was based upon establishing of the building line and taking from the owner any possible rights, any rights that he may have had by reason of establishing a building line.

Q. Does that include possible right to build out or extend the front of the building? A. It does, yes, sir.

Q. In your opinion, was there any benefit to the Cullis and Lewis property by reason of the establishment of the building line? A. Yes, sir.

Q. What did that amount to? A. One per cent. of the value of the property, $185.52.

Q. What was the net damage to the Cullis and Lewis property, in your opinion? A. The difference between $219.60 and $185.52.

Q. That is $34.08? A. $38.08. No, pardon me. I have made a mistake there in computing it—$33.08.

Q. It is $34.08. A. Thank you.

Q. In making your estimate of the damages, did you include anything for the expense of physical changes in the steps leading to the entrance? A. I did not, no, sir.

Q. So that that element of damage would be in addition to your estimate? A. Yes, sir.

Q. What elements of damage did you include in your estimate? A. You are speaking now of the Duncan Hood property?

Q. Just the Duncan Hood property. A. I inspected the property from every possible direction. I started on the corner of Beechwood Road and Springfield Avenue on the north side, and I walked slowly down toward the property in question owned by the Duncan Hood Corporation, and I had a full view of that property all the way as I approached on the north side. The property is opposite Woodland Avenue, so I figure, and a full view, and there was no damage from that direction. I approached from Kent Place Boulevard toward the east into Springfield Avenue, and obtained a full view of the property; and there was no damage in my estimation from that direction. I then walked along Springfield Avenue easterly toward the proper-

ty. It was in full view and there was no damage from that section. I crossed over along Beechwood Avenue to the south side of Springfield Avenue, and I approached the property going west, and I could see the property in question plainly in view until I got within approximately fifty feet; and then I noticed that the first door it was impossible to see. The rest of the building was in full view. I went over that situation two or three times, confirmed in my own mind that my basis, premises, were as near right as I could figure. I therefore came to the conclusion that the damage, if any—I am speaking of the damage to the building now on the first twenty-four feet. I therefore cubed the building, valued the building, and took off a certain amount for depreciation and obsolescence, and arrived at a value of the entire building. It is practically built into four. I divided by one-fourth, and it gave me the value of that building as being $6,000. I had already arrived at the value of the strip of land taken, and I allowed ten per cent., and it gave me my value of the damages, which amounted to $1,560; apart for the value of that easement, which I call an easement taken.

Q. Why did you take ten per cent.? A. There is no rule. It is sort of arbitrary. I assume one opinion is as good as another, but it has been my experience that the unit of value being one hundred per cent., that in a matter of this kind ten per cent. is a very generous amount.

Q. Has that percentage, to your knowledge, been used in other cases of street lines?

Mr. Stallman: I object to that.

The Court: Objection sustained.

Mr. Bain: Cross-examine.

CROSS-EXAMINATION by Mr. Stallman:

Q. Mr. Taylor, do I understand from your testimony that this matter of the view is important? Do I understand that the matter of the view of the premises from the nearer adjacent sidewalk is important? A. In my opinion it is very important in how it affects the property.

Q. You say that after you arrived at the value of land taken. Just what value was that? A. The value of the land taken.

Q. Was that $4 a square foot? A. No, sir. I didn't work it on that basis at all. I took as my base $400 a front foot for 100 feet deep. I multiplied the frontage of 108 feet by 100 at $400 a foot, and it gave me a valuation of that plot 100 feet deep of $43,200. I therefore wanted to find out what the value of the fee to a strip 6.7 feet would be worth if it was being sold or being condemned.

Q. I asked you what was that amount. A. And I applied the Newark rule for the seven feet, which was 17.5 per cent., and it gave me a valuation of the fee of a seven foot strip $7,560. I therefore decided that the easement rights was ten per cent., and I—

By the Court: Q. What do you mean by easement rights? A. I mean by easement rights, that it takes from the owner something that he has a right to—a right, in my opinion, some compensation, that it takes part of his rights away; not all of them, but a portion of them. We have never had any case like building lines established. We have had a lot of easements. That is one way I can designate it, by taking something above the surface that he has. They are not taking the fee. They are taking something that is tangible from him, and I can only describe it as a sort of an easement, and I figure

that if the fee was worth practically $7,300 if it was sold, that this taking away of this part of his rights for ten per cent. would be a very fair proportion of the fee right. That is the only way that I could arrive at it. It is the only way we have ever arrived at those easements that are taken that are below or above the surface.

Q. You weren't asked anything about an easement today? A. No, sir.

Q. We know what an easement is. An easement is generally over the land of somebody else who has the fee, isn't it? A. Yes.

Q. Now, the claim made in this case is that this 6.7 feet of the property, whatever you call it, that that belongs to the property owner; not an easement, but actually belongs to it; that they own the fee in it. That is the claim made by the property owner in this case. Why do you talk about easement? A. They weren't taking the fee. I had to start somewhere on it to find out what his right of easement in that was.

Q. Do you mean to say that this street line on this block making a uniform property line where all the property owners will have the same property line and be the same distance from the curb, that if a property was back from the property line about seven feet and was a hundred feet in width, 108 feet in width, and the building was never on that seven feet—that by taking off the seven feet which had never been used for the occupancy of a building, and taking into consideration the making of a uniform building line, that that would reduce the value of the lot itself $7,560; is that right? A. If they took the fee to it I would say so, yes, sir. If they took the absolute fee away from the man, that would be in my opinion that the prop-

erty being worth so much a front foot—

Q. How is a lot there that is nearly two hundred feet deep—A. We are working on the basis of a hundred feet.

Q. I know, but he has a lot 200 feet deep. There is no street dividing that lot so that by taking off this seven feet in front, approximately seven feet, it reduces the value of that lot this $7,560? A. No, sir, not full depth, your Honor. If you take the full depth it reduces it to, under the rule, 8.75 per cent., or $5,036. It depends upon the depth. A lot that is 200 feet deep is affected less in value by the taking of seven feet than a lot one hundred feet deep; the same as if the lot was only fifty feet deep, taking five feet off would affect the ratio greater than if it was a hundred feet deep. So I have allowed the fact of it being 200 feet in depth, I have allowed $5,036.85, and then for the building line I have established the uniform value of ten per cent., but my value for taking it off a hundred feet is more than it would be for two hundred feet; but my testimony is that the rear is not affected. The rear is not affected, and that is the reason I am saying it is only a hundred feet, valuing it at $7,560 for the fee in the strip of land and whatever they take. In my opinion it is worth ten per cent. or a total of $756, and I add onto that element the damage to that first twenty-four feet of that building by reason of obstructing the approach to it.

Q. Then it reduces the market value of that property $7,560, does it? A. No, sir. It reduces the market value of that property the sum of $2,216.

Q. No, no. But the taking of the land itself, as a matter of damage, is how much on the market value of that property? A. Taking the land itself

is $556, the market value of the property. You mean taking the fee of the land?

Q. Yes. A. Oh, pardon me. It is $7,560 taking the fee.

Q. It reduces the market value of that that much? A. Yes, sir, for a hundred foot strip.

The Court: Go on.

Mr. Stallman: That is all.

Mr. Bain: That is all. We rest.

Mr. Stallman: May I just say a word, if your Honor please? I think probably the Court has not understood from the City's case just what the facts are. This building line does not go through the entire block.

The Court: It does not go through the entire block?

Mr. Stallman: Oh, no. It starts down at the left-hand side of the block—that is, practically the end of the business district—comes down about forty per cent. of the block, and stops short with our property; and then the property to the right of us stands out seven feet in front of us for the rest of the block down to Maple Street. The building line does not go through the block.

I would like first on behalf of the property owners to introduce a large scale map, and I would like to have it put on the easel. This is the same thing you have, Mr. Bain, excepting a little larger scale.

The map referred to was received in evidence and marked Exhibit D-1.

PROPERTY OWNERS' CASE

JOHN H. KENTZ, a witness produced on behalf of the property owners, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Stallman:

Q. Mr. Kentz, you are an engineer and surveyor? A. Yes, sir.

Q. Did you make this map that is on the easel? A. Yes, sir, I did.

Q. Does that show the various lots of property on Springfield Avenue west of Maple Street? A. It does, sir, yes, sir.

Q. What is the name of that street in extension of Maple Street? A. Call it Highland Avenue.

Q. Highland Avenue? A. Highland Avenue, extension of Maple Street, yes, sir.

Q. Have you indicated on that map the fronts of the various buildings on the south side of Springfield Avenue? A. Yes, sir, I have.

Q. Is that represented by the hatched line? A. That is the hatched lines.

Q. Right there to the right of your pointer is a strip marked in red. What does that represent? A. Dotted line some distance south showed the original front of the buildings, and recently within the last ten years they built out to what is called the street line or deed line of their property. Portion shown in red is the new portion of the building.

Q. Those corner buildings that were built out to what you call a street line, they are quite old buildings? A. They have been there some years.

Q. You show five lots from Kerns to Walter

Brothers inclusive. These buildings have all been built out to the street line? A. They are comparatively new buildings to this point to what is known as Walter's butcher shop; they are somewhat older; they are about to the street line.

Q. Now I see a piece in red. What is that? A. That is known as the Powers building. The arrow is extended that far to the dotted line as shown on the map, but in recent years that was also extended out and includes a portion shown in red on this map (indicating).

Q. Will you show the jury and the Court on this map where this building line has been established? A. The building line on the south side of the street has been established at this point where this building shaded in red, to what is known as the boulevard, Kent Place Boulevard.

Q. When you get down on the left-hand side of the map opposite Kent Place Boulevard, what is there down in this section? A. Oh, there is a lot of smaller buildings.

Q. Is there a railroad bridge in here? A. Farther down, yes. The railroad crossing is about where that thumb tack is.

Q. Is or is not this the end of the business section of Springfield Avenue? A. Well, it extends to the railroad station, which is about the tack there (indicating).

Q. So this building line then on the south side of the street starts down about the railroad bridge and runs up to the Duncan Hood property and stops there, is that the idea? A. Yes, sir.

Q. Now, this part that is shaded green or blue across the Duncan Hood property and the Cullis and Lewis property, is the area between the deed line and the building line? A. Exactly.

Q. And the building line established by this ordinance is this hatched line? A. Hatched line along the present front of the building.

Q. Where you have it marked building line in the Walter lot, how far back of the street line and the building line east of the alley is the building line west of the alley? A. The building line is set back 6.7 feet west of the alley, extending across property of Duncan Hood corporation and Cullis and Lewis.

Q. That is merely a private alley, isn't it, driveway rather? A. Well, it is a driveway. You call them alleys.

Q. It is not an alley in the sense of a public alley. A. None of those are public alleys taken over by the city; just driveways.

Q. What is the distance, Mr. Kentz, from the driveway of Duncan Hood down to the corner of Maple Street? A. That I could show more accurate on the smaller scale map.

Q. That map is what? Ten feet to the inch? A. Ten feet to the inch. You have got about thirty-five inches—it is nearly forty inches—about nearly 400 feet from Maple Street to the Duncan Hood property.

Q. How long have you lived in Summit? A. All my life.

Q. You are familiar with the general business locations there? A. Yes, sir.

Q. Just where is the business section of Summit? A. The business section of Summit always extended from the point near the railroad here on both sides, and then continues eastward.

Q. How far? A. It goes now to a little this side of what is now Summit Avenue. I should think all told it is about 2,400 feet, and it is gradually

building in an eastward direction.

Q. In blocks how far to the eastward does the business section extend? A. In blocks it is three blocks east of this property. Of course this is an unusually large plot.

Q. Well, am I fair and accurate in saying that the main part of the business section of Summit is to the eastward of the location shown on this map? A. It is traveling in that way, in this vicinity, going in an eastward direction.

Q. Is or is not the tendency of development of new structures to the eastward of this location? A. Yes, sir. Newer buildings on to the eastward.

Q. There is a new theatre shown on that map? A. It is not indicated. It is known here on the plan as the I. & H. Realty Company. That is now known as the Strand theatre.

Mr. Stallman: That is all I have. You may cross-examine.

CROSS-EXAMINATION by Mr. Bain:

Q. Mr. Kentz, what does the colored portion of the Duncan Hood and the Cullis and Lewis property represent? A. That represents the ground line between their deed line and the building line that has been established, which building line is the present front line of their building.

Q. I have observed that there is a colored portion of the Powers property. What does that indicate? A. That indicated the newer portion of the building which was built from the original line to their deed line.

Q. So the colored portions of the Duncan Hood property and the Powers property indicate two different things? A. Two different things, yes.

Q. You haven't shown every new building line on

the south side of Springfield Avenue? A. We have. It is indicated here, new building line. The new building line is located seven and a half feet and parallel to the north side starting here on the map (indicating).

Q. Yes, but excepting on the Murphy Sisters' property on the north side of Springfield Avenue, there is nothing on that map to indicate the new building line? A. New building line runs along the Strand theatre to this point, and then it is picked up and shown by this light line (indicating).

Q. That is the fact? A. I am explaining it to you now. That is the building line on this side of the street. It follows this straight line across to the boulevard.

Q. Why didn't you indicate on that map plainly the building line on the northerly and southerly sides of Springfield Avenue? A. The north and south side is indicated in the same manner.

Q. You don't show any building line across the alleyway between the Muldowney property and the Cullis and Lewis property? A. Shown here, and it is marked (indicating).

Q. But that line doesn't extend across the alley? A. No, it doesn't extend across the alley.

Q. Why? A. Well, it could be extended.

Q. It ought to be, shouldn't it? A. It is used as a driveway. We don't close in all streets like that. For instance a street line would show up this street over this (indicating).

Q. That alley isn't a street. A. It is a driveway. We leave them all open on any map.

Q. Do you show the building line across the alley between the Duncan Hood property and the Powers property? A. No.

Q. You show a line of continuation across the alley way alongside of the Hood property, do you not? A. We show a line. There is none shown across the alley.

Q. Let me call your attention to the line running right through the numerals twelve on the alley between the Duncan Hood property and the Powers property. What does that line represent? A. That indicates a distance of twelve feet. It is merely drawn there to show the distance is twelve feet.

Q. Is it a practice of engineers to represent by a solid line to indicate distances? Isn't it usual to put arrows? A. This is an arrow.

Q. What distance is shown between the arrows? What does this other line between the arrows show? A. It shows connecting the two arrows, I tell you.

Q. Is that intended to show the new building line? A. No, sir.

Q. As a matter of fact, the new building line does not extend across the alleys. A. In no case is it shown across these alleys (indicating).

Q. My point is this. The new building line doesn't extend across the alleyway alongside of the Hood property? A. Not shown on the map.

Q. Does it extend, do you know? A. It extends to the easterly line of the Duncan Hood property, to George Powers.

Q. Are you sure of that or not? A. There is a driveway going in.

Q. Where did you get your information as to the new building line? A. I got it in the City Hall.

Q. Don't you know as a matter of fact the records show that the new building line does not extend across the alleyway alongside of the Hood property? Well, does it? You arranged to put this on this map accurately. A. Well, it is shown ac-

curately. The building lines extended from the alley westward.

Q. But you do not show the building line crossing the alleyway.

The Court: Oh, he does not. He says he does not.

Q. That line is not intended to show the building line? A. It is not. It only connects these two arrows (indicating).

Q. The building line begins where? Here or here? A. The building line extends from this point on the front of the building (indicating).

Q. And it is not intended to show the building line? A. No, sir.

Q. I beg your pardon. Does the building line extend across this alleyway? A. It is not shown, no.

Q. Does it, according to the proceedings? Do you know? A. It does follow the front line of the adjoining building from there west (indicating).

Q. Is there a building line across this alleyway? A. I don't know what rights others have to the alley. That is the reason why I let it open. I don't know whether it could be built upon or have to be kept open.

Q. Does the new building line extend across the end of the map? A. It terminates down at this lot (indicating).

Q. Does it extend down to this lot? I notice you show the new building line across the alleyway between Ziegner and Walter. A. That I do not think is a public alleyway. I mean others do not have rights into it. I think that alley could be closed up, but I think others have rights to those alleys.

Q. That is why you left two open and one closed. Then do I understand you to say that in your opin-

ion the public have rights in that alley on the Hood property? A. I don't know. I am not sure.

Q. But that is the reason you left it open. A. Yes.

Q. Thinking that they might? A. Thinking that they might.

Mr. Bain: That is all.

Mr. Stallman: That is all.

JOHN D. HOOD, one of the property owners, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Stallman:

Q. You live in Summit, Mr. Hood? A. I do.

Q. How long have you lived there? A. I have lived there for over thirty years.

Q. What is your business? A. Banking.

Q. What bank are you with? A. I am president of the Citizens Trust Company of Summit, New Jersey.

Q. What is your connection with the Duncan Hood Company? A. I am the president of that company also.

Q. What have you been engaged in doing the last thirty years? A. I have been developing and building up business property.

Q. How long have you owned this property that you call the Duncan Hood Corporation? A. 1922.

Q. Since 1922? A. I have had the management of the property somewhat previous to that.

Q. I show you a photograph and ask you if that is a correct representation of the south side of Springfield Avenue looking eastwardly from in

front of your property? A. Yes, sir, that is correct.

Mr. Stallman: I would ask to have that marked. I think you have seen that.

Mr. Bain: If this is the group of photographs that we have already agreed upon, I will agree that they go into evidence.

Mr. Stallman: I just want to put these two in now for the purpose of examination.

Mr. Corbin: They have all been numbered by series.

Mr. Stallman: The picture I have shown the witness is one marked H-5.

Q. Now, showing you photograph marked H-6, is that a correct representation of the southerly side of Springfield Avenue looking in a westerly direction toward your property? A. It is, sir.

Q. There are on both of these pictures a lamp post shown on the sidewalk. Is that the same lamp post shown on both pictures? A. It is the same lamp post, and there is another post shown there too, is there not?

Q. Yes, but this is the same lamp post? A. The same lamp post.

Q. You say that you have been developing business properties in Summit for some years? A. Yes.

Q. Are you familiar with the value of business properties? A. Yes, sir, I am.

Q. In 1924 just before the passage of this building line ordinance, what was the front foot value of your property on the south side of Springfield Avenue? A. I consider that it was worth $700 a front foot.

Q. What is the character of that property? A. There are four stores and eight flats, representing

the front portion, street portion of the property, and in the rear there are a number of individual garages.

Q. What is this front property? It is a three-story brick building, is it? A. It is a three-story brick building, yes.

Q. About how many feet long? A. It is 96 feet in length.

Q. How were the four stores occupied at the time? A. Two of the stores were occupied by the Public Service Gas Company, the first two.

Q. What do you call the first two? A. The two farthest east nearer the center of the town. The other two, one was occupied by a tailor, and the other by a furnishing store, household furnishings.

Q. How far back from the street line was the front of your building at that time? A. The first map shows it 6.7 feet from the property line.

Q. Within your recollection were there other buildings on your side of Springfield Avenue which fronted some distance back from the street line? A. Yes, sir. There was a great number of them that did front back on that same line.

Q. What was done with those various properties? A. One by one those stores came out to the full extent of their property line.

Q. And at the time that you purchased this property, was it your intention also to extend your property out? A. It was. The property was in great need of remodelling, as most stores are after having been built for a number of years. It was my purpose to extend—

Mr. Bain: I object to that.

The Court: Sustained.

A. (Continuing)—It was my purpose to extend—

Mr. Bain: No, wait.

Mr. Stallman: Does not the Court think that I might show the availability of this strip and what it could be used for?

The Court: Certainly. You could show that, but you cannot show what his intentions were.

Q. Mr. Hood, what was the most valuable use to which this seven foot strip could be put between your building and the street? A. Its real use would have been for the increase of depth for show windows.

Q. Show windows? A. Show windows, yes, which was an all-important necessity for modern store display; and it would also have modernized the building and provided for a porch for the flats above it if carried up one story in height.

Q. Show windows below and porches above? A. Above.

Q. What would the effect of those alterations or improvements have on the property? A. It would very much increase the revenue of the property as it would have made the stores much more desirable for tenants.

Q. Now, what, in your judgment, was the effect on that value of your property in establishing this building line? A. I considered the effect was to very much lessen my revenue on the property in that it prevented me from doing what I desired to do, of remodelling the show windows, and making deeper show windows. It was necessary for me, but I didn't go ahead with the remodelization on the same line. After the City had once set the line, I expected they would settle with me. I went ahead and made improvements on the front of the store on the old line.

Q. Do you know whether or not the building up of the buildings to the eastward of you out to the existing street line has had any effect on your rentals?

Mr. Bain: I object. In the first place the line has not had any effect. In the second place, that would not be an element of damage. Furthermore it would be a speculative damage anyway.

(Argument.)

The Court: I do not understand the physical situation sufficiently. Is it that these other property owners have been given a new line also?

Mr. Stallman: No. This new line starts with this man's property, the witness's. It starts with his property and runs a little ways to the west, and that is all there is. From the Duncan Hood property eastward there is no building line. Those properties have all been built out to the street and are not required by any building line to go back.

The Court: Then do you claim that they went beyond their property line?

Mr. Stallman: I will ask this witness.

By Mr. Stallman: Q. These shaded portions, Mr. Hood, represent the more recent extensions of these buildings out to the street line, do they not? A. They do, yes.

Q. Your property is this property down here, the Duncan Hood property, and the building line which has been established is this hatched line right along here? A. Yes.

Q. And as you understand it, the effect of this building line ordinance has been to prevent you from extending your building out to your deed line,

as has been done with the rest of these properties? A. That is correct. My property is recessed so to speak to the extent of 6.7 feet.

(The last question was read by the stenographer as follows: Do you know whether or not the building up of the buildings to the eastward of you out to the existing street line has had any effect on your rentals?)

The Court: I will allow the question. You may have an exception.

Mr. Bain: Exception. I want to say this to your Honor. That building to the east was built out four years ago, four years before the building line was changed, or more. What has that got to do with the establishment of the building line?

(Argument.)

The Court: I will allow it.

Mr. Bain: Kindly allow me an objection and exception.

A. I consider that my stores have been affected by twenty-five per cent.

The Court: Oh, well, that is stricken out. Actual facts; actual reasons.

Q. From your experience. A. My experience, one of them has already been rented for $125 a month where it was bringing $150 a month.

Mr. Bain: I object unless the time between those two rentals is stated.

The Witness: The rental of $150 was a rental which is carried over a long period of years from the Public Service Corporation, who occupied the two stores on the easterly end of the building.

Q. The easterly end—is that the end immediately adjacent to the jog? A. Immediately adjoining the jog.

Q. What was the date of that lease? A. They have been in the building for over twenty years. Their lease expired on the thirtieth of April, 1928. They left the building to go into their new building about March 15, 1928, and the store was rerented for $125 a month.

By the Court: Q. How much wider has the roadway been made in front of your property as a result of this? A. I am not sure the other side, your Honor. I know that it was made 6.7 feet wider on my side, and I believe about the same on the other side. I think approximately thirteen feet wider from curb to curb.

Q. According to this map you now have a roadway from curbline to curbline of 54.60 feet. A. That is correct.

Q. That you think is about thirteen feet more than it was before? A. Greater than it was before, yes, sir.

Q. Do you know how far it was from the Powers property? Was that out to its property line and the old curb before this change was made? How wide was that sidewalk out to the old curb? A. To the sidewalk was ten feet approximately.

Q. How is it now? A. It has been cut off, especially the end of it. They had to taper it in order to make a junction with the new line in front of my building, and it tapers down to a width of approximately seven feet at the west corner of the Powers building.

Q. How much of a width between the new curbline as established by this ordinance and the front of your property? A. I don't know as I got your question.

Q. Between your property line, the front property line, and the new curbline, what width have

they? A. What width have they now? There must be approximately three feet.

The Court: Go on.

Mr. Bain: Will your Honor hear a motion with respect to the last answer of the defendant in response to a question on direct-examination as to what the witness's experience with rentals had been? He said in the answer that the Public Service Corporation had rented one of his stores for a great many years past for $150, that they had built a new building of their own and had moved out in 1928, and that he had then rented the store for $125. I submit that that answer is entirely immaterial and irrelevant, that the new rental obtained is very remote from the date of the establishment of the building line four years later, and proves nothing with respect to any damage because of the establishment of the building line.

Mr. Stallman: The witness also testified, if the Court please, that it was under an existing lease. This was done during the pendency of the lease, and of course the Public Service could not reduce their rental during the pendency of that lease. They paid that rental until it terminated. If at the expiration of that lease the witness could not get that same rental, it seems to me that it is not as remote, but is as near as you could get it. The fact that the lease ran on for a couple of years after this improvement does not destroy the value of the effect his answer has.

The Witness: Your Honor, may I have one word?

Mr. Bain: I don't think that any differ-

ence in rental value four years after the date we are considering is material in the first place, and in the second place how does this witness know what influences the amount of rentals.

The Witness: May I have one word, your Honor?

The Court: Go on.

The Witness: I wanted to first say that the lease which the Public Service had with me over a period of twenty years was renewed one year prior to their leaving the building at a rental of $150 a month.

Mr. Bain: Then, your Honor, they renewed that lease with the jog in the street existing, because that jog existed for a long while.

(Argument.)

The Court: I won't strike it out. The jury understands the facts.

By Mr. Stallman: Q. What other tenants did you ever have, or did you have any other changes of the rentals with any of your other tenants? A. Yes, I did.

Mr. Bain: Now I object, if your Honor please, unless the time is stated and unless the reason for the change in the rental appears. There is nothing whatever to connect any testimony the witness may give in connection with that question with the change in the building.

(Argument.)

The Court: It doesn't amount to anything unless he goes into details and gives reasons. Go on with your questioning.

Mr. Bain: Will your Honor allow me an exception?

The Court: Yes, sir.

By Mr. Stallman: Q. State in detail what other changes you had in your rentals. A. The Public Service occupied two stores.

Q. You have told us about that. A. Both of these have been reoccupied. They have had tenants come in; and substitution of one tenancy.

Q. I don't get that. A. The Public Service occupied two stores, for which they paid $150 for one and $125 for the other, making a total of $275 for the two stores.

Mr. Bain: Your Honor, this is a repetition of the testimony that your Honor struck out.

The Court: No, it is not.

Mr. Bain: Then I am mistaken on that. I thought that your Honor had said that the testimony with respect to the re-renting of that property after they had left was inadmissible.

The Witness: The other store, in order to rent it I had to spend—

Mr. Bain: I object, your Honor. There is no connection between that expenditure and the change in the building line.

Mr. Stallman: You do not give him a chance to tell you about it.

Mr. Bain: No, but he is telling it first and leaving the connection after. I think we have a right to have the foundation first before we have the answer. That is the proper method of putting in testimony.

The Witness: There has been a change in three stores. The second one of which I am speaking I had to spend $2,000.

Mr. Bain: Will your Honor please allow me an objection?

The Court: Yes, you have an objection to

all this. He is not answering your question. You did not ask him anything about changes in the store.

By Mr. Stallman: Q. Did you have any changes there that were necessitated on account of this improvement—I will put it that way—on account of the building line? A. Changes that was necessary by the establishing of the building line?

Q. Yes. A. No, there was no changes that was forced by the changing of the building line.

Q. No structural change? A. There was a structural change in one store, yes, and that was the removal of the steps and the insertion of those steps into the property.

Q. What was the purpose of making the structural changes?

Mr. Bain: Which structural changes are you referring to?

Mr. Stallman: Those in the second store.

Mr. Bain: I object to that because the witness has said that those structural changes were not due to the establishment of the building line.

Mr. Stallman: If it is something that has not anything to do with this case, why, it is easy to strike out. I want to find out what the connection was.

Mr. Bain: The witness was asked whether it was due to the change of the building line, and he said no. Now, why follow that up?

Mr. Stallman: I am not going to ask him about the expenditure.

Mr. Bain: You are asking him about the changes. That is the same thing.

Mr. Stallman: What I want to find out is the fact. Now, if it is anything that has not

anything to do with this case, we will drop it.

Mr. Bain: The witness has said so. He has said the building line had nothing to do with that change.

The Court: I do hope we can stop this waste of time. When there are arguments needed by me I will ask for them. State the objection without giving any argument, and then if I find that I need argument to sustain it or to be enlightened, I will ask for it. Now, then, this is getting a bit mixed up.

By the Court: Q. When did your lease to the Public Service end? A. In 1927.

Q. When was the curb, according to the ordinance, actually built? A. I think it was built in 1924 or 1925. I haven't the dates in mind.

By Mr. Stallman: Q. About the time of the adoption of this ordinance? A. Yes, about the time, shortly after the adoption of this ordinance.

By the Court: Q. This other lease did not expire until about two and a half to three years afterwards? A. No, sir. They were tenants that had to carry over until the new building was built.

Q. Did they actually give up the occupancy before their lease expired? A. They did.

Q. How long before? A. A month and a half.

The Court: Go on with your question.

By Mr. Stallman: Q. Now, on re-renting your premises on the expiration of these existing leases, what did you find, if anything, to have been the effect on your property by reason of this ordinance? A. It affected the first store $25 a month.

By the Court: Q. How? How did it? A. By my inability to rent it. I rented it for $25 less than what they were paying me.

Mr. Bain: I do want to object to that on the ground that it is not an element of damage and proves no damage whatever.

The Court: Why doesn't it?

Mr. Bain: Because there is no connection between the lowered rental and the building line. There might have been a dozen things that influenced the drop in rental.

The Court: Certainly, and he will be asked about it and the jury are intelligent and they will understand it.

Mr. Bain: I beg your pardon.

By Mr. Stallman: Q. To what do you attribute that difference in rental?

The Court: It doesn't make any difference what he attributed it to. What are the facts? He has got to show that it was because of this public change of the line of the street, that that was why, and not because of general business conditions.

Mr. Stallman: All right, now. I will try to get it out.

Q. What other changes in rentals did you have? A. The second store I rented for $25 less, $100 a month. The store next to Mr. Lewis I had to lose $15 on, and I considered that the difference there was due very largely to the set back of my building.

Mr. Bain: I object, I must, to what he considers.

The Court: What he considers is stricken out.

Q. You say that the setting back of the curb followed shortly after the adoption of the building line ordinance? A. It did.

Q. You have told his Honor of the original side-

walk between your property and the curb, that it had only about three feet less. A. That is correct.

Q. So that whatever area the pedestrians were using for sidewalk purposes is now largely on your property? A. It is.

(Argument.)

Q. The curbline I understand you to say is now about seven feet nearer to your buildings than it was before? A. That is correct.

Q. And the street, that is the vehicular driveway in the street, is that much wider? A. That is correct.

Q. To what use is that additional width of street principally put?

Mr. Bain: I object, if your Honor please, on the ground that that has nothing whatever to do with the building line. The establishment of a building line cannot change the use of a street between curblines. Any change there is due to curblines, not building line. The building line does not change the width of the street one iota so far as travel is concerned.

(Argument.)

The Court: The Court cannot see why there is any necessity for getting confused upon the issue which these gentlemen are to pass upon as a question of fact. The City of Summit established a property line on Springfield Avenue, and the claim of the property owner is that the establishment of that line has the effect of taking 6.7 feet off his property away from him. He has taken these proceedings to have this jury pass upon the net damage done to his property as a result of the taking of that 6.7 feet made

necessary by the carrying out of this new property line.

In order for the jury to intelligently pass upon the amount of damages and pass upon the amount of benefits and strike the difference, the effect of the taking has got to be considered; and the effect of the taking cannot be measured so far as the market value of the property is concerned unless you know what kind of sidewalk he will have in front of his property and what kind of road he will have in front of his property as a result of the taking of this 6.7 feet.

Now, in order to determine that, for example—if he had the right to go out on a line with all the other property owners so far as the property line was concerned, and the making of this new line prevents him from doing that, that is an element to be considered. The width of the sidewalk is an element to be considered, and the width of the road is an element to be considered. It is not a question of fixing damages because of the establishment of a curbline or of the widening of the roadway, but you have got to consider where the curb is and you have got to consider how wide the road is in order to know what is the amount of benefit and what is the amount of damages from the taking of this 6.7 feet, and what is the practical effect of taking that away from his property.

Now, then, so far as rents are concerned: The mere fact that the property owner is getting less rent, the statement of that even though it is the fact can have no effect what-

ever on the jury unless the jury believe that that is the changed condition resulting from the establishment of this new property line, and that that is the direct cause of the reduction of the rentals, if there has been a reduction of the rentals, and that the changing of the line has been a proximate cause of the reduction in rentals. Of course it is evidence. The mere expression of opinion as it is does not amount to anything. But how are you going to get at that unless you first ask the witness whether there has been a reduction and then the reasons for the reduction? Go on with your questions.

Mr. Stallman: I was asking Mr. Hood about the use of the street in front of that property under the new conditions.

Mr. Bain: Will your Honor kindly note an objection and exception to that? The question relates to the roadway and I merely ask an exception and objection.

The Court: Wait till he finishes. This is entirely different now. You said before, Mr. Stallman, in your argument about the parking of cars and all that, that that is something that may be changed tomorrow by ordinance. I am not going to bother with that.

Mr. Stallman: I thoroughly agree with your Honor that we must show the physical situation.

The Court: I know, but that is something that is so uncertain and so temporary that I won't go into that. However, you can put your questions and I will pass on them.

By Mr. Stallman: Q. As the result of the widen-

ing of the roadway in front of your property, Mr. Hood, what change has there been in the use of that street? A. It has been used for parking.

Mr. Bain: I object to this. This relates to the use of the roadway. It is incompetent and immaterial.

The Court: Objection sustained.

Mr. Stallman: Will your Honor permit me an exception?

The Court: Yes, you may have an exception. In view of the answer given, the answer will be stricken out.

Mr. Stallman: The reason I ask this, your Honor, is that the witnesses for the City gave additional parking facilities as one of the reasons for their estimate for increased valuations or benefits.

Q. Mr. Hood, in your experience of thirty years handling real estate in Summit, to what extent do you consider your property has depreciated in value by reason of this improvement? A. I consider that it depreciated to the extent of $300 per front foot.

Q. Why? A. Because of the inset of the building, its recess.

Q. Is your property in view? Can it be seen by anyone walking along the southerly curb of Springfield Avenue, on the southerly sidewalk of Springfield Avenue, walking in a westerly direction? A. It cannot until one gets very close to the corner.

Q. Do you agree with Mr. Taylor, the witness for the City, that the matter of view is very important in the matter of property? A. I do.

The Court: Well, of course that was an improper question. Strike out the question and the answer to it.

Mr. Stallman: May I have an exception to your Honor's ruling?

The Court: You may. You cannot ask one witness to characterize the testimony of another.

Q. Now, Mr. Hood, do you consider that the building line establishment on this building line in this particular section of Springfield Avenue is any benefit to your property? A. I see no benefit.

Q. How far west of your property does the business section of Springfield Avenue extend? A. About 250 feet.

Q. About 250 feet farther? A. Farther.

Q. Then you come to the end of the business section; is that it? A. You do, yes.

Q. And it is only in that small section that this building line applies? A. It is.

Q. Now, where has been the recent development of business structures along that street? A. The corner of Summit Avenue and Springfield Avenue.

Q. The jury does not know just where those places are. A. A distance of two blocks, three blocks on the south side, or the north side, to the west, going up somewhat farther than this map. Two blocks farther than this map shows.

Q. Does the establishment of this building line in this particular section increase the access to that part of the street from the main business section of Summit? A. I don't quite catch you on that.

Q. Has anything been done under this building line ordinance to increase the access to your end of the street from the other business section of Springfield Avenue? A. Not at all.

Q. Are you familiar with the property next door to you; that is, the Cullis and Lewis property? A. I am.

Q. Have you known that since you have known your own property? A. I have.

Q. To what extent do you think that property has been affected by this building line ordinance? A. I see that it affected it exactly the same as mine. I see no difference.

Q. You mean that it has depreciated to the extent of $300 a foot? A. I do.

Q. Do you know, Mr. Hood, of the sale of any properties to the eastward of your property on Springfield Avenue? A. I do. Mr. Cullis bought his property about the time of the improvement.

Q. That is west of yours? A. Yes, pardon me. East? Any property east?

Q. East of your property? A. No. I don't know of any sale there at all.

Q. Was the Walters property sold since you have gone in there or before? A. Mr. Walter's property? That was purchased by Mr. Walter before I went there, before I purchased.

Q. And that is east of yours. Do you know about that sale? A. No, I don't know about that sale.

Q. Has there been any other property sold to your knowledge on the south side of Springfield Avenue between your property and Maple Street about 1923, 1924, or 1925? A. There has not, no.

Q. There has not? A. No sales at all.

Q. Now, there was testimony given this morning about various sales of property between Woodland Avenue and Kent Place Boulevard; that is, in the half block that contains the theatre and to the westward of your property. A. Yes.

Q. At certain prices which Mr. de Selding gave, which ranged all the way, I think, from $200 to $500 a foot within a short period of time. Do you know of any particular reason for that fluctuation

in value or that variation in value?

Mr. Bain: Your Honor, I object unless the source of his knowledge appears.

The Court: Answer yes or no.

A. I do.

By the Court: Q. How? A. I was in partners with the seller of one of those pieces of property for a number of years, and as a partner I knew him very well, and he was in great need of money, and I know that he sacrificed his property.

By Mr. Stallman: Q. Which property was that? A. That was the property now occupied by the Strand theatre.

Q. That is immediately opposite your property? A. Directly opposite.

Q. How was that property described this morning? How was it marked on the map? I will ask you that. A. It is marked on the map I. A. H. Realty Company.

Q. Do you know anything about any of these other sales that were made? A. I know that Mr. Cullis purchased the property adjoining me on the west from Mr. Reimann.

Q. That was subsequent to the time you bought your property? A. That was, yes.

Q. Do you remember what was paid for that property? A. I believe he paid $700 a foot.

Q. What in your opinion was the value of the building on that property? A. Little of no value.

Q. Why? A. It was a very old building.

Q. How old?

Mr. Bain: If your Honor please, this witness is not qualified.

The Court: He is not qualified.

(Adjourned until tomorrow morning, Wednesday, May 16, 1928, at 9:30 a. m.)

Elizabeth, N. J., May 16, 1928.

(The trial was resumed.)

JOHN D. HOOD, a witness called on behalf of the owners, resumed the stand and testified further as follows:

Direct-examination (continued) by Mr. Stallman:

Mr. Stallman: If the Court please, when we closed last evening, I had directed an inquiry to Mr. Hood as to the value of the structure on the property of Cullis and Lewis. I asked Mr. Hood that question on the basis of his testimony that for thirty years he had been engaged in developing and constructing buildings in Summit. The question for your Honor to pass upon is his competency to testify to the value of the building.

The Court: He is qualified to tell how old it is.

Mr. Bain: I will withdraw the objection.

By the Court: Q. How old was it? A. The building was about thirty-five years of age.

CROSS-EXAMINATION by Mr. Bain:

Q. You say you are a banker, Mr. Hood? A. Yes, sir.

Q. President of the Bank of Summit? A. Yes.

Q. How long have you been president of that bank? A. Five years.

Q. Prior to that time what was your occupation? A. I occupied the position of cashier.

Q. Where? A. The First National Bank of Summit.

Q. For how long had you held that position? A. Twelve years.

Q. So that for seventeen years you have been in the banking business? A. No, I have been in the banking business for thirty years.

Q. Prior to the time that you were cashier of the bank what was your position? A. In the same bank. I started with that bank in 1898.

Q. So that you have been a banker for thirty years? A. I have.

Q. You said that the fronts of some of the buildings along Springfield Avenue to the east of your property were built up. Will you please tell the Court and jury when the front of the building on the Powers' property, immediately east of your property, was build up? A. I have no positive record of that.

Q. Approximately? A. Approximately ten years.

Q. So that that building has stood out into the sidewalk beyond your building for about ten years past? A. About ten years.

Q. When did the Public Service Corporation first lease the store in your building? A. I found them there when I purchased the property.

Q. From 1922 on? A. When I purchased the property in 1922.

Q. Do you know how long they had been there? A. They had been there a number of years, some fifteen years prior to that.

Q. After you bought the property, when did the

lease of the Public Service Corporation expire? A. They had an option in it which permitted them to have possession there at a fixed rent until 1927.

Q. When did the term of the original lease expire? A. Two years previous.

Q. So that the term of the original lease expired in 1925? A. Yes.

Q. In 1925, the Public Service Corporation took up their option and renewed the lease? A. At a fixed rent.

Q. At the time they renewed their lease, the building on the Powers property, just east of your property, had already been extended out into the street? A. It had.

By the Court: Q. When was the lease renewed last? A. 1925.

The Court: That building had been out in the street, it had projected beyond the line of the witness' building for at least ten years before that time?

Mr. Bain: At least eight years prior to that time.

By Mr. Bain: Q. The corner properties were owned by the Duncan Hood Corporation? A. Yes.

Q. You are the owner of that corporation? A. Yes.

Q. Did you buy the property or did the Duncan Hood Corporation buy the property? A. The Duncan Hood Corporation took title to the property in each instance.

Q. You paid $42,500 for the Duncan Hood Corporation property in the year 1922, did you not? A. That was a cash consideration, yes.

Q. The whole consideration? A. Well, there were other things involved in that.

Q. Was there any other actual valuable consid-

eration paid aside from the $42,500? A. A long-term lease held by the Public Service at a very, very nominal rent was one of the considerations.

Q. Well, the lease had only five years to run from 1922 with an option of renewal of three years more? A. Yes, at a very, very low rent.

Q. That lease of the Public Service Corporation, including the option of renewal, would have ended in 1927, anyway? A. Yes, in 1927.

Q. So that at the time you bought the property, the lease had only five years to run? A. That is correct.

Q. And, of course, after you bought the property you got the rental? A. Yes.

Q. There are living apartments over the stores in that building, are there not? A. There are eight living apartments.

Q. And those have been rented by the Duncan Hood Corporation ever since? A. Yes.

Q. Do you know the price paid for the Cullis & Lewis property adjoining yours? A. I have been told the price.

Q. What were you told the price was? A. Thirty-one thousand dollars.

Q. That was for the whole property? A. That was for the whole property.

Q. Did that include any interest in the alleyway adjoining the Cullis & Lewis property? A. I believe it did.

Q. Where did you get your information that $31,000 had been paid for the Cullis and Lewis property? A. Mr. Cullis himself told me.

Q. Do you know the price paid by the Murphy Sisters for the vacant lot on Springfield Avenue diagonally opposite your property? A. No, sir.

Q. You never attempted to ascertain what price

was paid for that? A. No.

Q. Do you know the price paid by the Taylor Construction Company for the property on Springfield Avenue directly opposite your property? A. No, sir, I don't. I know it was bought very reasonably, but I don't know the price.

Q. Do you know the price paid by Christiansen for the parcel of property on the southerly side of Springfield Avenue at the corner of Kent Place Boulevard? A. No, sir.

Q. Do you know the price paid by Ginsburg for property on the northerly side of Springfield Avenue directly opposite your property? A. No, sir, I don't.

Q. Then, the only knowledge of sales that you have are the purchases of your own property and what you have been told about the property of Cullis and Lewis? A. Yes.

Q. Did you have any other knowledge of any other sales? A. I have no knowledge of the exact price of those other sales, no.

Q. You have said that in your opinion the value of your property was $700 a front foot. Was that the entire depth of the property? A. No, that is one hundred feet deep.

Q. Do you know the rule for determining the value of lots by depth in cases of one hundred feet? A. I know there is a Hoffman rule and a Davis rule, but I don't know their operation.

Q. Have you had any experience in determining the values of properties of depths of more than one hundred feet? A. No, my experience is purely as a banker, to judge a property rather quickly.

Q. So you are rather a banker than a real estate man? A. Yes, I am more of a banker than a real estate man. I can look at a piece of property and

estimate its value.

Q. Assuming that in your mind the front one hundred feet of your property is worth $700 a front foot, what would you think the total value for the whole depth of your property was? A. Well, it is a very irregular lot, and I would have to use income to determine value probably very largely.

Q. How deep is your property in the street line? A. 190 feet.

Q. That is the shortest line? A. That is the shortest line.

Q. There is a longer line? A. Yes.

Q. What is the longer line? A. I don't know. I don't know the depth of the property adjoining.

Q. You have attempted to scientifically determine according to your estimate of value of $700 a front foot for the first one hundred feet what the whole value of the property would be, according to your rule? A. I don't know anything about a scientific value, but the practical value of property.

Q. Will you please tell us any piece of property along either side of Springfield Avenue between Woodland Avenue and Kent Place Boulevard that sold for anything like $700 a front foot between the first of January, 1924, and the first of January, 1926? A. Mr. Cullis' property is the only property that I know that brought $700 a front foot.

Q. Is that including the building? A. Yes, that included the building, of little value.

Q. The only knowledge that you have of the sales of Cullis and Lewis is what Mr. Cullis told you? A. That is the only knowledge that I have of the prices brought. I never looked the records up.

Q. You are sure that you are not mistaken about that? Wasn't the price paid for the Cullis and Lewis property $21,500? A. If my recollection

serves me right, it was $31,000.

Q. That is a matter of recollection of what was told you and you would not pretend to say that that was accurate? A. No, I would not pretend to say it was accurate.

Q. The reason you say that the Cullis and Lewis property was sold for $700 a front foot was because you were informed that the price paid for it was $31,000? A. It was.

Q. The property has a frontage of 31.38 feet? A. Yes.

Q. That 31.38 feet does not include the alleyway? A. It does not include the alley. I don't know how many front feet Mr. Cullis has.

Q. You say you don't know how many front feet he has? A. No, I don't recall how many front feet.

Q. How could you determine the price paid for a front foot, if you knew the total price paid and did not know the number of front feet that he bought? A. He told me the property cost him $700 a front foot.

Q. Mr. Cullis told you that the property cost him $700 a front foot? A. Yes.

Q. You based your estimate of the value of your property on what Mr. Cullis told you he paid for his property, without making any effort whatever to get the facts with regard to at least four other sales of property on the same block on Springfield Avenue? A. No, I base my knowledge on absolute experience of all Summit property everywhere.

Q. If you were to buy a piece of property and wanted to know the price or value of it, wouldn't you find out what sales of property there had been in the immediate vicinity, that is, property of a similar character? A. Not necessarily.

Q. You don't think you would do that as an in-

vestor? A. No, sir, I don't.

Q. If you wanted to buy a piece of property on a certain block, would not you be interested in knowing what prices were paid for other pieces on the same block? A. I would know in a general way what property was bringing in that section.

Q. The way to get a knowledge of what property would bring in that section would be to find out what sales had been made? A. Possibly so, and what I believed would be the future of the property.

Q. You would not base your opinion on one sale alone, if there had been half a dozen sales at the same time? A. I am always glad to use any information that I can obtain, but I don't go out of my way to get information on what others have paid.

Q. So that what others have paid for property in the immediate vicinity has no bearing whatever upon the value, in your opinion? A. It has a bearing, if I have the information, but it does not altogether fix my mind. My mind is fixed on my judgment and knowledge.

Q. You would not give the price paid for other property any weight in determining value? A. Yes, I would. I would recognize that it had some weight, if I knew the facts.

Q. Wouldn't you think it necessary to get the facts? A. Not absolutely, no.

Q. It would be buying property rather blindly, would it not? A. Almost any property purchased on our main street has had a potential future value, which made one pretty safe. Buy it as cheap as you can, and you are sure to get a profit.

Q. That is dealing in futures? A. That is dealing in pretty much certainties for the last four or five years.

Q. As a banker, don't you know that if your bank was to lend money on property, you would want to ascertain the value of the property? A. Yes.

Q. And your appraisers would ascertain what property had sold for in that immediate vicinity, is that right? A. I think that they would be very glad to have that information, but I don't think that they would hold up their decision.

Q. Would not they go out and get the information? A. Not necessarily.

Q. The price you paid for your property in 1922 was $42,500, and that included the building? A. It did.

Q. It included not only a building on the front portion of your property but a building upon the rear portion? A. One very old building on the rear.

Q. Wasn't there also a garage in the rear? A. The only building in the rear was a building that was bringing in thirty dollars a month rent and a small building owned by the Public Service which was bringing in—I am not quite sure of the income of that small building. It was built by the Public Service.

Q. There were two buildings in the rear? A. Yes.

Q. A sort of stable or repair shop for automobiles, is that correct? A. Yes.

Q. And the price you paid for that whole property, including the building, was $42,500? A. It was.

Q. And the frontage on your property on Springfield Avenue was 108 feet? A. Yes.

Q. So that the price you paid was at the rate of approximately $400 a front foot? A. Yes.

Q. Did that include the building? A. It did, and the income from it was $4,000, from the entire property.

Q. That wasn't a bad rental on a $42,500 proposition, was it, ten per cent? A. That is what we generally figured the income should be, ten per cent in those days.

Q. Then, you got a rental of exactly what you figured the rental ought to be? A. Yes.

Q. And when you said the rental was nominal, that wasn't exactly accurate, was it? A. Yes, I think it is accurate.

Q. If you get a rental that is all that it ought to be, that rental is not nominal, is it? A. Well, they had a lower rent than the other stores occupying the same building, due to their lease.

Q. But it was a perfectly proper rent, so far as your property was concerned, and as based on its value? A. A fairly satisfactory rent with good intentions of an increase.

Q. What do you estimate is the value of your main building? A. Just the building?

Q. Yes, the building in the front of your property? A. I estimate the building and grounds—as of 1924?

Q. Not the ground, but the building itself in December, 1924. A. I estimate the building is worth $60,000.

Q. That is more than you paid for the whole property? A. Absolutely.

Q. Then you practically got the land for nothing? A. I know I paid the price for the land, not for the building.

Q. If the building was worth $60,000, and you paid $42,500, you got the land for nothing, did you not? A. No, I didn't.

Q. Doesn't that follow from the figures?

Mr. Stallman: If the Court please, that is merely argument for the witness.

Mr. Bain: I will withdraw it.

Q. If your building was worth $60,000, as you say, when you bought it, and you paid $42,500 for the property, what was the value of the land as shown by the price you paid for it? A. I consider that in 1924 my building was worth $130,000; $70,000 for the land, and $60,000 for the building.

Q. You figured in 1924 that your property was worth how much? A. $130,000.

Q. So that between 1922 and 1924 you think there has been an increase in the value of your property of three hundred per cent? A. No, I don't. It amounts to that, but I don't think so. I think the property I bought was fifty per cent of its value when I bought it, or less. I bought it at a sacrifice.

Q. Do you think Cullis and Lewis bought their property at a sacrifice? A. No, I don't. I think they paid a more reasonable and fair price for their property at that time.

Q. They paid $500 a front foot, according to you, in 1924? A. I understood they paid $700.

Q. You have said that the business section along Springfield Avenue in Summit has been going east, is that correct? A. It is, yes.

Q. That has continued for some time past? A. Not more particularly recently, very recently.

Q. The business had started to go east on Springfield Avenue before this change of the building line? Is that true? A. I think the building line had a lot to do with the change.

Q. Had the business not started to go east on Springfield Avenue prior to the change of the build-

ing line? A. I think not.

Q. Not at all? A. No.

Q. Will you please state what new buildings were put up on Springfield Avenue east of Woodland Avenue prior to the date of the establishment of the building line as far as Summit Avenue? A. What new building prior? Why, all the buildings were built on Springfield Avenue in this block here prior to that time. It ended with the City Hall on one side and a vacant lot owned by the Public Service on the other.

Q. Isn't it a fact that there were a number of vacant lots on Springfield Avenue east of your property and up to Summit Avenue prior to the establishment of the building line? A. No; I recall that Public Service lot only.

Q. Is that the only vacant lot? A. That is the only vacant lot that I recall.

Q. Will you state one new building that was put up on Springfield Avenue east of your property prior to the establishment of the building line? Going back over a period of three years prior to the establishment of the building line, how many new buildings were put up on Springfield Avenue east of your property as far as Summit Avenue? A. I don't know as I can state just when they were built. The last building that was built was the Summit Herald and—

Q. When was that? A. I don't know the date.

Q. It was prior to the establishment of the building line? A. Yes.

Q. Wasn't the auto show room of Cullis built prior to the establishment of the building line? A. I believe it was.

Q. That is on Springfield Avenue east of your property and before you come to Summit Avenue? A. Yes.

Q. Wasn't that Summit Herald building built prior to the establishment of the building line? A. That is just what I said.

Q. And that is on Springfield Avenue between your property and Summit Avenue? A. Yes.

Q. One of the large department stores of Summit is McClay's, is it not? A. Yes.

Q. And that was moved up on Springfield Avenue east of your property prior to the establishment of tne building line? A. It was.

Q. Where was it located before the establishment of the building line? A. In the McClay building, adjoining the Hicks' building.

Q. Will you please point out on the map where the old McClay building is? A. It is here (indicating); that is the old McClay building.

Q. Where is the new McClay building? A. Further up here (indicating) on the corner of Springfield and Beechwood.

Q. That business was moved before the new building line was established? A. Yes.

Q. About a year before? A. I don't know the exact time; some time before.

Q. So that here are three instances where business had gone east on Springfield Avenue before there had been any change in the building line, that is, McClay's store, Cullis Auto Show Room, and the Summit Herald? A. When you are speaking of the new business section of Summit, you are speaking, to my mind, of the section beyond Summit Avenue.

Q. There were three instances, at least, where business—and business of considerable size for Summit—had moved east on Springfield Avenue before the building line was established? Is that true? A. Yes.

Q. There is another, Wahl's sport goods shop, that was moved easterly on Springfield Avenue before the change of the building line? A. Absolutely.

Q. Were there any others? A. No, I think not. I don't recall which of those people built their own building. It was a natural tendency to want to go into their own building rather than pay rent.

Q. That is the natural tendency? A. It was the natural tendency for any man to want to own his own place and not pay rent.

Q. That is exactly what the Public Service Corporation did, isn't it? It built its own building on Springfield Avenue and moved into it? A. It did.

Q. And the building line had nothing to do with it? A. The building line had nothing to do with what?

Q. It had nothing to do with the Public Service Corporation putting up its own building? A. I think not, no.

Q. At the time these businesses, that I have mentioned, went easterly on Springfield Avenue, the property opposite your property on Woodlawn Avenue was vacant property, was it not? A. What's that?

Q. At the time these businesses, that I have mentioned, moved easterly on Springfield Avenue, the property directly opposite your property at the corner of Springfield Avenue and Woodland Avenue was vacant property? A. It was.

Q. And the price of that property at that time was very much lower than the prices of the other property to the east on Springfield Avenue which were taken to be built upon by these people who moved their business? A. No, I think not.

Q. Are you sure about that? A. Yes, the property sold very cheap up there in that section of the city.

Q. Isn't it a fact that these new businesses had gone easterly on Springfield Avenue because there was open ground on Springfield Avenue east of your property, upon which new buildings could be built, or upon which there were very old buildings which could be torn down and new buildings put up without any great loss of value? A. Will you repeat that question, please?

(The stenographer read the last question.)

A. I think they went there because there was vacant land on which they could build.

Q. And that was the reason, and not the establishment of this building line? That is evident, isn't it? A. Yes.

Q. That is evident because the businesses were moved before that building line was established? A. I would not say that the building line had anything to do with driving them out.

Q. Then, you did not intend to say, on your direct-examination, that the establishment of the building line had anything to do with business on Springfield Avenue going east? A. I think it did.

Q. I have called your attention to four particular businesses that went east long before the building line was established? A. Yes.

Q. Obviously, the establishment of the building line had nothing to do with those businesses going east? A. No.

Q. Wouldn't you say that they were the principal businesses done along Springfield Avenue? A. Not necessarily.

Q. I will add to that the Public Service Corpor-

ation. Putting in the five of them, weren't they the principal businesses done along Springfield Avenue? A. No; the Public Service—they were not seeking a prominent location. They were quite satisfied to stay in my building, but people always have to find them.

Q. Where is their present new building? A. Their present new building is situated on the corner where they purchased their lot some years ago. The lot determined the place of their building.

Q. That is at the corner of Summit Avenue and Springfield Avenue? A. Yes.

Q. Do you know when they purchased that lot? A. A number of years ago.

Q. Was it long before the establishment of the building line? A. Yes, long ago.

Q. And is not that lot more prominent than your property as a business location? A. Yes; they didn't buy it, I don't think, for that purpose.

Q. You don't know what was in their minds? A. No.

Q. But the fact is that they did buy a piece of property and built a building upon a lot that was more prominent for business purposes than your property? A. They bought it for either use or speculation.

Q. They have used it, and, therefore, the inference would be that they bought it for use? My question is this: Did they not actually choose a more prominent business location for their business than your property? A. Yes, they chose—one minute—no, I would not say so.

Q. They have got a more prominent business location? A. In the day of their choice it wasn't.

Q. But they have got a more prominent business location— A. It has turned out to be a more prominent one, but at the time of their purchase, it was not, no.

Q. You don't know whether they may have foreseen that that lot at the corner was going to be more prominent? A. No, I don't know that they may have foreseen that.

Q. Have there not been other buildings erected near the corner of Springfield Avenue and Summit Avenue? A. Yes.

Q. Don't you know that, for a number of years, business has gradually been going easterly on Springfield Avenue from your property? A. I do know that there has been a tendency of business to go east very, very gradually. Lately it has taken a new impetus and has gone there much more rapidly.

Q. But that started long before the building line was established? A. Because that was where the vacant and cheaper land was.

Q. The reason that business has gone easterly is because there was vacant land to the east of your property, which could be purchased, and new buildings put upon it, and that was the principal reason for the extension of business activity easterly along Springfield Avenue from your property? A. That was at the time.

Q. I think you said that your property was damaged by this building line to the extent of $300 a front foot? A. I do.

Q. In making that calculation, what did you estimate was the value of the 6.7 foot strip between the new building line and what may be called the old property line? A. I valued my property on the basis of $700 a front foot for one hundred feet deep, giving the lot a square foot value of seven dollars a square foot. I believe that any property in the front of a building, that could be used for show window display, had twice the value that any aver-

age foot in the rest of the building might have. Therefore, I considered that every square foot in the front of my property was worth fourteen dollars a square foot, giving a total valuation of $10,000 to that property.

Q. That is, you figure the actual value of the 6.7 foot strip at $14,000? A. Fourteen dollars a square foot, or $10,000 for the plot.

Q. That was an element by which you arrived at your estimate of the damage of $300 a front foot? A. That was the first step only.

Q. That is the value of that land? A. The value of the land.

Q. The value of that land was $10,000? A. Yes, absolutely.

Q. In making your estimate of the damage to your land, you assumed that the City was taking that land away from you? A. I certainly did.

Q. You assumed that just as though they had taken the fee? A. For all practical purposes, yes.

Q. Of course, there has been no change of your show windows by the building line? A. The building line prevented me from making a further display and coming out. Had my property come out to the front line, the line that I really owned, my property would have been increased to the extent of $1,000 a front foot, rather than $700 a front foot in 1924.

By the Court: Q. How long did you own that before they changed the building line? A. I owned it two years.

Q. Why didn't you bring it out and make that change in two years? The other buildings were already out. A. Your Honor, I spent on the property to increase its income a very large sum of money, devoting all my attention to that. I was

quite undetermined as to what the proper use was to put to the front, the most important portion of the building, and I had plans in my mind to bring it out and—

Mr. Bain: I object to that, your Honor.

The Court: If you don't want it, all right. I have been wondering, if it was so valuable because it was extended, why, when he bought the property, he didn't extend it so as to reach the same frontage as the adjoining property on the east had.

By Mr. Bain: Q. Mr. Hood, you had owned this property two years prior to the establishment of the building line? A. Yes.

Q. And during all of that two years the buildings to the east of you had extended out beyond your property? A. They had.

Q. And you had done nothing to correct that situation? A. They were there when I purchased that building.

Q. You did nothing to correct that situation? A. No, I didn't, other than plan for doing something. I actually did nothing.

Q. In addition to this valuation of $10,000 for the 6.7 foot strip that you used in estimating your damage to your property, what other elements entered into your computation of damage? A. The element of the fact that I was now prohibited from coming out to my property line.

Q. How much, in money, did you attribute to that? A. I considered that was worth fifteen per cent. of the value of my building and lot, which I valued at $130,000. Fifteen per cent. gave me a valuation of approximately $20,000.

Q. That was because you were prevented from building out? A. It was.

Q. That element of damage was the same element of damage that you put in the $10,000 valuation of the 6.7 foot strip? A. No, I don't agree with you.

Q. You told me that the reason you put the square foot value on the ten foot strip was because it prevented you from bringing your show windows out, and you could not use the property? A. No, that property was absolutely taken from me, and I felt it should be paid for. It had another effect, of preventing me from ever using it to do something with it, which would very, very much enhance the value of my property.

Q. You took the value of that strip, and then you said that, in addition to that value, there was a damage to the adjoining property in the rear, because you could not build out there? That is correct, is it not? A. Yes, of preventing me from doing it.

Q. As another element in computing your damage, you added something to the damage to the other property back of the 6.7 strip, because you could not build out, didn't you? A. In setting up fifteen per cent., it necessarily had to be arbitrary.

Q. No. In arriving at the value of the 6.7 foot strip, you put in your idea of the value of that property some damage, because you could not use that property to build out over it or put show windows over it, did you not? A. Yes, I did.

Q. In valuing the property that you would have left, you added fifteen per cent. of the value of that property also, because you could not build out in front of it? Is that correct? A. That is rather a difficult question.

Q. Isn't that the practical fact what you did? A. No, I considered my damages $30,000; $300 a foot for one hundred feet, in round numbers.

Q. How much did you add to your valuation of the 6.7 foot strip for damage, because you could not build out over it? A. In my method of figuring, I used $20,000 for one and $10,000 for the other.

Q. How much did you add to your basic valuation of that land in the 6.7 foot strip for damage because you could not build out over that strip with your show window? A. Possibly I doubled my price there. You might check me on that.

Q. You added one hundred per cent., approximately, to your base fee value of the 6.7 foot strip because you were prevented from building out over that strip? That is a correct statement of your testimony, is it not? A. I don't comprehend it.

Q. What you did in determining the value of the 6.7 foot strip was first to determine the square foot value of the land in that strip? Is that right? A. I did.

Q. And then you added to the value of the land in that strip some damage because you were prevented from building out over it, is that right? A. Yes.

Q. And you said you added one hundred per cent. to the value of the land in the strip for the damage because you could not build out over it? A. Yes.

Q. When you valued the property back of the 6.7 foot strip, you put in another fifteen per cent. of the value of that property, because you were prevented from building out in front of it? Is that correct? A. Yes.

Q. So that you had an element of damage because of your inability to build out both in your valuation of the 6.7 foot strip and in your valuation of the land behind it, is that correct? A. You may be correct.

Q. Well, am I correct? A. No, I don't think you are.

Q. Why? A. I think that I am correct. I think that I am correct in stating that I have a damage there of $300 a front foot or $30,000 all tied up in the same parcel. I attempted to divide it to arrive at something I should take on it from income.

Q. That is not my question. I want to find out how far this element of damage went because of the inability to build out. I want to know whether you put it in the value of the land in this 6.7 foot strip, and whether you put it in the land back of the strip. According to my interpretation of your testimony, you put it in both. A. I think you put it both in the same parcel. I think the whole thing is tied up all together, and I can't change my figures.

Q. I want to get the jury clear. Did you add something to your base fee value of the land in the strip because of your inability to build over it? Did you add something to that for damage? Yes or no? A. No; my testimony that I gave in the first place is correct.

Q. What was your base fee value of the land in the strip? A. The base fee was $10,000—the base fee was $14 a square foot.

Q. Didn't you tell me several times that you first determined the square foot value and then added something to that square foot value because of damage through your inability to build out? A. Yes, I took one as the land and the other as the building, and I considered what the damage was to my building, and that I could not bring it out to separate the two.

Q. Are my questions clear to you, Mr. Hood? A. No, they are not.

Q. Let me ask you the question again. It is only for the purpose of clarity and not for repetition. In determining your value of the land in the 6.7 foot strip, did you include damage because of your inability to build out over that strip? A. No, I did not.

Q. Then, if you did testify that you had before, you were wrong? A. That land was taken from me. It was part of my property taken from me.

By the Court: Q. I don't understand what you mean by that, if there is a damage simply because the property is taken from you. Do you mean that you put some special value on 't because it is taken against your will, because it is not a willing sale? Is that what you mean? A. No, I mean that so many square feet were taken away from me that might have been taken by some other section of my property, and I felt as though that had a special value then, due to the fact that it was in the front of my building rather than in the rear of my building. I had a special damage.

Q. What do you mean by "the front of your building instead of the rear of your building"? It could not be taken off the rear of your property, could it? A. No. So many square feet taken out of the plot.

Q. I want to know whether you put any special value on, or included as an element in estimating your damage, the fact that this was taken against your will. A. No, I would not say so.

By Mr. Bain: Q. Mr. Hood, you say that, in your opinion, the damage to the property by reason of the establishment of this building line was $300 a front foot, and that makes the total damage $30,000, approximately? A. Yes.

Q. You paid $42,500 for the property? A. I did.

Q. That leaves a difference of $12,500 as the value

of your property after it is damaged?

Mr. Stallman: I object to that question on the ground that what he paid for this property back in 1922 and the valuation of the property in 1925 is not a proper comparison.

The Court: Objection sustained. You are putting questions as though he admitted what you said.

Mr. Bain: I will put it in a different way.

Q. Assuming that your property had a value of $42,500, that being the price you paid for it, and that the damage to the property was $300 a front foot by reason of the establishment of the building line, in your opinion, making a total damage of $30,000, there would be left a margin of $12,500?

Mr. Stallman: I object to the question because the assumption that the property was worth $42,500 in 1925 has no basis in the evidence.

The Court: He is asking him to assume that. It is a perfectly proper question. As long as the question does not imply that he has made an admission, it is perfectly proper. Proceed. This witness is able to take care of himself.

By Mr. Bain: Q. Will you answer the question? A. Have you taken into consideration the amount of money spent on that property during the two years that I had it?

Q. My question was a simple one. It can be answered yes or no. Read the question, Mr. Stenographer, please.

(The stenographer read the question, as follows: Assuming that your property had a value of $42,500, that being the price you

paid for it, and that the damage to the property was $300 a front foot by reason of the establishment of the building line, in your opinion, making a total damage of $30,000, there would be left a margin of $12,500?)

A. If you base it on any such assumption.

Q. After the establishment of the building line, you had everything, every interest in your property, that you had before, except that you could not extend the front of your building out 6.7 feet, 'sn't that correct? A. That is a very important factor.

Q. But that is correct? A. No, that is not correct. Rebuilding that whole building would have, of course, permitted me to come out to that new line.

Q. My point is this: After the establishment of the building line you had every interest in that property that you had had before except the right to extend the front of your building 6.7 feet out into the sidewalk. Is not that right? A. I believe that is correct.

Q. That being the only thing that you have lost, you say that that has damaged your property to the extent of $30,000? A. I do.

Q. And that, as a practical situation, had existed for several years, and you never did anything to save yourself that damage of $30,000 before the building line was established? A. I did.

Q. You had never put the front of your building out? A. I immediately started remodelling plans, which included the bringing out of my building. I had plenty of time to complete the remodelling of the building, and, in fact, I had started on the remodelling of it, and it took a good deal of time to carry that out. It had to be all rewired. New light shafts had to be put through into the center,

and a new heating plant had to be installed.

Q. That had nothing to do with the building line? A. No, they were of prior importance for the comfort and satisfaction of the tenants.

Q. It had nothing to do with the building line? A. There were leases on the building, which I could not alter in any way, and it would have been foolish for me to come out and give these people additional window space without their paying additional rent, and I left that until the last thing, when the City came along and established the building line and prevented me from doing it.

Q. You knew all of that when you bought this property in 1922, did you not? A. I knew what?

Q. That you might make all these changes to add to the value? A. Yes, I certainly did. That is the reason I picked it up quick when it was offered to me. I knew I could increase the income from $4,000 to $13,000.

Q. You didn't do anything until several years after you had bought the property? A. Yes, I did. I immediately started.

Q. All your plans were somewhat nebulous? A. No, most of them were executed.

Q. You had not actually built out in front? A. No, that was the one thing I didn't do, because it was a very fundamental thing, and it was a thing which involved a definite plan, and a thing which I didn't feel like undertaking. Capital was involved in the thing also.

Q. That was the one definite plan about which you did not arrive at any conclusion? A. I had very clearly in my mind what I was going to do.

Q. But you did not attempt to put your plans into effect? A. No, for lack of capital.

Q. It was lack of capital, and not the building

line? A. The building line stopped me from making that investment of capital.

Q. But the real reason was because of lack of capital? A. For the two year period it was the reason I didn't get at it earlier.

Q. Nothing else? A. Yes.

Q. Wasn't the real reason, Mr. Hood, because you were obtaining a rental from the property, which was perfectly satisfactory? A. What is that?

(The stenographer read the last question.)

A. No, that was not the reason at all. I was building up the income of that property just as rapidly as I possibly could. I had succeeded in building it up.

Mr. Bain: That is all.

RE-DIRECT-EXAMINATION by Mr. Stallman:

Q. Mr. Hood, there was some question asked about the rest of your property there. Is it not a fact that your rear property is much wider than your front property? A. Yes; I also own the property back of Mrs. Powers. That is to say, her property runs only 106 feet deep, and I own in back of Mrs. Powers, running back to the railroad.

By the Court: Q. What was your total rent when you bought this property? A. $4,000.

Q. How was that made up? A. It was made up—

Q. How much did you get from the Public Service Corporation? A. The Public Service? I secured—I think they were paying me about $40 a month for each store; $80 for the two.

Q. What else? A. I was getting $50 apiece for the other two stores.

Q. What else? A. There were eight flats, and

they were renting from $35—six of them were renting at about $35 and two at about $40.

Q. That would make about $290? A. Yes. Then there was a stable in the rear, which was bringing in $30 a month, and I spent on the property—

Q. Never mind about that. I am asking about rents. That would give you $6,000 a year? $80 for two stores and $100 for two other stores is $180? A. Yes; $35 for six flats.

Q. You mean $35 apiece for the flats? A. Yes.

Q. That would be $210? A. Yes, and $40 for two other flats.

Q. That is $290 and $30—that would be $500? A. I am speaking of net when I said $4,000. I had to heat that building, and janitor services.

Q. I want the gross. A. $470 a month twice twelve—$5,640 gross.

Q. What do you consider necessary to get out of that property in order to net six per cent.? Six per cent. gross? A. I consider you would have to make at least ten per cent.

Q. You would have to do more than that with the heating? A. Yes.

Q. You would have to make it at least twelve per cent., would you not? A. Yes, you would have to make it at least twelve per cent.

Q. What rent did you get after the Public Service Corporation went out? A. Well, my buildings were all under lease, so I had to begin with the rear end.

Q. I want to know what rent you actually got after the Public Service Corporation went out. A. $125 a month for the first store.

Q. For one store? A. For one store yes. The other one I had to remodel. That brought $100.

Q. That makes four stores, doesn't it? A. Yes.

Q. In other words, you changed four stores into two? A. Changed one store into two. The Public Service had two stores. For one I got $150, and for the other I got $100.

Q. How about the flats? Did they remain the same? A. No, I have had a change of five tenancies, another store and two flats. One flat I had to reduce ten dollars a month, from $65 to $55.

Q. Will you just give me the rents after the Public Service Corporation lease expired? A. I got $55 for seven flats, and $60 for one flat. That makes $440. I got $125 for one store; $100 for the next store; $120 for the next store on a lease $125 next year; $110 for the next store. That represents the main building only.

Q. That is $900 a month, isn't it? A. It is $890—$900 is correct.

Q. What did you get for the barn? A. For the barn that was bringing in $30? I got $50 for one section, $35 for one section. It was absolutely untenable. $35 for another; $20 for another section; $11 for another section; $15 for another section; $20 for another section; $60 for the loft upstairs.

Q. That makes a total of $1,111 a month? A. I have a new building that I put on. I built a new building directly in back of the Powers building. It is in back of the entire tract.

Q. I am trying to get at a comparison, the actual difference between the rents that you got out of the property as it existed before, and what you got after the property line had been changed by ordinance. A. Then, there is one more building to add to this.

Q. That same building? What changes did you make in the stores? What was the cost? A. I put in new fronts in the stores.

Q. After the building line was changed? A. Yes, after the building line had been established.

Q. What else? A. I rewired the entire building. I put in new light shafts to make all rooms light, where there were a number of dark rooms previously. I rebuilt the back porch and stairway going up, and rebuilt the roof. I put in a new heating plant. I remodelled the fronts and completely changed the character of the building.

Q. On your direct-examination you made the assertion that your rental value had been reduced. That means nothing to the jury, unless you can tell them, as a matter of intelligent comparison before and after, what that reduction was. A. Since the establishment of the building line there have been five re-occupancies, which made necessary new rents. For one I received $25 a month less; for the other $25 a month less; for a third $15 a month less, and for a flat $10 a month less, and for another flat $5 a month less, making a total of eighty dollars less since the building line has been established.

Q. That would be $960 a year? A. $960 a year on five tenancies out of twelve.

Q. If you give your heat—what would that represent a capitalization of six per cent. on? A. After deducting heat?

Q. No. A. It is a capitalization on $16,000 at six per cent.

Q. $960, of course, is ten per cent. of $9,600. A. Yes, it is; that is on five tenancies only.

Q. That has been the actual reduction, has it not? A. Yes.

By Mr. Bain: Q. You stated some reductions in rents since the establishment of the building line. There were also some increases, were there not? A. One automobile shop rented the second store, and

I had to spend about $2,000—

Mr. Bain: Never mind what you spent.

Mr. Stallman: I will bring that out later.

By Mr. Bain: Q. The fact is that in your gross rents there has been an increase since the building line has been established? A. No, there has not.

Q. Then, I am wrong about all these figures? A. No, I have just taken off $80, and there is no—

Q. The store occupied by the Public Service Corporation before the establishment of the building line brought $150 a month? A. Yes.

By the Court: Q. Suppose you take it this way: What was the total cost of the improvements you put in there? A. You are speaking of this one store?

Q. I am taking the whole building and all these additions. A. I don't think I could state to you positively.

Q. What is it, approximately? A. Fifty thousand dollars.

Q. You were getting $5,640 before? A. Right.

Q. Now you are getting, after you made these improvements, $13,332? A. Yes.

Q. That is a difference of $7,692? A. Correct.

Q. And that is the equivalent of ten per cent. of $76,920? A. Yes, sir.

Q. And it cost you $50,000? A. Approximately.

Q. I am asking you this so that the jury may have some figures along that line. A. About $50,000.

Mr. Stallman: That is all.

Mr. Bain: That is all.

H. DONALD HOLMES, a witness called on behalf of the owners, being first duly sworn, according to law, on his oath, saith:

Direct-examination by Mr. Stallman:

Q. Mr. Holmes, you live in Summit? A. Yes, sir.

Q. What is your business? A. Real estate.

Q. How long have you been in the real estate business? A. Twenty years.

Q. How long have you lived in Summit? A. Thirty-three years.

Q. Do you know the properties of the Duncan Hood Corporation and Cullis and Lewis on the south side of Springfield Avenue? A. I do.

Q. You have bought and sold property in Summit? A. I have.

Q. Do you know where the property line has been established on the south side of Springfield Avenue? A. I do.

Q. In your judgment, has the establishment of that building line resulted in a damage or a benefit to those two properties? A. A damage.

Q. Why do you say it has damaged the property? A. Well, you have taken a piece of property in the center of a block and set it back 6.7 feet behind the property adjoining. You have also created a very sharp turn as a result of that, as you come down Springfield Avenue going west, so that you are not able to see the properties until you get practically to them.

Q. What, in your judgment, was a fair market value of the strip of land to which the building line applies?

Mr. Bain: I object to that question on the ground that the value of the strip of land

is not made the value in this case.

Mr. Stallman: I submit it is one of the elements.

The Court: Objection sustained. The question is: What was the market value of the land before and the market value of the land after, because this is really a taking, and I am going to so hold. I have already said that. He can give the reasons why afterward for that difference. That is according to one of your requests, that the test will be to the jury as to what is the market value of the land and building, and what is the market value of this property before this change and what was it afterward.

By Mr. Stallman: Q. What, in your judgment, was the difference in the value of this property, as a consequence of the establishment of this building line? A. The difference in value, in my judgment, is $16,430. You are speaking of the Duncan Hood property alone?

Q. Yes. There are two properties. Give both of them. A. The Duncan Hood property, $16,430; Cullis and Lewis, $3,712.50.

Q. You said $16,430? A. Yes.

Q. Will you tell the jury how you arrive at those figures? A. I have taken a value on the land of $500 a front foot. I have taken the number of square feet, 724 square feet, in the case of the Duncan Hood property and 215 in the case of the Cullis and Lewis property, and as a result of my figures, determined the value of $7.50 a square foot for the front part. Then, I have taken into consideration the damage to the property as a result of the setback, and arrived at those figures.

Q. At what rate did you establish your conse-

quential damages? A. I established it on the Duncan Hood property at eleven per cent.; on the Cullis and Lewis property, at seven per cent.

Q. To what values did you apply those percentages? A. To the value of the properties.

Q. What, in your opinion, were those values? A. The values, in my opinion, of the Duncan Hood property at that time was $100,000.

Q. One hundred thousand dollars? A. Yes, sir, and of the Cullis and Lewis property, $30,000.

Q. So that the consequential damage to the Duncan Hood property was eleven per cent. of $100,000? A. $11,000, yes, sir.

Q. Plus a land value—A. $5,430.

Q. On the Cullis and Lewis property you took seven per cent? A. Seven per cent. on the valuation of $30,000.

Q. And the land value—A. $1,612.50.

By the Court: Q. Mr. Holmes, you have been here listening to the testimony? A. Yes.

Q. Did you place that valuation of $100,000 on the Duncan Hood property after that $50,000 improvements had been put on it? A. Why—

Q. When did you fix this market value? As of what time? A. As of 1924.

Q. Before the improvements were put on it? A. Yes, sir.

By Mr. Stallman: Q. So that you computed the damage on these two properties in these two items as to the value of the land included in the strip and the damage to the remainder of the property by reason of being set back from the adjoining building line? A. Yes, sir.

CROSS-EXAMINATION by Mr. Bain:

Q. Mr. Holmes, how many square feet are there in the entire Hood property? A. Do you mean in the entire property which he has purchased?

Q. Yes. A. I don't know.

Q. How do you arrive at a valuation of $7.50 a square foot for the land in the 6.7 feet strip? A. I took it on the basis of value of $500 a front foot, one hundred foot depth.

Q. At that rate, what would your valuation be of the entire Hood property for its entire depth? A. I don't know; I haven't taken into consideration the entire depth. I have taken into consideration the front property, which is affected.

Q. Do you mean to say that you valued only the front portion of the Hood property at $100,000? A. Yes, sir.

Q. You made no attempt to find out what, in your own mind, the value of the whole property would be, if the front portion were valued at $100,000? A. No, sir; I considered that the back portion is an entirely separate parcel. It has an entrance, and it is practically a little community in itself.

Q. How could you determine the value per front foot of the front portion without having first determined the front foot value of the entire depth? A. I base my value on knowledge of real estate values over the street.

Q. In order to determine real estate values, you have got to know sales, don't you? A. Yes.

Q. Do you know of any other sales of property on the same block west of Woodland Avenue and the Hood property? A. Which other sales do you refer to?

Q. Do you know of the sale of the Cullis and

Lewis property? A. Yes, sir.

Q. Do you know of the sale of the Hicks' property? A. Yes, sir.

Q. Do you know of the sale of the Christiansen property? A. Yes, sir.

Q. In no one of these cases was $500 a front foot paid for the first one hundred feet, was it? A. In my opinion, it was for the Cullis and Lewis property.

Q. But, as a matter of fact, the total depth sold to Cullis and Lewis was 190 odd feet, is that correct? A. I believe that is correct.

Q. What was the price paid for that property? A. $21,500.

Q. Then, Mr. Hood's information was wrong, so far as your information is concerned? A. I don't know anything about his information.

Q. The actual price was $21,500 paid for the Cullis and Lewis property? A. That is my understanding.

Q. That is for the entire depth? A. That is my understanding.

Q. And that included the building?. A. Yes.

Q. The frontage of the Cullis and Lewis property was 31.38 feet? A. Yes, sir.

Q. There are some rights in the alleyway adjoining? A. Yes, sir.

Q. That purchase was made in 1924? A. Yes.

Q. That is the same year as that in which this building line was changed? A. Yes.

Q. That price paid for that property in 1924 does not show a value of $500 a front foot for the first one hundred feet, does it? A. Well, that all depends on how you look at it. In my opinion, it does.

Q. It can't, can it? If the price paid were $21,

500 for 190 feet depth and the frontage was 31.38 feet, and the same rights in the alley, and the purchase price included the value of the building, how can you possibly say that that sale shows a value of $500 a front foot for the first one hundred feet of land, regardless of the building? A. If you take $500 a front foot for your 31 feet, it cost you $15,000.

Q. Suppose you took $500 a front foot for the first one hundred feet of the Cullis and Lewis property, you would have $15,000 for that land alone, would you not? A. Yes, sir.

Q. How much would you have to add to that to determine the value of the land in the rear? A. Your value of the land in the rear in the Cullis and Lewis property is very small, because of the fact that it has got a narrow lot. He has not the opportunity to develop his lot in the same manner that the Duncan Hood propery can be developed.

Q. Isn't it obviously common sense to say that if $21,500 were paid for a piece of property about thirty-one feet wide, that property having a building on it, that the value of the land alone in that property, as shown by the sale, was not $500 a front foot for the first one hundred feet? A. I can't agree with you on that. I think the value is in the front one hundred feet.

Q. You are a real estate man? A. Yes, sir.

Q. Suppose you were asked, after having been given the size of a piece of property and the price paid for it, what that price showed the value of the property to be per front foot, would you not divide the purchase price by the number of front feet? A. Not always so.

Q. How else can you determine the value per front foot? A. Well, there are a great many things

that enter into the value of the front foot of a piece of property, and it might be purchased—

Q. I am speaking of the value as shown by a sale. A. It might be purchased with a thousand feet in depth.

Q. If it had a thousand feet in depth, and there was a certain price paid for it, the price per square foot would be the price paid divided by the one thousand? A. Yes, that would be what he paid for it.

Q. So that what Cullis paid for their property was less than $500 a front foot for the first one hundred feet? A. No; if you are taking it on the basis that you are taking, you have to divide your number of front feet into his total price, and you will get over $500 a front foot.

Q. But it would not be $500 a front foot for the first one hundred feet? A. It would be $700 a front foot for the whole thing.

Q. There is a rule by which you can determine the value of the first one hundred feet in a sale of that kind, is there not? A. I believe there are such rules.

Q. Haven't you heard of a rule called the Davis rule? A. Yes, sir.

Q. And by that rule, where you have the sale of a lot more than one hundred feet in depth, and the purchase price paid for it, you can determine the value of the first one hundred feet as shown by the sale? A. I think your Davis rule will more particularly determine the value of the rear rather than the front.

Q. It works both ways, does it not? A. I don't think so.

Q. Are you sure? A. I don't think so. I think it is applied to the rear.

Q. Isn't it a fact that, where you have a lot two hundred feet in depth, the rear one hundred feet is presumed to have a value of one-third as much as the front portion? A. Will you say that again, please?

(The stenographer read the last question.) A. Under some conditions that would be true; under other conditions I would not consider it would be true.

Q. You did not attempt to apply the rule in this case? A. I haven't applied any rule. I am applying my own knowledge.

Q. On what did you base your valuation of $500 a front foot for the first one hundred feet of the Hood property and the Cullis and Lewis property? A. On the sales of property and the demand for property at that time.

Q. Up to December, 1924, there had not been a sale of any property in Springfield Avenue between Woodland Avenue and Kent Place Boulevard for as much as $500 a front foot for the first one hundred feet? A. With the exception of the Cullis and Lewis property.

Q. But there had been other sales for very much less? A. Yes, sir.

Q. You paid no attention to those other sales? A. I did.

Q. You know, of course, that on the opposite side of Springfield Avenue from the Duncan Hood and Cullis and Lewis properties there was a sale of vacant land to the Murphy sisters at $200 a front foot? A. Yes.

Q. And that sale was in 1923? A. Yes.

Q. In January 1923? A. Yes.

Q. You knew, also, that the Christiansen property on the corner of Kent Place Boulevard was

sold in November, 1924, for approximately $309 a front foot? A. It was sold for $24,000.

Q. There were forty-two feet of frontage? A. That is about correct.

Q. That made about $309 a front foot? A. Yes.

Q. You also knew that the Hicks property had been sold to Walter in April, 1925, for approximately $352 a front foot? A. About $450 a front foot.

Q. Including the building? A. Including the building, which was worth practically nothing.

Q. But it had a value? A. I would not give it any value.

Q. It had some value? A. The sale was made on the basis of land value, not of any building value.

Q. Did you make the sale? A. I did.

Q. The building, that was on the Hicks property, had a store on the ground floor and some apartments up above? A. Yes, sir.

Q. And it was occupied for store purposes? A. Yes.

Q. So that you could not say that that building had no value? A. I would consider that the building had practically no value as a building. It was a very old building, in a very bad state of repair.

Q. Nevertheless, it could be rented, and somebody would occupy it? A. Yes, somebody occupied it.

Q. And therefore, it had a value? A. A value so long as it lasted.

Q. These three properties I have mentioned, the property sold to the Murphy sisters, the Christiansen property, and the Hicks property, all had a depth of more than one hundred feet? A. Yes.

Q. They all averaged between 180 and 200 feet in

depth? A. I don't think that would be true of the Christiansen property.

Q. But the other two were certainly over 200 feet in depth? A. Yes.

Q. And the price per front foot paid for them was for the entire depth? A. Yes.

Q. You also knew of the sale of property to the Taylor Construction Company, directly opposite the Cullis and Lewis property, in August, 1924, for approximately $251 a front foot, did you not? A. I think you are wrong on that figure.

Q. What was your information of the front foot price paid for that property? A. I sold that property to the Taylor Construction Company in December 1924, for $35,000.

Q. What price was that per front foot? A. That would be figured about $280 a front foot.

Q. What was the depth of that property from Springfield Avenue? A. One hundred feet.

Q. Is that the depth in the entire rear line? A. That was approximately the same. There may have been one or two feet difference in the line.

Q. That was $280 a front foot, according to your computation? A. Yes.

Q. In 1924? A. Yes.

Q. Don't those sales show that the value of land on that block of Springfield Avenue in 1924 was less than $500 a front foot for the first one hundred feet? A. No; as I remember the particular circumstances in connection with the sale of the Hicks property to Walter and the sale of the Breed property to Taylor, I don't consider that they established the value of that land, because they were both properties that were sold under peculiar circumstances. They were very anxious to get rid of them, and they were sold at a figure which I consider far below the market.

Q. How long had they been on the market? A. The Breed property was in my office, I should say, about a month to six weeks from the time it was listed until it was sold.

Q. Do you know whether it had been listed with anybody else before that? A. I do not.

Q. Have you any knowledge as to whether that property was for sale before it was given to you to sell? A. I don't know.

Q. For how long a time was the Hicks property on the market? A. The Hicks property was not in my hands for a very much longer time, not any longer than that.

Q. Was it in anybody else's hands? A. Not to my knowledge.

Q. You say it had not been in anybody else's hands? A. Not to my knowledge.

Q. You have no knowledge one way or the other, is that what you mean? A. That is what I mean, certainly.

Q. What would you say was the average price per front foot paid for the various properties along Springfield Avenue, along the southerly side of Springfield Avenue between Woodland Avenue and Kent Place Boulevard? A. I haven't valued that.

Q. You made no attempt to do that? A. No.

Q. So that you could not say, and you have not arrived at any opinion as to the average value per front foot for land along the southerly side of Springfield Avenue between Woodland Avenue and Kent Place Boulevard? A. No, sir, because there are lands along in that section that differ very materially in value.

Q. You say that in arriving at an opinion as to the damage to the Cullis and Lewis property and the Hood property, because of the establishment of

the building line, you valued the land and the 6.7 foot strip at $7.24 a square foot? A. $7.50 a square foot, I think I said.

Q. 724 square feet at $7.50 a square foot? A. Yes.

Q. There is 108 feet of frontage in the Hood property? A. Yes, sir.

Q. And multiplying that by the depth of 6.7 feet makes 724 square feet? A. 724 square feet in that strip.

Q. At what rate per square foot did you value that property in arriving at your estimate of damages? A. $7.50 per square foot on that front piece.

Q. And the entire one hundred feet in depth of the Hood property would contain 10,800 square feet, is that right? A. Yes, sir.

Q. —which you valued at $100,000? A. With the building.

Q. That is approximately ten dollars a square foot? A. Yes, sir.

Q. The reason you put a value of $7.50 per square foot on the strip was through the application of some rule? A. The application of a rule of mine.

Q. Nothing else? A. No.

Q. It was an arbitrary figure? A. The figure arrived at in the best of my judgment.

Q. But it is your own judgment? A. Yes, that is.

Q. You cannot explain to the jury any scientific formula by which that was done? A. The formula that—

The Court: He has repeatedly said that he has given his information upon his own knowledge and experience and has not followed any rule.

Q. Did you apply the Hoffman rule? A. No.

The Court: He has said repeatedly that he applied no rule.

Q. In putting that value of $7.50 a square foot on the strip, did you assume that that bit was being taken away from Mr. Hood? A. I assumed that all use, so far as Hood is concerned, is being taken away from him.

Q. All use? A. Yes.

Q. That is, he was being deprived of the land himself? A. Yes, sir.

Q. You also said, in arriving at your estimate of damage, you applied eleven per cent. to your valuation of the Hood property? A. Yes, sir.

Q. To what valuation, in figures, were those percentages applied? A. In the case of Duncan Hood Corporation, $100,000 value; in the case of Cullis and Lewis, $30,000 value.

Q. How did you arrive at those percentages? Through a mere matter of judgment? A. A matter of judgment.

Q. Were those percentages applied by reason of the fact that Mr. Hood and Cullis and Lewis could not build out in front of their property beyond the new building line? A. They were applied because the property had been set back.

Q. There had been no physical setting back? The property is now where it has always been? A. Yes, but applied because they are compelled to keep on the line in which their building is now located.

Q. And because they are prevented from building out? A. Absolutely.

Q. In applying a value of $7.50 per square foot to the land and the strip, did you not also consider that, by taking that strip—assuming that it has been taken—Mr. Hood and Cullis and Lewis were prevented from building out? A. No, sir, I took

the value of the land.

Q. What value did the land have, except for the purpose of building out? A. The value of ownership that anybody would have in land.

Q. Yes, but the only value was the use that could be made of it for the purpose of extending the building? A. Very true.

Q. And the damage because of the deprivation of that use is your damage of $7.50 a square foot? A. The damage—my first figure is not the damage. My first figure is the value of the property; my second figure is the damage to the remainder of the property.

Q. Because Hood has suffered by reason of the restriction in the use of that 6.7 feet strip? A. The strip has been taken away from him, and he is not allowed to use it for any purposes whatever.

Q. Why do you say that? A. Well, I can't quite see any purpose that he can use it for. It has been taken into sidewalk.

Q. As a real estate man, you, of course, know what the building line is? A. Yes, sir.

Q. You know that, when a building line is established, the owner of the property upon which the building line is established owns the land in front of the building line? A. Very true.

Q. And he can use that land in front of the building line for any purpose, except to put a permanent building upon it? A. He can't put anything on that sidewalk, under the ordinance of the City of Summit.

Q. I am talking about the building line. A. Very true.

Q. Disregard the sidewalks. After the building line has been established, the owner of the property can use the land in front of the building line

for every purpose except to put a permanent building upon it? A. No, sir, he cannot.

Q. After the building line is established, the owner can use the land in front of the building line for lawns, trees, gardens, or for putting anything he chooses upon it, except a permanent building? A. That is true in the case where the property sets back of the sidewalk. Your building line is your sidewalk line.

Q. Do you understand that the question in this case is the damage created by a building line? A. Yes, sir.

Q. And not by any changes of sidewalk or curb? A. Yes, when I speak of sidewalk, I speak of the inside line of the sidewalk.

Q. We are not talking about sidewalks in this case; we are talking about the building line. A. It is the inside line of your sidewalk. It is absolutely coincidental.

The Court: I don't understand you, Mr. Bain.

Mr. Bain: Your Honor, this proceeding was merely for the establishment of a building line in front of this property and other properties along Springfield Avenue. This procedure did not involve any widening of Springfield Avenue. It did not involve any narrowing of sidewalks. As your Honor will observe from the ordinance, it involved only one thing, and that was the establishment of a building line. I am informed that the proceedings for the widening of the street and for the changing of the curbline were separate and distinct from this proceeding. Those proceedings have been completed, and assessments have been made for them, and

they are completed. What we are considering now is merely the damage and the benefits from the building line, and, as I said before, that building line is not a property line. It is not a sidewalk line. It is a line placed in a man's property, beyond which he cannot put a permanent structure. That is all we are dealing with here, just that building line and nothing else. The question is: How have these properties been damaged and how have they been benefited, and to what extent, by the establishment of that building line? The property owners still own the fee to the land between the building line and the old property line.

The Court: What good is the fee to that?

Mr. Bain: If the City have not acquired the right to use that land between the present building line and the old property line, they can eject the City. They can put them out, but that has nothing to do with this case.

The Court: It has everything to do with this case, and I have been surprised at this line of questioning to this witness. When they establish a building line, you can't put your building beyond that line?

Mr. Bain: No.

The Court: The practical effect of the establishment of the building line here is what is shown on that map.

Mr. Bain: Of course, there is this other element; the fact that that condition with respect to the sidewalk has existed for a great many years. That has not been changed.

The Court: What has not been changed?

Mr. Bain: The relationship of the sidewalk to the fronts of the building.

The Court: The relationship of the curb has been changed.

Mr. Bain: The curb has been put back, but in another proceeding.

The Court: It does not make any difference whether it was in another proceeding. The question is: What is the practical effect upon this property by the establishment of the building line? You can not get the practical effects, so far as the question of damages or benefits is concerned, unless you know what the condition of the street itself will be after the establishment of the building line. This witness, in his opinions on direct-examination, was never asked whether there was any benefit. He was simply asked what damages there were, and it is a question for the jury to pass upon not only the damages, but also the benefits that may have been derived from the establishment of this building line. It seems to me that it is very technical to say that you simply established a building line and do not take the fee. Whether you take the fee or not, the question is: What is the practical effect upon the owner of this property? When that building line is established, as it is here, then the effect is that, in order to have a ten foot sidewalk, he cannot go beyond that building line, because the curb line is there. That is the position I am going to take in charging the jury, and that is why I interrupted now, so that you may understand it. Proceed.

By Mr. Bain: Q. Ordinarily, the establishment of

a building line is of benefit to the property, is it not? A. In some cases I think it is, and in other cases I think it is a detriment.

Q. Why, ordinarily, would the establishment of a building line be of benefit?

Mr. Stallman: I object to that. The witness did not say it would ordinarily be a benefit.

Q. For whose purpose is a building line established, with respect to the property? A. For many purposes. In this particular case—

Q. No, not this particular case; generally. A. Well, to keep buildings back a certain distance from the street.

Q. And to widen the street, to make the space between the front of the building on both sides wider than it would be if those buildings were built out to the property line? A. Some times that would be true. The street would not be changed, but the building line would be set back.

Q. In this case? A. In this case it has worked as a damage, because the building line—

By the Court: Q. How about the width of the street? A. In this case it widened the street in this particular spot.

Q. It did in other spots, too, did it not, to the east? A. This is the building line here (indicating), along through here. Now, the building line at this point—

Q. You said it only widened at this particular spot. Didn't it widen Springfield Avenue, too? A. Not as much.

Q. Springfield Avenue is 42.40 feet east of this property, but still the easterly side was widened some? A. Yes.

Q. Do you know about how much? A. My recol-

lection is about six feet.

Q. About how much is the street widened in front of this property? A. About seventeen feet.

Q. As compared to what it was before the present curb line was established? A. Yes, sir.

By Mr. Bain: Q. Do you know that it is a benefit to the property to have a building line established for the purpose of preventing one building from being built out, and if that building is built out, the other ones would be compelled to come out to meet it? A. It is a benefit if you establish a straight building line.

Q. Between Mr. Hood's property and Kent Place Boulevard the building line is straight? A. Just to Kent Place Boulevard, and then it jogs out again.

Q. But between Woodland Avenue and Kent Place Boulevard the building line on Mr. Hood's side is straight? A. Yes, sir.

Q. The establishment of the building line prevents the owner of the property to the west of Cullis and Lewis from extending their building out, and thereby compel Cullis and Lewis to build out?

Mr. Stallman: Objection.

A. It is clearly apparent that the establishment of the building line prevents anybody from building their building out beyond the building line.

Q. And thereby compel other owners to build out to meet them, which is a benefit, is it not?

The Court: Does it compel them? Does he admit that it compels them?

A. I don't admit that it compels anybody to build out.

By the Court: Q. Practically, it means something of a benefit? Isn't that the practical result?

A. It would naturally result in the building out of the buildings, yes, sir.

By Mr. Bain: Q. What would result in the building out?

By the Court: Q. If one builds out, the other builds out? A. Yes.

By Mr. Bain: Q. Now the establishment of a building line prevents that, and it is therefore a benefit? A. Not in this particular case, because the building line has not been established straight, and, consequently, has allowed other buildings to remain out in front of this building.

Q. In view of the present conditions of the building, and the condition in which they were on December 2, 1924, if the building to the west of the Cullis and Lewis property had been extended out, Cullis and Lewis would have had to extend their building out to meet the other extended building? A. They would not have had to. That building has extended out for years ahead of the Cullis and Lewis building, and they have not extended out.

Q. Therefore, the jog created by the irregularity of this building line caused no damage to the property? A. It caused a damage to the property, because you have said now that they cannot build out.

Q. Your distinction is between an actual, existing, irregular line and a technical line beyond which nobody can build? A. My distinction is between the privilege of a man to use his property and the taking away of that property.

Q. And the actual use? A. The actual use or ownership.

Q. It is a matter of fact that the fronts of the buildings along Springfield Avenue between Woodland Avenue and Kent Place Boulevard were irregular before the establishment of a building line? A. They were irregular.

Q. And that condition had existed for a great many years? A. Yes, sir.

Q. Without any damage to the property? A. Yes, sir.

Mr. Bain: That is all.

HERMAN F. BECK, a witness called on behalf of the owners, being first duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Stallman:

Q. Do you reside in Summit, Mr. Beck? A. I do.

Q. What is your business? A. Real estate.

Q. How long have you been in the real estate business? A. Close to ten years.

Q. How long have you lived in Summit? A. About the same time.

Q. Have you bought and sold real estate in Summit as a real estate agent? A. I have.

Q. Are you familiar with the value of properties on the south side of Springfield Avenue, and were you familiar with those values in the year 1924? A. I am and was, yes.

Q. Do you know where the building line has been established on the south side of that street? A. I do.

Q. In your judgment, has the establishment of that building line resulted in a benefit or a damage to the properties of the Duncan Hood Corporation and Cullis and Lewis? A. A damage.

Q. What, in your opinion, does the damage amount to, in money? A. The total I found for the Duncan Hood, $13,844, and for Cullis and Lewis, $3,390.

Q. How did you arrive at those figures? A. In the first place, I took the land figuring approximately—of course, this was an arbitrary figure—at 125 feet depth, and found that there were approximately 13,500 square feet. I figured the front of this worth approximately six dollars a square foot, which would give 724 square feet, the amount taken by the City of Summit, $4,344 for the land taken. I figured the consequential damage of from twelve to seven per cent., which should make approximately nine and one-half on the Hood property, because of the fact that the land was set back the jog there, of $9,500, which would give a total of $13,844 in this. In the Cullis and Lewis property I took approximately the same figures, excepting that I give them a damage of seven per cent., because they were not in the immediate line of the jog, which would give them $2,100 for the damages and $1,290 for the amount of land taken, or a total of $3,390.

Q. That is, you figured the area in front of the Cullis and Lewis property also at $6.00 a square foot? A. Yes, sir.

Q. Which made $1,290, and $2,100 as consequential damages? A. Right.

Q. Do you think that those figures, $13,844, and $3,390, respectively, fairly represent the difference in the market value of that land in 1924, as a result of the establishment of the building line? A. I certainly do.

Q. Do you base those figures upon your experience and judgment as a real estate man? A. I do.

Mr. Stallman: Cross-examine.

CROSS-EXAMINATION by Mr. Bain:

Q. At what rate per front foot did you value the first 125 feet of depth of the Cullis and Lewis prop-

erty and the Hood property? A. At $500.

Q. A depth of 125 feet? A. I have arbitrarily made it 125 feet.

Q. Why did you arbitrarily make it 125 feet? A. Because I felt that the land there would run approximately that on a basis of the piece used for the frontage value.

Q. Isn't the standard lot 100 feet in depth? A. The standard lot accepted by experts in your largest cities, yes.

Q. Generally speaking, the standard lot, taking it as a unit for valuation purposes, is 25 feet by 100 feet depth? A. Yes.

Q. And any additional width is calculated according to that basis? A. Yes.

Q. So that you departed from the ordinary rule in taking 125 feet of depth? A. I did.

Q. What was your total valuation of that portion of the Hood property having a frontage of 105 feet and a depth of 125 feet? A. The land?

Q. Yes. A. $54,000.

Q. The property sold by Hicks to Walter just west of the Cullis and Lewis property brought very much less than $500 a front foot for the first 125 feet? A. Not so much.

Q. Well, that property was sold in 1925 for $31,000? A. Yes.

Q. And the total frontage was approximately 73 feet? A. Yes.

Q. And the total depth was 190 odd feet? A. No, I don't think the total depth averaged more than 155 to 160 feet.

Q. It was certainly over one hundred feet? A. The westerly side was, I think, 152 feet, and the easterly side was somewhat deeper.

Q. But, in any event, the depth of that property

was more than 100 or 125 feet? A. Yes.

Q. And the price paid, of course, was for the entire property having that depth? A. Right.

Q. There was a building on that property? A. Yes.

Q. The price paid for that property sold by Hicks to Walter in 1925 was less than $500 per front foot for the entire depth? A. Yes.

Q. That is true? A. Yes.

Q. That certainly does not show a value of $500 a front foot for the first 125 feet? A. No, it does not.

Q. The price paid for the Christiansen property on Springfield Avenue and the corner of Kent Place Boulevard does not show a value of $500 per front foot for the first 125 feet? A. No.

Q. The price paid for the property purchased by the Murphy Sisters on the opposite side of Springfield Avenue in January, 1923, does not show a value of $500 per front foot for the first 125 feet? A. It does not.

Q. Those sales that I have mentioned show a value of less than $500 a front foot for the first 125 feet? A. They do, yes.

Q. So, also, does the sale of the property on Springfield Avenue opposite the Hood property, that is, the sale to the Taylor Construction Company in 1924? A. Yes, sir.

Q. That shows a value of less than $500 a front foot for the first 125 feet? A. It does. By the way, that ran only 100 feet.

Q. But, assuming that it had 100 feet, it shows a value of less than $500 a front foot for the first 125 feet? A. Yes.

Q. How did you arrive at a percentage of twelve per cent. for consequential damage to the Hood

property? A. It was an arbitrary figure I took, based upon my knowledge of real estate and real estate values, and what I considered the loss in revenue on a very conservative basis would be to the owners, as a result of the property being set back from the property line as it extended into the busier and better part of Springfield Avenue.

Q. You valued the land alone a depth of 125 feet in the Hood property at $54,000? A. I did.

Q. What do you think that building on that land was worth? A. I figured the building at $46,000 approximately. That is, the main building.

Q. So the total is about $100,000? A. Yes.

Q. You knew that Mr. Hood paid $42,500 for that property and the property in the rear in 1922? A. I sold it to him; I should know.

Q. You sold it to him? A. Yes, our firm did, at least.

By the Court: Q. Why did you make that jump on that estimate? A. I happened to know that the owner was extremely anxious to dispose of that property. They needed the cash, and the building was in terrible condition. Mr. Hood had to spend a lot of money on it to increase his rentals. Nothing had been done on it, and it was sold way below the real value.

Q. You made your estimate on that property, in your judgment, after these considerable changes and improvements had been made? A. Not altogether.

Q. I know not altogether, but you just said that the reason why you made the difference between what you sold to Mr. Hood for and your $100,000 was because the parties that sold were in much need to sell, and because the property was in a bad condition, and Mr. Hood had to make a great deal of

improvements and changes? A. Yes, sir.

Q. So you took those two elements into consideration—A. I did.

Q. —in figuring your estimate of $100,000 as compared with what he had paid a year before, or two years before, $42,500? A. That and the additional values as a result of the increased demand for land.

By Mr. Bain: Q. Do you believe that the Hood building was worth much more on December 2, 1924, than it was at the time it was purchased by the Hood Company? A. Yes.

Q. How much more value would you think the Hood building had in 1924 than at the time it was purchased by the Hood Company? A. I might qualify by saying, in the first place, that he bought it very cheaply, and he had already made some improvements. I would add approximately fifty per cent. valuation to it.

By the Court: Q. He said he put $50,000 on it? A. Approximately.

By Mr. Bain: Q. What, in your opinion, was the value of the Hood building at the time he bought it? A. Based upon the percentage and the increase I guess it would run into $30,000.

Q. It was worth $30,000 at the time he bought it? A. Yes.

Q. And he spent $50,000 on it? A. Not on the building alone; on his entire property. Some of that is on real property.

Q. Do you know how much he spent on that building, on all of the buildings on the property? With respect to all the buildings on the property, what, in your opinion, were they worth at the time that Hood bought the property? A. That is a rather difficult question, because I think the real property was worth very little. No barn on it.

Q. What is the value of the buildings? A. I can't answer that.

Q. Do you know how much Mr. Hood spent on the main building and front where the stores and apartments are? A. Just in a rough way. I haven't asked him. I estimated—

Mr. Stallman: I think counsel ought to specify the time, whether it is before or after 1924.

The Court: Before or after the time he places his estimate.

By Mr. Bain: Q. Up to the time you based your estimate, do you know how much Mr. Hood had spent on the main building, on the front portion of the property? A. Roughly, I should judge about ten or twelve thousand dollars.

Q. If he spent $50,000 on the whole property, he must have spent $40,000 on some other building? A. He had not completed his improvements in the building then.

Q. When did you make your appraisal and examination? A. I was over the property a number of times. I examined it at the time—

Q. When did you make the final valuation? A. For this purpose?

Q. Yes. A. I haven't the figures here, but about a year or a year and a half ago.

Q. At that time had all the improvements been made? A. They had, except some store fronts.

Q. Do you know up to that time how much Hood had spent on the main building? A. I gather about eighteen or twenty thousand dollars, probably twenty thousand dollars total.

Q. Assuming that he spent $50,000 on the whole property, he must have spent $32,000 on the rest. What did he do, to your knowledge, to the other

buildings? A. He made considerable changes in the barns, and he added a new building in the rear, which is used for a garage and paint shed.

Mr. Bain: That is all.

DAVID S. WALTER, a witness called on behalf of the property owners, being first duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Stallman:

Q. Mr. Walter, do you reside in Summit? A. Yes, sir.

Q. How long have you lived there? A. Almost forty years.

Q. What experience have you had in buying or selling or handling real estate in Summit? A. I have bought and sold several parcels.

Q. Have you bought and sold property on Springfield Avenue? A. Yes, sir.

Q. Are you the Mr. Walter who has been mentioned in the testimony as being the owner of one of these lots on Springfield Avenue? A. One of these parcels, yes.

Q. What property do you now own on Springfield Avenue? A. I own the one I have my business in, two next door, one parcel lot across the street, one parcel, oblong at an angle, and one down the corner of Highland Avenue and Springfield Avenue.

Q. Then, you own four or five lots or parcels of land on Springfield Avenue at the present time? A. Yes.

Q. Do you know where the building line has been established on the south side of Springfield Avenue?

A. Where the present buildings are now? A. Yes.

Q. In your judgment, has the establishment of that building line resulted in a benefit or a damage to the property of the Duncan Hood Corporation and Cullis and Lewis? A. A damage.

Q. What, in your judgment, does the damage amount to? A. I would say $300 a front foot.

Q. Why do you estimate it at that figure? A. Because I base mine where I am located in my business about a thousand dollars a foot at that time, and on account of the in-set there, I feel that it has been damaged to the amount of $300 a foot.

Q. Do you base that upon your experience in buying and selling real estate along that street?

Mr. Bain: I object. That question is so leading.

A. Yes, I do.

Q. Have you computed that detriment or damage into money? A. Approximately.

Q. What is your judgment of the amount of the damage? A. In the case of the Duncan Hood property, which has a frontage of 108 feet and a depth connected with the frontage used of about 125 feet —do you want the value in 1924?

Q. Yes. A. I figured the value in 1924 was worth about $500 a front foot.

Q. What do you estimate the damage to be? A. By reason of the establishment of the building line?

Q. Yes. A. Aside from the value of the property between the established building line and the property line of the property, the front street line of the property—

Q. Did you place a separate value on the strip? A. The value of the strip, in my opinion, would be about fifty per cent. more than the average value

per square foot for the strip 125 feet deep.

Q. Roughly speaking, that would be about four dollars a square foot plus fifty per cent., six dollars a square foot? A. If the average value of the strip 125 feet figures $4.00 a foot, I should say that the strip between the establishment of the building line and the front line of the property would be worth six dollars a square foot.

Q. 125 feet deep, 125 square feet multiplied by four would give you $500? A. Yes.

Q. And that is what you estimate the value of that land at that time, $500 a front foot? A. That's about it, yes.

Q. Or four dollars a square foot? A. Yes.

Q. Or six dollars a square foot for the area involved in this proceeding? A. Yes.

Q. So, we are clear on that? A. Yes.

Q. You say you figured some consequential damage in addition to that?

Mr. Bain: I object to that.

Mr. Stallman: I will withdraw the question.

Q. Did you figure anything in addition to the bare land value? A. In my opinion, there is a damage which the balance of the property has suffered by reason of the establishment of that building line, varying in its length. It is greater on the eastern end than it is on the western end. I should say perhaps ten per cent. of the value of the building, of the property.

Q. Is that an average? A. That would be an average, yes.

Q. And on what value would you apply that average of ten per cent.? A. I would apply that to the value of the 108 feet by 125 feet deep, with the building on it as it stood in 1924.

Q. What was the amount of that value to which you would apply that percentage? A. The value would be, in my opinion, about between $90,000 and $100,000.

Q. So, in addition to the six dollars a square foot, you would add nine to ten thousand dollars by way of damages? A. If it figures—yes, about that.

The Court: I don't think that can be based on it. I will strike it out if you object.

Mr. Bain: I object to the question.

The Court: Strike it out. Objection sustained.

Mr. Stallman: Exception.

CROSS-EXAMINATION by Mr. Bain:

Q. You are a butcher, are you not? A. Yes.

Q. You have been in the butcher business for years? A. Yes, sir.

Q. You are also a director in Mr. Hood's bank? A. Yes, sir, but I am not favoring him on this property proposition because I am a director in the bank.

Q. How long have you been in the butcher business? A. All my life.

Q. You never did anything else? That is your business? A. Yes, sir.

Q. In arriving at an estimated damage of $300 a front foot, because of the establishment of this building line, what valuation did you place on the entire Hood property per front foot? A. Well, I claim if you can stay out with a line of my other property, I feel it would be worth a thousand dollars at that time.

Q. How much did you value the whole Hood property at? A. That I couldn't say.

Q. And the same thing applies to Cullis and Lewis? A. Yes.

Mr. Bain: That is all.

ARTHUR W. HICKS, a witness called on behalf of the property owners, being first duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Stallman:

Q. Judge, do you live in Summit? A. I do.

Q. How long have you lived there? A. All my life, practically, a little under sixty years, if you want it exact.

Q. What experience have you had in handling real estate? A. I was active in the real estate business for about thirty-five years.

Q. You are the pioneer real estate agent of Summit, are you not? A. I am no longer active.

Q. Have you bought and sold real estate in Summit? A. For myself and for others.

Q. Are you familiar with the value of properties along Springfield Avenue? A. I think so.

Q. Are you the Mr. Hicks who has been mentioned as being a party to some of these trades that have been testified to? A. I have been in business all my business life with my brother, in partnership and the property in question, that has been mentioned here, was in his title, stood in his name, but I had absolute control of it under a power of attorney.

Q. Do you consider that the establishment of this building line has resulted in a benefit or a damage to the properties of the Duncan Hood Corporation and Cullis and Lewis? A. I consider that it has resulted in a detriment, a damage.

Mr. Stallman: Cross-examine.

CROSS-EXAMINATION by Mr. Bain:

Q. Do you value the land in the front 125 feet of the Hicks property at $500 a front foot or $4.00 a square foot? A. I didn't say so. I made no estimate of the value of the land on the Hicks property.

Q. Then I misunderstood you. I thought you said, in answer to a question by Mr. Stallman, that you valued the land in the first 125 feet of depth of the Hood property at $500 a front foot or four dollars a square foot, is that correct? A. That applies to the Hood and the Cullis and Lewis property.

Q. Then, you did value the land in the first 125 feet of depth of the Hood property and the Cullis and Lewis property at four dollars a square foot? A. Approximately, yes.

Q. You valued the land in the 6.7 feet strip in front of the Hood property and in front of the Cullis and Lewis property at six dollars a square foot? A. That is, fifty per cent. more.

Q. And that fifty per cent. you added for consequential damage? A. I didn't say so.

Q. Didn't you? A. No.

Q. What did you do it for? A. Because I said that the front 6.5 feet or 7 feet, whatever it is, was worth fifty per cent. more in value than the average value of the entire strip 125 feet deep.

Q. You have been in the real estate business for a long while, have you not? A. I stated the time, about thirty-five years.

Q. Is there any rule recognized by the real estate men in general—A. There is no—

Mr. Bain: Just a minute.

Q. —for the determination of the value of a front portion of a piece of property, of a strip across the front portion, in the way you have determined it? A. I know of no rule which is used by the purchaser, aside from corporations, railroads, and municipalities, in determining the value of a portion of a piece of property. The purchaser has not a mind for technical rules.

Q. There are, however, two rules recognized by real estate men for the purpose of determining the value of the front portions of standard lots of 25 feet by 100 feet? A. In some sections, yes.

Q. They are rules that are now generally applied throughout the country, and they are known as the Hoffman rule and the Davis rule, is that right? A. Yes.

Q. You didn't use either one of those rules? A. No.

Q. But you used a method entirely your own, without regard to those rules? A. That is correct.

Q. At four dollars a square foot, the value of the 6.7 feet strip would be how much, in your opinion? A. Well, that is a question of multiplication.

Q. You have done the multiplication? A. Not recently.

Q. Did you ever do it? A. I learned to do it in school.

Q. But you didn't use your knowledge that you got in school for the purpose of valuing these properties? A. Not this morning. I haven't any notes.

Q. As a matter of fact, you haven't got with you at the present time, and you can't state without going through multiplication what your total valuation of this 6.7 feet strip was? A. No, I didn't burden my memory with that.

Q. You merely carried in your mind the square

foot values? A. Yes.

Q. I am a little curious about this addition of fifty per cent for a front 6.7 feet piece of property 125 feet in depth. Is there any way that you can tell the jury how that is a common sense method of calculation? A. Well, I think it is a self-evident fact that the front of a lot is worth more than the rear of a lot.

Q. Yes, but how do you make it fifty per cent for 6.7 feet? A. That is based on my judgment, formed on my experience. That is the best answer I can give you to that question.

Q. In arriving at your estimate of the damage to the two properties by the establishment of the building line, you assumed that the 6.7 feet wide strip was being taken away from these two owners, did you not? A. I assumed that the use of the strip, approximately seven feet wide, was being taken away from the owners.

Q. But, to determine the value of that use, you used the actual entire value of the fee? A. Yes, sir.

Q. And, therefore, you assumed that the fee was being taken away? A. I didn't assume that anything was being taken away. I was asked to give the value of that strip, of the fee of that strip.

Q. You assumed that the owner had nothing of the fee or none of the interest in the fee left? A. Yes.

Q. You gave him an allowance for the full value of the fee? A. I was placing a value on the fee.

Q. Does that apply to both properties? A. Yes.

Q. Your valuation of the strip, your allowance for damages, your allowance for damage because of the restricted usefulness of the strip 6.7 feet wide, included damage because the owner could not ex-

tend the building over that strip, is that correct? A. Because he had to accept the front of the building for all time as it is now, unless they change the ordinance.

Q. In arriving at the estimate of damage, based on a valuation of six dollars a square foot for the land in the 6.7 feet strip, you made an allowance for the damage sustained by the owners because they could not extend their building over that land? A. I didn't say so.

Q. Didn't you? A. No.

Q. What else was this fifty per cent for? A. As I explained before, the frontage of a lot, the front part of a lot, is worth more in proportion than the average value for the whole lot.

Q. And if you pay an owner for having taken the first six or seven feet depth of his property according to some percentage added to the value of the property, you have paid him for every interest that he had in that property and every damage that he sustains by reason of the fact that he cannot use it? A. So far as the value of the property is concerned, yes.

Q. You did, however, determine that there was some additional percentage of damage to the other property by reason of the fact that the property could not be extended to the front over the 6.7 feet strip? A. No, you misunderstood me there. The point that I make as to what you might call the consequential damage is that the front of the structure that is there now must always remain on that line. The type and style of the front cannot be changed to meet modern ideas. If the building set back, we will say eighteen inches from the established building line, that would allow—as has been done in another section of Summit—the owner to

construct a new front, which would add greatly to the appearance of the building and the desirability of the building as a business center or business property.

Q. The inability of an owner to extend his building to the front is a damage to the building, is it not? A. Well, it is a damage to the owner of the building.

Q. But it is, with respect to the use of the building? A. The use of the property.

Q. No. The use of the building? A. In this case, to the use of the building, because the building is on the building line.

Q. If there has been any consequential damage in the case of the Hood property, that consequential damage has been to the building, is that correct? A. To the owner through the building.

Q. But with respect to the building itself? A. Yes.

Q. If you attempt to determine consequential damage by applying a percentage from any value, you ought to apply that percentage only to the value of the building? A. I disagree with you there.

Q. If you admit that the damage in this case has been to the building, and you make an allowance for the damage to the land separately from the damage to the building, which you have by giving the owners damages for the value of the land in the strip, the remaining damage is to the building, and any percentage that you apply ought to be applied to the value of the building and not the value of the other land? A. In determining the value of the building and its rental value, which is a factor in determining that value, you can't very well divide a rental of fifty dollars a month and say that forty-five dollars of this goes on the structure and five

dollars goes to the building. I am taking it as a whole, as it exists.

Q. You heard Mr. Hood testify? A. I was in the room during the time.

Q. Did you hear him testify with respect to rentals before and after the establishment of the building line? A. I didn't get the figures.

Q. Assuming that the rental figures of Mr. Hood indicate that he gets a greater gross rental from his property now than he did before the establishment of the building line, you would not say that rentals showed any decrease in value? A. In Mr. Hood's case, he has made a large expenditure there.

Q. But those expenditures would be used for the purpose of determining how much of the increased rental should be applied to the expenditures for improvement? A. Certainly.

Q. And even though that were done, according to Mr. Hood's figures, he still has obtained a greater gross rental than before?

Mr. Stallman: I object to that.

Mr. Bain: I want to get clear on this question of consequential damage.

Q. You have in this case two elements of damage; damage to the land, and damage to the building? A. Two elements of value; the value of the land taken, and the value of the damage to the remainder of the property.

Q. The first element that you stated is the damage to the land? A. The value of the land.

Q. And you make a distinction between damage and value, do you? A. Yes.

Q. And that distinction is because in this case, in your opinion, the land itself is being taken, and the land is not being really damaged, is that correct? A. Yes.

Q. Having first ascertained the value of the land that is being taken, and you do that by applying a certain value to the 6.7 strip, then you think there has been consequential damage to something else, is that right? A. A resultant or consequential damage.

Q. Is that something else the remaining land or is it the building? I should judge from your testimony that it was the building. Am I right? A. It is both.

Q. How much is applied to the building and how much to the land? A. I haven't figured that out. I suppose I could. It would depend on the relative value of the building and the land.

Q. That relative value would have to be known to apply your method? A. If you want to divide it, yes.

Q. The point is this: You applied, I think it was, ten per cent in the case of the Hood property— A. About ten per cent.

Q. —to the value of that property for consequential damages. Assuming that the building on the Hood property was worth so much, and the land was worth so much, you could not apply that ten per cent uniformly to both of them, could you? A. I don't know whether I quite get you. I may be dumb, but—

Q. Was there the same consequential damage to the remainder of the Hood land, after taking the 6.7 feet strip, as there was to his building? Was there the same percentage of damage? A. Approximately, yes.

Q. How do you know it? A. Well, there are lots of things that you know that you can't explain.

Q. And this is one of them? A. No, I think I can explain that, if it is of interest.

Mr. Stallman: I think it is immaterial.

Q. This ten per cent that you have applied to some valuation was something you merely took out of your own head, was it not? A. Yes, I have no notes or any other place to get it.

Q. It is without relation to any scientific formula or without any relation to any rule for the purpose of determining consequential damage? A. No, I haven't any use for that.

Q. You haven't any use for scientific formula? A. Yes, for some things.

Q. But not for the purpose of determining property values? A. Scientific formulae are of no interest to the purchaser of a piece of property, in my experience.

Q. You have got this thing entirely out of your own head? A. Yes.

The Court: He has said that.

Mr. Bain: I want to know what he means by saying that he has no use for scientific formula.

The Court: The only thing we are interested in is how he arrived at his result.

By Mr. Bain: Q. Can you explain, so the jury can understand, how you took a certain definite ten per cent of the value of only a portion of this property for the purpose of determining consequential damage? A. The factor, that I believe I used in the value of the entire property on which the ten per cent was based, was $100,000, as the value for the whole property. Am I correct in that?

Q. I don't know. Is that $100,000 for the first 125 feet or for the whole property? A. For the first 125 feet.

Q. Why did you take 125 feet instead of 100 feet? A. Because 125 feet is the depth that is necessary

to go with the building that is on that plot. The rear of the lot is used for other purposes and has a different value separate and apart from the frontage.

Q. But the standard depth of a lot generally recognized is one hundred feet? A. There is no standard depth of a lot recognized in Summit as between the buyer and seller. There is a minimum.

Q. That is one hundred feet? A. It depends upon what use the man can make of it.

Q. The standard minimum for most any use in most any part of the United States is one hundred feet? A. I take that statement as correct. I assume it is.

The Court: Why do you take up time with this?

The Witness: My ten per cent was on $100,000. If you place the value of your building at $75,000, or the value of your land at $54,000, the value of your building would be $46,000. Now, you can divide that, if you wish, as ten per cent on $54,000, or ten per cent on the $46,000.

Q. How did you divide it? A. I didn't divide it; I lumped it.

Mr. Bain: That is all.

CHESTER C. HENRY, recalled:

Direct-examination by Mr. Stallman:

Q. Mr. Henry, will you state to the jury your qualifications to testify regarding real estate values? A. In Summit?

Q. Yes. A. My first real estate operations there took place in 1903.

Q. Have you been engaged in buying and selling

real estate in Summit? A. I have been engaged exclusively for between four and five years. Before that, at periods.

Q. For the last twenty-five years you have been more or less engaged in the real estate business, is that what you mean? A. Yes.

Q. Do you know, from what experience you have had, what the value of property is on Springfield Avenue? A. I think I do.

Q. Do you know what that value was in 1924? A. I think I do.

Q. Do you know where the building line is established there? A. I do.

Q. In your judgment, has that building line resulted in a benefit or a damage to the property of the Duncan Hood Corporation and Cullis and Lewis? A. A damage.

Q. What is the amount of that damage, in your judgment? A. To the Duncan Hood property, $14,400; to the Cullis and Lewis property, $3,600.

Q. How did you arrive at those figures? A. By the damages that have been caused to that property because of the building line having been established in such a way that they are not able to build their properties out in line with the adjoining properties.

Q. I mean, what was your computation? A. I based it on the resistance to pedestrians passing the stores.

Q. No. Those are the elements. I want your computation. Was the $14,400, for instance, a mere figure that you gave it, or did you arrive at that by some computation? A. I arrived at it from the question of rental income.

Q. What method did you employ? A. I took the amount that the stores would bring, stores of that

size would bring built out compared with the other property, and the rent that they are compelled to rent them for now, and the difference there showed on the Duncan Hood property a difference of fourteen—

Mr. Bain: I object.

The Court: Objection sustained.

Q. Leave out the figures. What capitalization rate did you use on the difference in the rentals that you used? A. The percentage?

Q. Yes. A. Fifteen to twenty-five per cent. Fifteen per cent on the westerly stores, and twenty-five per cent on the easterly.

Q. You didn't get my question. At what rate did you capitalize your rental returns? A. Ten per cent.

Q. In arriving at your estimate before and after valuing the property, did you take a lot basis or a square foot basis? A. I took the front foot basis.

Q. What was the front foot basis that you took into consideration? A. As of what date?

Q. As of the time of the adoption of this ordinance in December, 1924. A. Eight hundred dollars a front foot.

Q. Did you arrive at any conclusion as to what the difference in the value of a front foot would be as a result of the establishment of the building line? A. No, I didn't figure it just that way.

Q. Either in bulk amount or in percentage? A. No.

Q. Can you say now how much, in your opinion, the front foot value was affected by the establishment of the building line, either in amount or percentage? A. From ten to twelve and one-half per cent.

CROSS-EXAMINATION by Mr. Bain:

Q. When did you first arrive at that figure? A. When did I?

Q. Yes. Had you ever considered those percentages, ten to twelve and one-half per cent. before this? A. I figured that right now.

Q. It never entered your head before? A. Well, I had the gross figures before, and it was easy enough to just figure the percentage basis.

Q. But those percentages had not been applied by you before in any way? A. No, not till now.

Q. You say you valued the Hood and Cullis and Lewis properties at $800 a front foot? A. As of 1924.

Q. Please state any property sold in Springfield Avenue between Woodland Avenue and Kent Place Boulevard at anything like $800 a front foot. A. It wasn't the property—at that time, you mean?

Q. Yes, between the years 1923 and 1924, or 1924 and 1925. Please state any sales at anything like $800 a front foot. A. Well, the Cullis and Lewis property, I guess, came nearest to it.

Q. Not near it by $100 a front foot, is that right? A. One hundred dollars a front foot.

Q. That is, even including the building? A. Including the building. I considered the building on the Cullis and Lewis plot of no value whatever.

Q. Including the building on the Cullis and Lewis property and the alley alongside of it to the full depth of the Cullis and Lewis property, that property actually sold in 1924 for something less than $700 a front foot, and yet, in the same year, you value the Cullis property and the Hood property to a depth of only 125 feet for $800 a front foot? A. I do. I don't consider the depth.

Q. How do you justify it? A. By the fact that

the property, that is, the Cullis and Lewis property, is the most westerly property, and as you go to the west, property decreases in value very rapidly.

Q. There was a piece of property sold right along side of the Cullis and Lewis property in 1925 for very much less than $800 a front foot for a depth of 125 feet? A. It sold for $500 a front foot.

Q. For a depth of what? A. I didn't figure the depth. It had ample depth for business purposes.

Q. That sale certainly does not show a value of $800 a front foot for a depth of 125 feet, does it? A. I could have sold—

Q. Never mind that. What does that sale show? A. I am not trying to justify my appraisal by any previous sale, because I don't thing the previous sales have any bearing upon this matter at all.

Q. How long have you been in the real estate business? A. Five years in Summit; that is, devoting my exclusive time about five years. I have been connected with real estate in Summit for thirty-two years.

The Court: Are there any further questions from this witness?

Mr. Bain: I want to find out how he gets—

The Court: He says that he does not think that any similar sales of property of substantial similarity in that neighborhood have anything at all to do with the value of this particular property.

Mr. Bain: Very well. I won't pursue it.

Mr. Stallman: I think that is all we have.

The Court: We will take a recess now until half-past one this afternoon.

(A recess was had until one-thirty o'clock p. m.)

Afternoon Session.

Mr. Corbin: Your Honor, we have this series of photographs that really should go in evidence. Mr. Pringle and I agreed that we would consent to their admission without producing the photographer. We have had the photographer mark the location of the camera on this map, and I have identified each photograph with a number. I will offer the map, P-3, and all the photographs. The photographs are numbered S-1 to S-9, and H-1 to H-6. The "S" stands for the City of Summit's photographs, and the "H" stands for the Hood and Cullis and Lewis, six in number. I might say that where the camera stood, there is a little dot in each case, with an arrow pointing in the direction in which the camera was looking at the time the photograph was taken, with the number of the photograph alongside of the arrow.

The Court: How much time do you wish?

(Argument.)

Mr. Bain sums up the case for the City of Summit.

Mr. Stallman sums up the case for the property owners.

The Court charged the jury as follows:

CHARGE

DALY, J.:

Gentlemen of the jury, counsel for the parties interested have requested the Court to charge certain questions. Of those requests the Court will charge such as the Court approves.

> "Our statute provides that 'The municipality shall have power and authority to establish, by ordinance, building lines on any street or part thereof * * * and thereafter no new building, structure or part thereof shall be erected between such building line and the street.'"

That is true.

> "Upon adoption of any such ordinance, the board shall thereupon proceed to determine the amount, if any, to be paid as damages to the owner or owners of land affected by the establishment of such building lines, having due regard to the partial use of the land to be enjoyed by the owner thereof."

That is in the statute.

> "In this case the City of Summit established a building line along the southerly side of Springfield Avenue, coincident with the face of the buildings of Duncan Hood Company and Cullis and Lewis, which line is 6.7 feet inside of the street line."

The evidence is to that effect.

> "This building line does not run the entire length of the block, but comes to an abrupt end at the easterly line of the property of Duncan Hood Company, from which point easterwardly the buildings are erected on the

same property line as the one established by this ordinance.

"The Constitution of this State provides that private property shall not be taken for public use without just compensation.

"The right to acquire property, to own it, deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right."

That is true.

"With the right of ownership and possession goes the right to use, enjoy, and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute."

That is true.

"The owners of the land in these cases had the right, before the adoption of the building line ordinance, to erect or to extend and maintain their buildings out to the line of the property which they owned under their deed."

That is true.

"The effect of the building line ordinance is to prevent these owners from erecting or extending and maintaining their buildings or structures upon that part of their land lying between their present buildings and the newly established building line of the southerly side of Springfield Avenue."

That is true.

"It is your duty and function to decide whether the establishment of these building lines and the restriction against the use of that strip of land constitute a damage or a benefit to the land of these property owners."

That is true.

"In deciding these cases you will take into consideration, among other things, the physical condition and surroundings of these properties at or before the time this ordinance was adopted and decide whether, as a result of the ordinance, the property has been made more or less usable, available, and valuable than it was before."

That is true.

"You may take into consideration the fact that the building line in front of the properties of these appellants does not extend eastwardly from the Duncan Hood property, and that some of the buildings on Springfield Avenue east of the Duncan Hood property have been extended out to the property line, and that the buildings of the appellants cannot be extended beyond the newly established property line."

That is true.

"You may also take into consideration the effect of setting back the curb lines and widening the vehicular roadway in front of these properties, in order to determine whether these changes favorably or adversely affect the value of the property of these appellants."

That is true. You do take that into considera-

tion in the determination of the practical situation as it existed before and after the establishment of the property line because of the establishment of the property line in so far as the change affected the market value of the properties in question, if it did.

"If you find that these properties have been damaged or reduced in value, as a result of the adoption of the building line ordinance and the consequences thereof, the measure of damages by which your verdicts are to be reached is the difference between the fair market value of the property before and after the making of these improvements or changes as a result of the making of these improvements or changes."

That is true.

"No lands of the Duncan Hood Company or Cullis and Lewis were taken by the establishment of the building line in front of their properties on December 2, 1924."

That is true in the sense that absolute ownership and fee of these lands were not taken. As to what use the owner could put the lands that were restricted, that has already been explained to you in the charges requested, which have been read and which will be further explained to you.

"The jury should consider any benefits derived by the properties of the Duncan Hood Company and Cullis and Lewis from the establishment of the building line as well as any damages caused thereby."

That is true.

"Any benefits and damages to the proper-

ties of the Duncan Hood Company and Cullis and Lewis derived by or resulting from the establishment of the building line must be determined according to the condition of the properties on the date of the establishment of the building line."

That is true.

"The jury should not allow the Duncan Hood Company nor Cullis and Lewis any damages which are speculative in character."

That is true.

Gentlemen, much has been said during the discussion of this case as to market value, and it is necessary for you to know what, in law, market value means.

Market value is the price agreed upon by a willing buyer and a willing seller, by a buyer who is not compelled to buy and a seller who is not compelled to sell. A man selling because he is in extreme financial adversity, for example, or a buyer buying because there is some extraordinary need for a particular spot or location is not what is meant by a willing buyer and a willing seller. It is where neither one has to act and yet their minds agree freely upon a valuation.

That is easily explained. It is easily defined in the way that I have defined or illustrated, but when it comes to the practical application to a given set of facts, then it requires good reasoning power upon the part of juries to determine what was the particular market value of a particular property.

Our law allows evidence to be brought in through the lips of experts. For what purpose? That those opinions are conclusive upon the jury, and

that they must follow those? Absolutely and conclusively no. These experts are allowed to give their opinion as a matter of assistance and guide to the jury in the determination of rational, intelligent judging, for, in the final analysis, it is the jury that say, from all the evidence, what the market value is on any particular property.

You can readily see that the mere expression of opinion of a man who is in the real estate business, standing by itself alone, amounts to nothing, unless he gives the reasons upon which his opinion is based. The value to be given by a jury to the opinion of a real estate expert will be largely measured by the soundness of the reason, according to the judgment of the jurors, upon which the opinion is based.

From experience we know that one of the best ways of an expert's opinion carrying weight with the jury is by making a comparison of what he alleges to be the market value of the property by the selling prices of properties of substantial similarity in the same neighborhood, made within a recent time of the time at which you are to determine values.

There has been much evidence in this case as to sales made in this immediate vicinity, and there has been much evidence as to the comparison of the property, as to substantial similarity with the properties under those sales.

Of course, there are other ways. If, because of an improvement like this, the rental values have been reduced, that is certainly evidence to be considered by the jury in the making up of their determination as to market value, but it is not evidence that they are to give weight to unless they believe from the preponderance of the evidence that, if there was a reduction in the rentable value,

the reduction was due to the improvements or changes made, as in this case.

Gentlemen, with these remarks with reference to this particular point of expert testimony, you must understand that you, after all, are the judges of every bit of the evidence in this case as to what the market value of these properties was before the changes were made and what the market value was after the changes were made. You will not only consider the evidence which has been presented to you good men, but you have a right to consider the fact that you, yourselves, looked at the property and saw it for yourselves.

It will be your duty to take into consideration not only what you actually saw when you went out there on Monday, but, from all the evidence in this case, you have to make a mental picture, as nearly accurate as you can, of what the condition was before these changes were made. You will take all these things into consideration, and then, based upon the preponderance of evidence in the case, you will determine what was the market value of this property before this building line was established, and what was the market value after the establishment because of the change in the building line, as established by this ordinance.

When you determine market value, and when you determine damages to market value, you can readily see that the element of "coercion," as it were, or the element of unwillingness on the part of the property owner that this change should be made, cannot enter into it.

The City of Summit had a right to make these changes. The changes are made under the strength of the law of our state. When, in the judgment of the governing body of that or of any like municipality, it is for the general good that that shall be

done, then the man's private right to the ownership of the property must always give way for the public good. Therefore, that is an element, if there has been unwillingness, that should not prejudice the jury's mind one way or the other as to the fixing of values.

Of course, it is true in this case that we don't know whether the property owners did object to this. That is beside the question. All we do know in that respect is this: If the owners of more than one half of the frontage of the lands affected by this change had objected, then they could not have made the change.

I want to express to you gentlemen my appreciation for the admirable and intense application you have given to the unfolding of the testimony in this case.

Counsel for the City, in his summing up; admits that there is some damage to the property owners. The question is: What damage?

In determining what net damage there is, you have also the duty to consider whether or not there were benefits as a result of this improvement or change. If you find that there was a benefit to these abutting properties and that there was a damage, then you subtract one from the other, and that will be the result. You will determine what was the benefit to the market value of these properties and what was the damage to the market value of these properties and strike the difference.

Be fair, as I am confident you will. Neither passion nor prejudice nor sympathy, I am sure, will have anything to do with you. Take it cold-bloodedly. Take all this evidence offered you, gentlemen, and discuss it among yourselves, respecting one another's opinion, and in a fair, generous way, one to

another of you jurors, arrive at a result which is what actual net damage was done to the market value of these properties by reason of the establishment of this building line.

Much has been said about just what was done and about the lands not actually being taken. Under our statute there is what is called "The Home Rule Act," which now applies to municipalities generally. In order to show you just what is meant by that contention that has been made that the lands are not taken but that the owners' right to the use of them has been restricted, we will take, for example, one of those lovely places in a rural community in the County of Union.

The authorities might make a property line where they say that you cannot build within so many feet of your front property line. Sometimes they put in the ordinance that, although you cannot put the main structure on a certain line, you can build a porch or a lawn or a fence beyond the actual main structure or foundation walls of your building. There is a partial use permitted.

What was done in this case? What was the effect of the establishment of this building line? This was on a business street, and the establishment of this building line is to the effect that they could not erect a new building or structure or any part thereof upon that which was taken.

What did that do in this case? That is for you to pass on practically. You are to say what kind of street there was here before this change and what kind of sidewalk was here before this change. What is the practical effect, from a market value, upon the value of these properties because of the changes made by this ordinance?

You will take into consideration the fact that

there was nine and a fraction feet of sidewalk, as the map will indicate. You will consider what damage was done by this restriction of the ordinary, unqualified use which a man has of his property, which was taken away by reason of this ordinance prohibiting the property owners, after its adoption, from erecting a new building or structure on the property that was taken away, as it were, from the lines of the deed and included within this property line as established.

You will have to bring in two separate verdicts, because there are two property owners.

Gentlemen, you may take the case.

Mr. Bain: The City of Summit excepts to those portions of the charge which charged the requests of the owners to the effect that the owners had the right to extend the building out to the property line, and that the building line prevents the owners of the building from building out to the property line.

Also, to the refusal of the Court to charge the requests of the City of Summit Nos. 2, 3 and 4.

Also, to that part of the charge which stated that the establishment of the building line is, in effect, to prevent the owners from building out in front of the building line.

Also, to that part of the charge which left for the consideration of the jury the kind of sidewalk that existed before the change of the building line.

Also, to that part of the charge which stated that the jury might take into consideration changes in the curb lines and roadway.

The Court: I said that they should take into consideration the practical conditions that existed before and after the change.

Mr. Stallman: I desire to except to your Honor's

refusal to charge the request of the property owners as submitted.

I also desire to except to that much of your Honor's charge when you charged that the jury should determine the damages in this case according to the condition of the property as it was at the time the ordinance was adopted.

I also desire to except to that part of your Honor's charge wherein you instructed the jury that the opinion of real estate agents amounts to nothing except as it may be corroborated by the reasons which they give for their opinion, and that the soundness of their opinion depends upon the reason which they give for it.

REQUESTS TO CHARGE IN BEHALF OF THE PROPERTY OWNERS

1. The Act of 1917 amended by Ch. 137 of P. L. 1920 and Ch. 238 of P. L. 1922, provides that:

(a) "The municipality 'shall have power and authority to establish, by ordinance, building lines on any street or part thereof * * * *and thereafter no new building, structure or part thereof shall be erected between such building line and the street.*

(b) "Upon adoption of any such ordinance, the board shall thereupon proceed to determine the amount, if any, to be paid as damages to the owner or owners of land affected by the establishment of such building lines, having due regard to the partial use of the land to be enjoyed by the owner thereof.' "

2 (a) In this case the City of Summit established

a building line along the southerly side of Springfield Avenue, coincident with the face of the buildings of Duncan Hood Co. and Cullis and Lewis, which line is 6.7 feet inside of the street line.

(b) This building line does not run the entire length of the block, but comes to an abrupt end at the easterly line of the property of Duncan Hood Co., from which point eastwardly the buildings are erected on the same property line.

3 (a) "Article 1 of section 16, and article 4 of section 8 of the state constitution provide that private property shall not be taken for public use without just compensation.

(b) The right to acquire property, to own it, deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right.

(c) With the right of ownership and possession goes the right to use, enjoy, and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute.

(d) A provision of an ordinance which assumes to be a police regulation, but which in reality is designed to deprive one of the use of his property under the pretence that it is enacted to promote the public welfare, safety, and health, will be set aside as an invasion of the right of private property" (unless provision is made for paying just compensation for the same.) Ignaciunas v. Risley, 98 N. J. L. 712.

4. The owners of the land in these cases had the

right, before the adoption of the building line ordinance, to erect or to extend and maintain their buildings out to the line of the street, in the same manner as the owners of the adjacent property have done.

5. The effect of the building line ordinance is to prevent these owners from erecting, or extending and maintaining their buildings or structures upon that part of their land lying between their present buildings and the newly established building line of the southerly side of Springfield Avenue.

6. It is your duty and function to decide whether the establishment of these building lines and the restriction against the use of that strip of land constitutes a damage or a benefit to the land of these property owners.

7. In deciding these cases you will take into consideration, among other things, the physical condition and surroundings of these properties at or before the time this ordinance was adopted and decide whether, as a result of the ordinance, the property has been made more or less usable, available, and valuable than it was before.

8. You may take into consideration the fact that the building line in front of the properties of these appellants does not extend eastwardly from the Duncan Hood property, and that the buildings east of the Duncan Hood property have been extended out to the street line, and that the buildings of the appellants can not be extended beyond the newly established property line.

9. You may also take into consideration the effect of setting back the curb lines and widening

the vehicular roadway in front of these properties, in order to determine whether these changes favorably or adversely affect the value of the property of these appellants.

10. If you find that these properties have been damaged or reduced in value, as a result of the adoption of the building line ordinance and the consequences thereof, the measure of damages by which your verdicts are to be reached, is the difference between the fair market value of the property before and after the making of these improvements or changes.

REQUESTS TO CHARGE IN BEHALF OF THE CITY OF SUMMIT

1. No lands of the Duncan Hood Company or Cullis and Lewis were taken by the establishment of the building line in front of their properties on December 2, 1924.

2. It appears from uncontradicted testimony that the sidewalk extending from the front lines of the present buildings of the Duncan Hood Company and Cullis and Lewis to the curb line had been used by the public continuously for over twenty years prior to the date of establishment of the building line, and, therefore, neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages because they are prevented by the building line from extending the fronts of their buildings.

If request No. 2 is refused, then No. 3 is as follows:

3. If the jury find that the sidewalk extending

from the front lines of the present buildings of the Duncan Hood Company and Cullis and Lewis to the curb line had been used by the public continuously for over twenty years prior to the date of establishment of the building line, neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages because they are prevented by the building line from extending the fronts of their buildings.

4. Neither the Duncan Hood Company nor Cullis and Lewis are entitled to any damages to their properties caused by changes in the curb line or sidewalk in front thereof.

5. The jury should consider any benefits derived by the properties of the Duncan Hood Company and Cullis and Lewis from the establishment of the building line as well as any damages caused thereby.

6. Any benefits and damages to the properties of the Duncan Hood Company and Cullis and Lewis derived by or resulting from the establishment of the building line must be determined according to the condition of the properties on the date of the establishment of the building line.

7. The jury should not allow the Duncan Hood Company nor Cullis and Lewis any damages which are speculative in character.

EXHIBIT P-1

ORDINANCE ESTABLISHING BUILDING LINES

AN ORDINANCE to establish building lines on Springfield Avenue from Woodland Avenue westerly to Kent Place Boulevard, in the City of Summit, and to establish restrictions as to the erection and maintenance of buildings and other structures between such building lines and the street, and to assess benefits or award damages against the lands or real estate benefited or damaged by the establishment of such building lines.

BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF SUMMIT, pursuant to the provisions of an act entitled "An Act respecting the establishment of building lines in municipalities in this State," approved March 29, 1917, and the several supplements thereto and amendments thereof.

1. Building lines are hereby established on Springfield Avenue from Woodland Avenue westerly to Kent Place Boulevard, in the City of Summit. Said building line on the north side of said Springfield Avenue shall be a line drawn parallel to and seven and one-half feet north from the northerly line of said Springfield Avenue, and said building line on the south side of said Springfield Avenue shall be a line described as follows: Beginning at a point twelve (12) feet west of the east line of property now owned by the Duncan Hood Corp. said point being the north east corner of the existing building line on said property; thence along the existing north face of said building to the east side line of property now owned by Cullis & Lewis; thence along existing north face of building on

said Cullis & Lewis property to the east line of property now owned by one Hicks; thence along existing north face and north face produced of the second story of building on said Hicks property to the east side line of property now owned by one Zeigner; thence along existing north face and north face produced of the second story of building on said Zeigner's property to the east side line of property now owned by one Burroughs; thence along the existing north face and north face produced of building on said Burroughs' property to the west side line of said property.

2. No new building, structure or part thereof, shall be erected on the property between said building lines and the lines of said street; and after eighteen months from the date of the adoption of this ordinance no structures or building or part thereof whatever shall continue to stand between said building lines and the street.

3. Upon the adoption of this ordinance the City Clerk shall certify and deliver a copy of the same to the Board of Assessors of the City of Summit to determine the amount, if any, to be paid as damages to the owners of the lands affected by the establishment of such building lines and the amount of benefits to be assessed against the lands or real estate benefited by the establishment of such building lines, according to the provisions of said act.

4. The sum of Ten thousand dollars ($10,000) be and it hereby is appropriated for the purpose of paying damages so awarded which shall exceed the benefits assessed upon any parcel of land or real estate, or the damages assessed in case no benefits shall be assessed on any such parcel of land or real estate.

Exhibit P-2

5. This ordinance shall take effect immediately in the manner provided by law.

Approved:

W. S. TOPPING,
Mayor.

I, Frederick C. Kentz, City Clerk of the City of Summit do hereby certify that the foregoing ordinance was duly passed by the Common Council of said City at a regular meeting held on Tuesday evening, December 2d, 1924.

FREDERICK C. KENTZ,
City Clerk.

EXHIBIT P-2

Map produced by City of Summit showing building lines.

EXHIBIT P-3

Map produced by City of Summit showing points from which photographs were taken.

EXHIBITS S-1 TO S-9

Photographs.

PROPERTY OWNERS' EXHIBITS

EXHIBIT D 1

Map produced by property owners showing building lines.

EXHIBITS H-1 TO H-6

Photographs.

New Jersey Court of Errors and Appeals

IN THE MATTER OF The award for damages and the assessment for benefits accruing from the establishment of building lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit.	
DUNCAN HOOD CORPORATION, a Corporation of the State of New Jersey, Appellant-Respondent, VS. CITY OF SUMMIT, a Municipal Corporation of the State of New Jersey, Respondent-Appellant.	On Appeal from Union County Circuit Court.
GEORGE H. CULLIS and CLIFFORD H. LEWIS, co-partners doing business under the firm name and style of CULLIS and LEWIS, Appellants-Respondents, VS. CITY OF SUMMIT, a Municipal Corporation of the State of New Jersey, Respondent-Appellant.	On Appeal from Union County Circuit Court.

REPLY BRIEF FOR CITY OF SUMMIT, APPELLANT.

The brief for respondents is of such nature that a reply thereto is necessary.

I.

(a) (b)

Respondents do not deny that the Trial Judge erred in overruling the questions asked appellant's witness, Herman de Selding, which are quoted in the brief for appellant. They argue only that the error was overcome by the answer of the witness to a subsequent question. Such was not the case.

Appellants sought, by the questions which were overruled, to obtain the opinion of the witness as to the damage to respondents' properties because of the building line, assuming that the sidewalk in front thereof extended from the front line of respondents' buildings to the curb. The Trial Judge refused positively to permit the witness to give such testimony (Case, p. 71, l. 20—p. 72, l. 33).

The question which was then asked and answered merely assumed that there was a sidewalk *somewhere* between the fronts of respondents' buildings and the curb (Case, p. 73, ll. 23-30).

(c)

The error of the Trial Judge in refusing to permit appellant's witness, Frank H. Taylor, to state his opinion as to the value of respondents' lands, based on the prices paid for other lands similarly situated and in the neighborhood, is likewise not denied by respondents. Here, also, they contend that the error was overcome by the answer to a subsequent question asked of the witness by the Trial Judge. Respondents are mistaken in this respect.

The Trial Judge first overruled the question asked Mr. Taylor, then said he would allow it, but reversed himself and again overruled it (Case, p. 87, l. 23—p. 89, l. 9; p. 90, l. 34—p. 92, l. 10; p. 94, l. 1—p. 95, l. 10).

The witness was then asked by the Trial Judge to state his valuation of respondents' lands per front foot and stated his appraisal.

The action of the Trial Judge in overruling the question asked Mr. Taylor, challenged his opinion as an expert witness, notwithstanding he had qualified as such and had been permitted to testify.

II.

It is said in the brief for respondents that the answer to the first objectionable question asked their witness, John D. Hood, on direct examination was stricken out. Not so.

The question was as follows (Case, p. 115, ll. 5-8):

> "Q. Do you know whether or not the building up of the buildings to the eastward of you out to the existing street line has had any effect on your rentals?"

The following answer was given to this question (p. 116, ll. 25-28):

> "A. I consider that my stores have been affected by twenty-five per cent."

This answer was a rank conclusion and the Trial Judge struck it out on his own initiative.

The question was continued, however, and answered as follows (p. 115, l. 1—p. 116, l. 33):

> "Q. From your experience? A. My experience, one of them has already been rented for $125. a month where it was bringing $150. a month."

Appellant objected to this last answer but the Trial Judge permitted it to stand (Case, p. 118, l. 8—p. 119, p. 22).

Counsel for respondents says that only a limited objection was made by appellant to the answer of this witness to the following question (Case, p. 119, ll. 23-26):

> "Q. What other tenants did you ever have, or did you ever have any other changes of the rentals with any of your other tenants? A. Yes, I did."

The objection was on the ground that there was nothing to connect any change in rentals with the building line. This objection, surely, was sufficient (Case, p. 119, ll. 27-40).

It is also said by counsel for respondents that there was no objection, or only a qualified objection, to several other questions asked this witness, on direct examination with respect to changes in rentals.

The vice of the testimony of Mr. Hood in regard to changes in rentals was that it was predicated on a question which related to the forward extension of buildings to the eastward of respondents' lands many years before the building line was established, and had no relation whatever to the building line. Such testimony was creating an erroneous impression on the jury and appellant tried to stop it. Mr. Hood was, however, an interested witness, and impetuous in his testimony. He insisted upon saying what he would. Finally, the Trial Judge noted an objection of appellant to all of his testimony as to changes in rentals (Case, p. 120, l. 1—p. 121, l. 7).

III.

(a)

The third point in the brief for appellant deals only with appellant's exceptions to matters charged by the Trial Judge. In the brief for respondents, the third point begins with a statement that certain exceptions *to the charge* were by number only. This statement has no reference to exceptions to the charge and may be misleading if not put in its proper place.

Respondents endeavor to support the charge of the Trial Judge to the effect that the building line alone prevented respondents from extending their buildings forward, thus preventing the jury from considering the sidewalk easement across the fronts of respondents' lands, by saying that the sidewalk easement was not proved and, in any event, could not have been asserted by appellant upon the trial. Such conclusions are contrary to fact and law.

The first witness for appellant who testified to the sidewalk easement was Edward B. Twombly. It is said in the brief for respondents that he was a child seven years of age in the year 1908. This is a plain mistake. He was then a youth sixteen years old and not a child. The testimony of this witness was as follows (p. 34, l. 38—p. 36, l. 22):

> "Q. Do you recall when the present building on the Duncan Hood property was constructed? A. To the best of my recollection it was about the time of the Spanish War.
>
> "Q. That was in 1898. Do you recall at that time whether there was any sidewalk in front of the building on the Duncan Hood property? A. Why, before it was built there was a single flag sidewalk there. It was an open lot."

* * * * * * *

"Q. After the building was put up on the Duncan Hood property, what was done to the sidewalk in front of that property? A. A sidewalk was laid, as I recollect it. The concrete sidewalk was laid at that time from what appeared to be the curb to the front line of the building.

Q. Do you recall about the year when that concrete sidewalk was laid? A. To my recollection it was laid approximately at the same time the building was built.

Q. Would you say or could you say that the sidewalk in front of the Duncan Hood building was laid in the year 1900 or some time prior thereto? A. It was laid prior to 1900.

Q. Have there been any changes in the sidewalk in front of the Duncan Hood building since 1900 that you recall? A. None that I recall. The sidewalk has always remained there. Whether it has been relaid or not I don't know.

Q. Can you say whether or not there has been a sidewalk in front of the Duncan Hood property and the Cullis and Lewis property and extending from the front walls of this property to the curb, continuously since the year 1900. A. There has."

* * * * * * *

"Q. For what purposes were the original flagstones in front of these two buildings, and subsequently the concrete pavement, used? A. Used by the public.

Q. As a sidewalk? A. As a sidewalk."

Mr. Twombly thus stated the mode, extent and use of the paved sidewalk in front of respondents' properties in plain words.

Appellant's witness, David B. Melroy did not testify that people used the sidewalk across the fronts of respondents' lands *only* to get into the stores thereon and to look into the store windows. Of course, some people passed over the sidewalk into the stores or stood on the sidewalk and looked into

the store windows. That is the customary thing for people to do when stores abut on a sidewalk.

Mr. Melroy testified that he was employed in the store now occupied by the respondents Cullis and Lewis from the year 1892 until about the year 1909, and thereafter had a store in the building of the other respondent, Duncan Hood Corporation. He had passed over the sidewalk in front of respondents' properties almost every day during the past thirty-six years. Mr. Melroy testified that at all times since the year 1900 there has been a uniform concrete sidewalk in front of respondents' properties extending from the front of their buildings to the curb, and that this sidewalk has been used by the public (Case, p. 45, l. 29—p. 49, l. 9).

The quotations in the brief for respondents with respect to the testimony of appellant's witness, David J. Flood, were not the words of the witness but of the questions of counsel for respondents. These questions and the answers thereto indicated only that pedestrians could walk in a straight line along the sidewalk in front of respondent's properties or deviate if it suited their purpose. He did not testify that people traversing this block did not use any more of the sidewalk in front of respondents' properties than they did in any other part of the block, but said only that they would not have to do so. Nor did he testify that no one walked on the sidewalk immediately in front of respondents' stores except to look into the store windows. The statement in the brief for respondents in this respect is far fetched.

Mr. Flood testified positively as to the existence and use of the sidewalk in front of respondents' stores (Case, p. 56, l. 1—p. 58, l. 2).

Appellant's witness, Chester C. Henry, did not testify that he never saw any one deviate from the regular sidewalk except to look into the windows of re-

spondents' stores. He was asked on cross examination whether he had ever seen anyone change his course along the sidewalk and walk close to the stores and answered that there was no reason for doing so except to look into the store windows (Case, p. 64, ll. 33-40). He admitted, however, that the width of the sidewalk in front of respondents' stores permitted several people to walk abreast (Case, p. 65, ll. 5-27).

Mr. Henry testified that a public sidewalk covering the entire space between the fronts of respondents' buildings and the curb had existed for over twenty years prior to the establishment of the building line (Case, p. 61, l. 20—p. 63, l. 30).

Counsel for respondents likens the sidewalk in front of respondents' stores to a store lobby flanked on both sides with store windows, but there is no such likeness. The fronts of respondents' stores are on a straight line.

The suggestion in the brief for respondents that there was a recessed areaway in front of respondents' stores is not warranted. The combined frontage of respondents' properties is 139 feet and the buildings next west of them extend forward of respondents' buildings only three feet. Jogs of this sort in sidewalks often occur.

It is argued for respondents that the use of the pavement in front of their buildings by the public, as a sidewalk was permissive in its origin and, therefore, that there was no easement by prescription. If such were the fact, respondents failed to prove it as a defense.

It is stated in 2 Corpus Juris, page 266, that:

> "So it has been held that actual occupancy accompanied by acts of ownership inconsistent with ownership in another is presumably adverse, and that an actual, continuous, and exclusive possession for the statutory period, un-

> explained, raises a presumption that the possession is hostile and with the knowledge of the owner. Although the facts are sufficient to raise the presumption of adverse possession, this presumption may nevertheless be rebutted by proof to the contrary."

In the case of *Dickinson, et al.* v. *Delaware, Lackawanna & Western Railroad Co.*, 87 N. J. L. 264, it was said:

> "In the case *sub judice* there was proof of public user of the road for twenty years and that such user was acquiesced in by the railroad company, for there is no proof that it did any act which repelled the presumption that it was its intention to subject the land to that public use. The evidence in the case under consideration from which acquiescence could be inferred was like that in the case of Township of Riverside v. Pennsylvania Railroad Co., *supra*. The like may be said as to the proof of public user. It is true that there was evidence in the case last cited that the highway had been worked and repaired by the public authorities, but that of course was not evidence of a dedication by the railroad company, but of an acceptance of a dedication by the public authorities, and long continued public user is itself evidential of such acceptance if it continue for twenty years, even though the public authorities do not work the road. Smith v. State, 23 N. J. L. 712, 727."

The case of *Pennsylvania Railroad Co.* v. *Hulse*, 59 N. J. L. 54, cited in the brief for respondents, is not in point for in that case it was proved that the easement was by grant and permissive in origin and continuance.

The argument in behalf of respondents with respect to the existence of the sidewalk easement is futile. The testimony, at least, created a jury question as to the character and use of the sidewalk.

It is stated in 19 Corpus Juris, page 965, that:

> "Where an easement is claimed by prescription, the questions whether the character of its use has been adverse or permissive, continuous for the full prescriptive period, and whether a prescriptive right has in fact been acquired by such use, are questions of fact for the jury under proper instructions from the court as to the nature of adverse possession, unless the proof and inferences are all one way."

Respondents contend that appellant could not avail itself of the existence of the sidewalk easement in the present cases because, in effect, they involved the condemnation by appellant of respondents' lands and, in condemnation proceedings, the condemnor cannot dispute the title of the party against whom the proceedings are brought, citing 20 Corpus Juris, page 927.

Such rule does not prevent the condemnor from proving the existence of an easement over the lands to be acquired in mitigation of damages.

> *Laing* v. *United New Jersey Railroad & Canal Co.*, 54 N. J. L. 576;
> 20 Corpus Juris, Sec. 186, p. 725.

Furthermore, the character of the compensation for lands taken by condemnation differs materially from that for the establishment of a building line. In the former, lands are taken from the owner and he is entitled to their value, while in the latter no lands are taken and the owner is entitled only to damages resulting from the restricted use of his lands because of the building line.

The question in the present cases, therefore, was whether the establishment of the building line so restricted the use of respondents' lands that they could not extend the fronts of their buildings forward and, if so, the extent of the damages caused

by such restriction. *If the sidewalk easement prevented respondents from extending the fronts of their buildings, obviously, the restriction caused by the building line caused no damage, and the existence of the sidewalk easement was a material factor to be considered.*

(b) (c)

It is argued in behalf of respondents that the Trial Judge was justified in permitting the jury to consider the effect of the setting back of the curb line and widening of the vehicular roadway in front of respondents' properties, on the ground that the statute under which the building line was established provides for the fixing of damages with due regard to the partial use of the land to be enjoyed by the owner, and that the setting back of the curb line and narrowing of the sidewalk affected such partial use in these cases.

Such argument defeats itself for it shows that any damage due to the setting back of the curb line was separate and distinct from that caused by the building line. The building line merely prevented respondents from using the land they may own in front of their buildings, if any, for permanent buildings, while the setting back of the curb line prevented the use of such land for purposes permitted by the building line.

There was no change in the curb line at the time the building line was established. Respondents' witness, John D. Hood, testified on direct examination that the curb was set back *after* the building line was established, and the testimony of appellant's witness, Chester C. Henry, on cross examination so indicates (Case, p. 63, ll. 33-38; p. 123, ll. 37-39).

The statements in the brief for respondents that there were no separate proceedings for the setting

back of the curb line and that appellant made use of the establishment of the building line to set back the curb line, are unwarranted. Such course is prevented by the law of this State. The ordinance establishing the building line does not provide for any change in the curb line, and such change could not have been made under this ordinance (Exhibit P-1, Case, p. 223). Counsel for appellant stated at the trial that the curb line was set back in a proceeding separate from that for the establishment of the building line and such statement was not disputed by respondents. The Trial Judge, however, was of opinion that the fact that the proceedings for the two improvements were separate made no difference, and, this, we submit, led to his error in permitting the jury to consider damages due to the setting back of the curb line (Case, p. 178, ll. 9-39).

IV.

Appellant requested the Trial Judge to charge the jury that the sidewalk easement across the fronts of respondents' lands was proved by uncontradicted testimony, and therefore, that respondents were not entitled to damages because they were prevented by the building line from extending their buildings forward, or, in the alternative, that if the jury found that the sidewalk easement existed, then respondents were not entitled to such damages. Both of these requests were refused and exceptions taken by appellant (Case, p. 217, ll. 25-26; p. 221, l. 28—p. 222, l. 13).

The Trial Judge was also requested by appellant to charge the jury that respondents were not entitled to damages caused by changes in the curb line or sidewalk. This request was also refused and exception by appellant taken (Case, p. 217, ll. 25-26; p. 222, ll. 14-17).

These requests were numbered 2, 3 and 4 and appellant excepted to the refusal of the Trial Judge to charge them, the exceptions stating the numbers of the requests refused.

Counsel for respondents argue that such exceptions were insufficient, citing the cases of *State* v. *Blaine,* 6 N. J. Adv. R. 506, and *Napper* v. *West Jersey & Seashore R. R. Co.,* 6 Adv. R. 1036. The latter case is on page 1036 of the New Jersey Miscellaneous Reports and not the Advance Reports.

Neither of the cases cited have any bearing on the present cases.

The case of *State* v. *Blaine, supra,* was a criminal case in which the Supreme Court declined to consider the refusal of the Trial Judge to charge certain requests, because they had been *assigned for error* by number only. The Court of Errors and Appeals, however, passed upon the refusal to charge the requests, notwithstanding the action of the Supreme Court.

In the case of *Napper* v. *West Jersey & Seashore R. R. Co., supra,* on a rule to show cause why a new trial should not be granted in a negligence case, one of the reasons assigned for setting aside the verdict, was the refusal of the Trial Judge to charge certain requests, the *reason* merely containing a general statement that the Trial Judge refused to charge the requests, without stating their language, effect or numbers. The Supreme Court held that such *reason* was irregular and insufficient.

Appellant's requests to charge which were refused in the present cases are quoted in full in the grounds of appeal, and the suggestion of counsel for respondents that they have not been properly brought before the Court is certainly not supported by the cases cited nor any others.

The propriety of charging the subject matter of these requests has been fully discussed in the argu-

ment for appellant on the exceptions to the charge of the Trial Judge and need not be repeated.

V.

With respect to the allowance of interest on the verdicts in these cases it should be borne in mind that the verdicts were not for the *value* of any lands taken by the establishment of the building line, but for *damages* resulting from the restriction it put upon the use of respondents' lands. Such damages, if any, are continuing and the verdicts included not only an allowance for them to the date of the verdicts but for all time in the future.

ROBERT J. BAIN,
CLEMENT K. CORBIN,
Of Counsel with Appellant.

46
47

New Jersey Court of Errors and Appeals

In the Matter
of
The award for damages and the assessment for benefits accruing from the establishment of building lines on Springfield Avenue from Woodland Avenue to Kent Place Boulevard in the City of Summit.

Duncan Hood Corporation, a corporation of the State of New Jersey,
Appellant-Respondent,
vs.
City of Summit, a municipal corporation of the State of New Jersey,
Respondent-Appellant.

On Appeal from Union County Circuit Court.

George H. Cullis and Clifford H. Lewis, co-partners doing business under the firm name and style of Cullis and Lewis,
Appellants-Respondents,
vs.
City of Summit, a municipal corporation of the State of New Jersey,
Respondent-Appellant.

On Appeal from Union County Circuit Court.

BRIEF FOR CITY OF SUMMIT, APPELLANT.

1.

Statement of the Cases.

These two appeals are by the City of Summit, a municipal corporation of the State of New Jersey, from judgments recovered against it in the Union

County Circuit Court by the Duncan Hood Corporation, a corporation of the State of New Jersey, and George H. Cullis and Clifford H. Lewis, partners trading as Cullis and Lewis, for damages resulting from the establishment by the City of a building line across the fronts of their properties on Springfield Avenue in Summit. The judgment in favor of the Duncan Hood Corporation was for $13,012.67 damages and $176. costs and that in favor of Cullis and Lewis was for $3,461.67 damages and $176. costs (Case, pp. 6, 18).

Briefly stated, the facts are as follows:

The Duncan Hood Corporation and Cullis and Lewis each own a parcel of land fronting on the southerly side of Springfield Avenue between Woodland Avenue and Kent Place Boulevard in the City of Summit, the lands of the Duncan Hood Corporation having a frontage of 108 feet and those of Cullis and Lewis a frontage of 31.38 feet.

On December 2, 1924, the City of Summit passed an ordinance establishing building lines across the fronts of these lands and others on both sides of Springfield Avenue between the avenue and boulevard mentioned (Case, pp. 223-225).

This ordinance was passed pursuant to the provisions of an act of the legislature entitled "An "Act respecting the establishment of building "lines in municipalities in this State," approved March 29, 1917, which act as amended in the year 1920, provides as follows (P. L. 1920, p. 276):

> "2. In addition to any power now vested in "any board or body having control of the "streets and highways of any municipality in "this State, said board or body shall have "power and authority to establish, by ordi- "nance, building lines on any street, or part "thereof, in said municipality and thereafter "no new building, structure or part thereof "shall be erected between such building line

"and the street. Such ordinance may also fix "the time after which no structure, building "or part thereof whatever shall continue to "stand between said building line and the "street. The re-erection, reconstruction and "repair of any existing building or structure, "or the erection of any temporary structure "situated between the building line and the "street, may be permitted before the time "fixed as aforesaid, upon such terms and con- "ditions as may be prescribed in such ordi- "nance by said municipality.

"3. * * * Upon the adoption of any such "ordinance, it shall be the duty of the clerk "of such municipality to certify and deliver "a copy of the same to the officer or board "charged with the duty of making assessments "for local improvements in such city, which "officer or board shall thereupon proceed to "fix and determine the amount, if any, to be "paid as damages to the owner or owners "of the lands affected by the establishment "of such building lines, having due regard to "the partial use of the land to be enjoyed "by the owner or owners thereof, and such "board or officer shall also fix and determine "the amount of benefits to be assessed against "the lands or real estate benefited by the "establishment of such building lines, and all "the proceedings of the said board or officer "and the further proceedings for the adoption "or confirmation of his or their report as to "the award of damages or assessments for "benefits shall be under the provisions of the "law governing awards of damages and as- "sessments for local improvements affecting "such municipality. * * *

"The amount of damages, if any, accruing "to any parcel of land or real estate shall be "deducted from any amount of benefits as- "sessed thereon, and in case the amount "of damages so awarded shall exceed the "benefits assessed upon any parcel of land "or real estate, or in case no benefits shall "be assessed thereon, the balance of such dam-

"ages shall be paid by the municipality to the "owner or owners of any such parcel of land "or real estate."

The building line established by the above mentioned ordinance across the fronts of the lands of the Duncan Hood Corporation and Cullis and Lewis was coincident with the front lines of the existing buildings on such lands.

Awards of damages and assessments for benefits accruing from the establishment of such building line across the lands of the Duncan Hood Corporation and Cullis and Lewis were duly made to and against them by the local assessors of the City of Summit pursuant to the act under which the ordinance was passed, and confirmed by the governing body of the City.

The act for the establishment of building lines provides that the confirmation of awards and assessments and all subsequent proceedings shall be under the provisions of the law governing awards of damages and assessments for local improvements affecting the municipality, which is the act entitled "An Act concerning municipalities," approved March 27, 1917, commonly called the "Home Rule Act."

Section XX. of the latter act as amended in the year 1925, provided as follows (P. L. 1925, p. 234):

"Any owner or owners of lands or real "estate taken for any such improvement may "appeal to the Circuit Court of the county "wherein such municipality is situate at any "time within thirty days after the confirma- "tion by the governing body of the award "complained of. Such appeal shall be taken "in the manner prescribed in section twenty- "three-a of this article. The court to which "appeal is had shall order a trial by a struck "jury to assess such damages and benefits "anew. Such trial shall be conducted as in "other cases of trial by jury in condemnation

"appeal actions, upon an issue to be framed
"under the direction of or by the court. * * *
"The judgment entered in any Circuit Court
"in such appeal shall fix the amount to be re-
"covered by the appellant, and such judgment
"may be enforced in the same manner as are
"other judgments of said court."

The Duncan Hood Corporation and Cullis and Lewis were dissatisfied with the awards made to them by the City of Summit and appealed therefrom to the Union County Circuit Court (Case, pp. 1-2, 13-14).

The issues framed on such appeals were as to the damage or benefit, if any, sustained by or accruing to each of the appellants by reason of the establishing of the building line provided by the ordinance of December 2, 1924, across their lands, and to be paid by the City of Summit (Case, p. 4, ll. 17-40; p. 15, l. 28—p. 15, l. 16).

The appeals were tried together before Judge Daly and a jury on May 15 and 16, 1928, and the jury returned a verdict of $10,781. for the Duncan Hood Corporation and $2,868. for Cullis and Lewis (Case, pp. 6, 18).

The Trial Judge, presumably upon request of the Duncan Hood Corporation and Cullis and Lewis, thereupon ordered judgments entered for the verdicts of the jury together with interest thereon from December 2, 1924, the date of the passing of the ordinance, to the date of entry of the judgments, which increased the amounts of the judgments to those heretofore stated.

The City of Summit moved before the Trial Judge to vacate the judgments on the ground that such allowance of interest was without warrant or authority of law (Case, pp. 7, 19). This motion was made on May 31, 1928, and has not yet been decided.

These judgments carry interest from the date upon which they were entered and, being appeal-

able, the City of Summit appealed therefrom for the purpose of having alleged errors at the trial passed upon by this Court at the earliest possible moment (Case, pp. 8-13; pp. 20-25).

2.

Grounds of Appeal.

In order to avoid repetition, the grounds of appeal can be generally stated as follows:

1. Erroneous exclusion of certain testimony upon the trial.

2. Erroneous admission of certain testimony upon the trial.

3. Errors in the charge of the Trial Judge to the jury.

4. Erroneous refusal of the Trial Judge to charge the jury as requested in behalf of the City of Summit.

5. Erroneous inclusion of interest on the verdicts of the jury in the judgments.

3.

Brief of the Argument.

I.

Certain testimony was erroneously excluded by the Trial Judge upon the trial.

(a)

The following question was asked of Hermann de Selding, a witness for the City of Summit on direct examination (Case, p. 71, ll. 20-25):

> "Q. Assuming there is a public sidewalk "between the fronts of the Cullis and Lewis

"property and the Duncan Hood property on "Springfield Avenue to the curb line, what, "in your opinion, would be the damage to "those two properties by the establishment of "that building line?"

There was objection to this question by counsel for the Duncan Hood Corporation and Cullis and Lewis, who will hereafter be often called the property owners, on the ground that the City had failed to show that the entire width of the sidewalk was subject to public easement, and the question was excluded by the Trial Judge upon the ground that the City had not proven any title to the lands within the property lines as described in the deeds, by prescription. Exception was thereupon taken (Case, p. 71, l. 20—p. 72, l. 21).

The objection was contrary to previous testimony and the Trial Judge was not justified in excluding this question upon the ground stated or any other ground.

Before Mr. de Selding was called to the stand, four witnesses produced by the City had testified that there was a paved sidewalk in front of the properties of the Duncan Hood Corporation and Cullis and Lewis, extending from the fronts of the existing buildings to the curb, and that such sidewalk had been used by the public continuously for over twenty years prior to the date of the ordinance establishing the building line. The testimony of these witnesses in that respect was not contradicted and the existence of the sidewalk easement was conclusively proved (Case, p. 29—p. 65).

Counsel for the property owners endeavored to bring forth by cross-examination of the witnesses for the City that, notwithstanding the entire width between the front line of the buildings and the curb was paved, some portion of the pave-

ment immediately adjoining the buildings was for the use of the property and not the public. He was not successful in that regard, but if he had been, he would only have succeeded in creating jury questions as to the width of the sidewalk and the extent of the easement, in which event the foregoing question would have been proper.

The view of the Trial Judge that the City had not proved any title by prescription to the lands within the property lines as described in the deeds was erroneous.

It has been well settled in this State that the use of property by the public for highway purposes during a continuous period of twenty years creates a public easement by prescription. *Wood* v. *Hurd,* 34 N. J. L. 87. *Township of Riverside* v. *Pennsylvania Railroad Co.,* 74 N. J. L. 476.

In the present cases such use was proved by the testimony of the witnesses for the City beyond any doubt. If such were not the case, there was, at least, a question for the jury and not the Trial Judge as to the existence and extent of the easement. *Wood* v. *Hurd, supra.*

The reference of the Trial Judge to property lines described in deeds was premature. No deeds had been produced when the question under discussion was asked and, as a matter of fact, none were produced at any time during the trial.

The testimony sought by the question asked Mr. de Selding was important for the City. The property line established by the ordinance of December 2, 1924, across the lands of the Duncan Hood Corporation and Cullis and Lewis was coincident with the front lines of the buildings thereon, and if these owners were prevented by a public sidewalk easement from extending the fronts of their buildings, the damages resulting from the establishment of the building line would be much less than if there were no such easement.

(b)

The following question asked Mr. de Selding on direct examination was also overruled by the Trial Judge and exception to his ruling noted; (Case, p. 72, ll. 22-33):

> "Q. Assuming Mr. de Selding that the pub-
> "lic passed (used the land) in front of the
> "front walls of Ducan Hood building and the
> "Cullis and Lewis building for sidewalk pur-
> "poses, what, in your opinion, was the damage
> "to those two buildings by the establishment
> "of the present building line?"

The word "passed" in this question was evidently an error in transcribing the testimony.

Counsel for the property owners objected to the last mentioned question without stating the ground of the objection. The question was overruled by the Trial Judge who gave no reason for his ruling.

Presumably the objection in this instance was also on the ground that the existence of a sidewalk easement across the front of the lands of these owners had not been proved. If so, the argument with respect to the question first mentioned applies.

In any event, Mr. de Selding was a qualified expert witness in matters relating to the value of real estate and was permitted by the Trial Judge to testify as such witness. The question last asked him was a hypothetical question.

The rule of law with respect to hypothetical questions as stated in Wigmore on Evidence; Vol. 1, sec. 672, p. 767, is as follows:

> "In other words, the hypothetical question
> "to the physician, as to the data for in-
> "ference, takes the place of the question to
> "the bystander whether he was in a position
> "to observe the affray."
>
> "The reasoning may be explained in the
> "following propositions: 1. Testimony in

"the shape of inferences or conclusions *rests*
"*always on certain premises of fact.* That
"which has been called Observation, serving
"as a basis of belief in matters directly cog-
"nizable by the senses—as, the facts of an
"affray, a conversation, a trespass, and the
"like—is here replaced by what may be called
"a Consideration of the Premises. Just as
"observation of the situation or affair or sur-
"roundings is in the one case essential to the
"formation of a witness' belief based on his
"senses, so a consideration of specific data is
"essential to the formation of an inference
"or conclusion or opinion. If the witness has
"not considered or had in mind these prem-
"ises, his inference or opinion is good for
"nothing. 2. *These premises,* a consideration
"of which is essential to the formation of the
"conclusion or opinion, *must somehow be sup-*
"*plied by testimony.* The same witness may
"supply both premises or conclusions; or one
"witness may supply the premises and an-
"other the conclusion. The two are not neces-
"sarily connected. 3. If the latter method is
"chosen, and a witness is put forward to tes-
"tify to the conclusion, *the premises consid-*
"*ered by him must be expressly stated, as the*
"*basis of his conclusion;* otherwise, since his
"conclusion rests for its validity upon a con-
"sideration of the premises, and since the tri-
"bunal may later decide that certain prem-
"ises are not proved and may thus reject
"them, it must, before accepting his conclu-
"sion, have the means of knowing whether it
"is based on a consideration of premises ac-
"cepted as true by the tribunal. If those
"premises are not made to accompany the
"conclusion, the tribunal might be accepting
"a conclusion for which the witness had con-
"sidered premises found by the tribunal not
"to be true. 4. Hence, the premises must be
"stated hypothetically in connection with the
"conclusion; then, by other testimony, the ma-
"terial for determining the truth of the as-
"sumed premises may be furnished to the tri-
"bunal.

"The key to the situation, in short, is that "there may be two subjects of testimony— "premises, and inferences or conclusions; that "the latter involves necessarily a considera- "tion of the former; and that the tribunal "must be furnished with the means of reject- "ing the latter if upon consultation they de- "termine to reject the former, i. e. of distin- "guishing conclusions properly founded from "conclusions improperly founded. That this "is the orthodox and accepted theory of the "hypothetical question in our law may be "gathered from the following passages, in "which practically the principle is indicated "in one or another aspect."

It was held in the case of *Lindenthal* v. *Hatch et al.,* 61 N. J. L. 29, that a hypothetical question to an expert witness, with a view to obtain his opinion, must be so framed as to set out the facts with such distinctness that the witness may exercise his judgment upon them in expressing his opinion.

In the case of *Birtwistle* v. *Public Service Railway Co.,* 112 Atl. 193, it was held that the opinion of an expert witness may be adduced by a hypothetical question which assumes the facts in accordance with the theory of the party propounding it, and which the evidence tends to prove.

The question in the present cases was as to the amount of damages and benefits, separately determined, resulting from the establishment of the building line and to be paid to and assessed against the Duncan Hood Corporation and Cullis and Lewis. One of the theories on which the City proceeded was that the lands immediately in front of the buildings on the lands of these owners were subject to a public easement for sidewalk purposes which materially affected the amount of such damages. For the purpose of sustaining this theory, the City produced witnesses who testified

to the use of the lands for a period of time necessary to create such easement. Based upon the premises established by their testimony, Mr. de Selding, who was conversant with all other elements necessary to a conclusion as to the amount of the damages, was asked his opinion. The correctness of the premise so assumed depended upon fact and law and was a question for the jury. The Trial Judge by refusing to permit Mr. de Selding to answer the last mentioned question, prevented the City from presenting its case to the jury on a proper theory, the basic facts of which the jury alone could decide. This was erroneous.

(c)

The Trial Judge also overruled the following question asked Frank H. Taylor, a witness for the City, on direct examination and exception to the ruling was taken (Case, p. 87, l. 23—p. 92, l. 10):

> "Q. Mr. de Selding testified to the sale in "1924 to Cullis and Lewis of the property "now occupied by them, having a frontage of "31.38 feet with some rights in the alleyway "adjoining, for $21,500; also to the sale of "the adjoining property in the year 1925 by "Hicks to Walter, having a frontage as shown "on the map of 73.33 feet, for a price of $31,- "000. He also testified to a sale of prop- "erty on the same side of Springfield Ave- "nue but down near the corner of Kent Place "Boulevard in the year 1924 by Borroughs "to Christiansen, having a frontage of 42.88 "feet, for a certain consideration; and to a "sale by Reed to J. and L. Murphy of vacant "land on the opposite side of Springfield Ave- "nue between Woodland Avenue and Kent "Place Boulevard having a frontage of 50 "feet, for a price of $10,000; and also to the "sale in the year 1924 by Brody to Heller "Construction Company of a plot 117.47 feet "wide for $23,750 and of another plot 94.72

"feet wide for a price of $23,750. In view of
"of those sales, would you say that the prop-
"erty of the Duncan Hood Company and Cul-
"lis and Lewis have any greater value than
"$400 a front foot for the first hundred feet
"of depth?"

Counsel for the property owners objected to the question on the ground that Mr. Taylor, as an expert witness with respect to the value of real estate, could not base his opinion on facts stated by a previous witness. The question was overruled on the ground that the witness had no personal knowledge of the sales mentioned.

The objection and the ground upon which it was sustained have no merit.

Mr. Taylor is a real estate agent, broker and appraiser. He bought and sold much real estate, made many appraisals thereof and had experience with changes of building lines, the damages resulting therefrom and benefits thereof. His office and activities were, however, mostly in that section of the State called the Oranges and he did not have much personal knowledge of sales of property in Summit. In all other respects he was a competent expert witness and was recognized as such by counsel for the property owners who, upon being asked by the trial judge whether he would admit Mr. Taylor's qualification, said he had used Mr. Taylor as an expert witness and had to admit his qualification (Case, p. 86, ll. 12-13).

This witness had examined the properties of the Duncan Hood Corporation and Cullis and Lewis as well as other properties in the immediate vicinity, the sales of which were mentioned in the question. He had all the knowledge necessary to express an expert opinion as to the values of the properties involved in these cases, except the prices paid for property similarly situated and in the vicinity. The question asked him was,

therefore, a hypothetical question based upon pertinent facts which were before the jury and stood uncontradicted. It was a proper hypothetical question and should not have been overruled.

II.

Certain testimony was erroneously admitted by the Trial Judge upon the trial.

The trial judge permitted John D. Hood, a witness for the Duncan Hood Corporation and Cullis and Lewis to answer the following questions on direct examination, over objection of the City, to which exception was taken. (Case, p. 115, l. 1—p. 120, l. 14).

> "Q. Do you know whether or not the build-
> "ing up of the buildings to the eastward of
> "you out to the existing street line has had
> "any effect on your rentals?"
> "Q. What other tenants did you ever have,
> "or did you have any other changes of the
> "rentals with any of your other tenants?"
> "Q. State in detail what other changes you
> "have had in your rentals."

Objection was also made on behalf of the City to the following testimony by Mr. Hood and motion made to strike it out which motion was refused (Case, p. 116, ll. 29-33):

> "Q. From your experience? A. My expe-
> "rience, one of them has already been rented
> "for $125. a month where it was bringing
> "$150. a month."

In answer to these questions, Mr. Hood was permitted to testify to some changes in the rentals of his company's property four years after the establishment of the building line without in any way connecting the two.

He testified that many years ago the Public Service Corporation leased two of the stores in the building of the Duncan Hood Corporation for a period of over twenty years, at a rental of $150. a month for one store and $125. a month for the other; that this lease expired on April 30, 1928; and that on March 15, 1928, the Public Service Corporation left the leased premises and occupied its own building which it had constructed nearby. Mr. Hood also testified that subsequently he rented the stores formerly occupied by the Public Service Corporation at a rental of $125. and $100. a month, respectively.

As a matter of fact, the lease to the Public Service Corporation, made over twenty years ago, provided for a rental of one store at $150. a month and expired in the year 1927 when it was renewed at the same rental for another year (Case, p. 119, ll. 12-15).

Mr Hood's testimony in answer to the questions mentioned left the jury to infer that the establishment of the building line caused some reduction in the rentals of two of the stores in the building of the Ducan Hood Corporation, which was erroneous in the absence of testimony connecting the reduction with the establishment of the building line.

III.

There was error in the charge of the Trial Judge to the jury.

(a)

The Trial Judge charged the jury, upon request of the property owners, as follows, and exception thereto was taken in behalf of the City; (Case, p. 209, ll. 25-40; p. 217, ll. 19-24):

"The owners of the land in these cases had "the right, before the adoption of the build- "ing line ordinance, to erect or to extend and "maintain their buildings out to the line of the "property which they owned under their "deed."

"The effect of the building line ordinance is "to prevent these owners from erecting or "extending and maintaining their buildings "or structures upon that part of their land "lying between their present buildings and "the newly established building line of the "southerly side of Springfield Avenue."

These portions of the charge were erroneous. They assumed that the Duncan Hood Corporation and Cullis and Lewis owned the lands in front of the building line under deeds which were not produced, and ignored the existence of a public sidewalk easement in the lands immediately in front of the buildings of these owners.

The deeds for the properties owned by the Duncan Hood Corporation and Cullis and Lewis were not produced. They may or may not have included the lands in front of the building line.

If it be said that the City, by adopting the map mentioned in the ordinance establishing the building line and the map accompanying the report of the commissioners of assessment showing the lands affected, both of which showed property lines about 6.7 feet in front of the established building line across the lands of these owners, the answer is that the sidewalk easement could not be vacated by the adoption of such maps, nor is the City estopped thereby from asserting the existence of the easement.

With respect to the sidewalk easement, four witnesses produced by the City testified that the lands between the fronts of the buildings on the lands of the Duncan Hood Corporation and Cullis and Lewis, and the curb were paved, and had been

used by the public for sidewalk purposes continuously for over twenty years prior to the date of the ordinance establishing the building line. Such user unquestionably created a public easement.

An exclusive enjoyment of an easement, in any particular way, for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person, which might have been, but was not asserted.

Shreve v. *Voorhees,* 3 N. J. Eq. 25;
Hulme v. *Shreve,* 4 N. J. Eq. 116;
Shields v. *Arndt,* 4 N. J. Eq. 234;
Society v. *Holsman,* 5 N. J. Eq. 126;
Stuyvesant v. *Woodruff,* 21 N. J. L. 133;
Delaware, etc., Canal Co. v. *Wright,* 21 N. J. L. 469;
Campbell v. *Smith,* 8 N. J. L. 140;
Thorpe v. *Corwin,* 20 N. J. L. 311.

In the case of *Wood* v. *Hurd,* 34 N. J. L. 87, heretofore cited, it was said:

> "The right of the public accrues by such "acquiescence as carries with it the intention "of the owner to subject his fee to the public "use; and mere acquiescence for twenty "years, unaccompanied by any act which re- "pels the presumption of such intention, is "conclusive evidence of abandonment to the "public. It must be a use by the public of "the neighborhood, not a use confined to one "or two individuals."

The rule thus stated was cited with approval by the Court of Errors and Appeals in the case of *Township of Riverside* v. *Pennsylvania Railroad Company,* 74 N. J. L. 476, also cited above, but Justice Fort, who delivered the opinion in the latter case, said:

> "The law is correctly stated in this quota-
> "tion, except that we do not accede to the
> "suggestion, if it be there made, that acqui-
> "escence in a user by the public is of neces-
> "sity required to cover a period of twenty
> "years to give the public an easement. That
> "question is not decided, as it is not neces-
> "sary to pass upon it in this case for the rea-
> "son that the Trial Judge charged that twen-
> "ty years' adverse user was necessary, and
> "the jury have found that such a user ex-
> "isted."

The easement in the present case was conclusively proved. If, however, the facts were such as to create a question about it, or its extent, the question was for the jury. In any event, the Trial Judge was not justified in charging the jury as a matter of law that the owners in these cases had the right, before the adoption of the building line ordinance, to extend their buildings beyond the building line, and that the building line alone prevented them from doing so.

(b)

The Trial Judge also charged the jury, upon request of the property owners, as follows, and there was exception in behalf of the City (Case, p. 210, ll. 32-39; p. 217, ll. 33-35):

> "You may also take into consideration the
> "effect of setting back the curb lines and
> "widening the vehicular roadway in front of
> "these properties, in order to determine
> "whether these changes favorably or ad-
> "versely affect the value of the property of
> "these appellants."

The issue in these cases was only as to the amount of damages and benefits resulting from the establishment of the *building line* (Case, pp. 3-5; pp. 15-17).

There was some testimony by John D. Hood, a witness for the property owners, that shortly after the building line ordinance was passed, the City (presumably by appropriate proceedings) caused the curb line in front of the lands of these owners to be set back and the vehicular roadway widened. Any changes in the curb line and vehicular roadway were, however, the subject of proceedings which were separate and distinct from those for the establishment of the building line, and, if the Duncan Hood Corporation and Cullis and Lewis sustained any damage because of the setting back of the curb and widening of the vehicular roadway, they must have been compensated therefor in the proceedings for such changes.

Any changes in the curb line and vehicular roadway in front of the lands of these owners were entirely foreign to the issue in the present cases, and the Trial Judge erred in submitting to the jury a question as to the effect of such changes on the value of the property involved.

(c)

Part of the charge of the Trial Judge to the jury was as follows, and exception thereto was taken in behalf of the City (Case, p. 216, ll. 34-39; p. 217, ll. 30-33):

> "You are to say what kind of street there "was here before this change and what kind "of sidewalk was here before this change."

By this part of the charge, the Trial Judge again permitted the jury to base its verdicts upon changes in the sidewalk and vehicular roadway as well as upon the establishment of the building line which was erroneous for the reason that changes in the sidewalk and vehicular roadway were foreign to the issue as heretofore stated.

IV.

The Trial Judge erroneously refused to charge the jury as requested in behalf of the city.

(a)

In behalf of the City, the Trial Judge was requested to charge the jury as follows:

> "It appears from uncontradicted testi-
> "mony that the sidewalk extending from the
> "front lines of the present buildings of the
> "Duncan Hood Company and Cullis and
> "Lewis to the curb line had been used by the
> "public continuously for over twenty years
> "prior to the date of establishment of the
> "building line, and, therefore, neither the
> "Duncan Hood Company nor Cullis and
> "Lewis are entitled to any damages because
> "they are prevented by the building line from
> "extending the fronts of their buildings."

In the event of a refusal to so charge, the Trial Judge was requested in behalf of the City to charge as follows:

> "If the jury find that the sidewalk extend-
> "ing from the front lines of the present build-
> "ings of the Duncan Hood Company and
> "Cullis and Lewis to the curb line had been
> "used by the public continuously for over
> "twenty years prior to the date of establish-
> "ment of the building line, neither the Dun-
> "can Hood Company nor Cullis and Lewis
> "are entitled to any damages because they
> "are prevented by the building line from ex-
> "tending the fronts of their buildings."

The Trial Judge refused to charge the subject matter of either of these requests and exception to such refusal in behalf of the City was noted (Case, p. 217, ll. 25-26; p. 221, l. 28—p. 222, l. 13).

Such requests to charge in the alternative were proper. *Kosher Dairy Co.* v. *New York, Susquehanna & Western Railroad Co.*, 86 N. J. L. 161.

The refusal of the Trial Judge to charge as first requested was erroneous.

The existence of a paved sidewalk between the front lines of the buildings on the lands of the Duncan Hood Corporation and Cullis and Lewis and the curb line, and the use of such sidewalk by the public continuously for a period of over twenty years prior to the date of establishment of the building line in the present cases, were conclusively proved by the uncontradicted testimony of four witnesses for the City (Case, pp. 30-65). A public easement for sidewalk purposes in the lands between the fronts of the buildings and the old property line, assuming it was some distance in front of the buildings, was thus created. *Wood* v. *Hurd, supra; Township of Riverside* v. *Pennsylvania Railroad Co., supra.* The Duncan Hood Corporation and Cullis and Lewis were and are prevented by this easement from extending the fronts of their buildings, and the establishment of the building line did not deprive them of any right in that regard with consequent damage.

Counsel for the property owners objected to the introduction by the City of testimony with respect to the sidewalk easement on the ground that it tended to impugn or question their title, notwithstanding the local assessors proceeded on the theory that the owners had title to the lands between the building line and an assumed property line in front of it.

There was not and could not have been on the trial of these cases in the Union County Circuit Court any evidence of the theory on which the local assessors proceeded. The trial in that Court was, under the provisions of the Home Rule Act, *de novo,* and all parties had the right to introduce any evidence material to the issue.

The existence of the sidewalk easement was material to the issue because the amount of the damages resulting from the establishment of the building line depended largely upon it. Proof of the easement did not impugn or question any title of the property owners. They had never asserted any title as against the easement and proved none at the trial. There was, therefore, no title to be impugned or questioned so far as the cases disclose.

Assuming, however, that the property owners had proved a paper title to the lands covered by the easement and that proof of the easement would have impugned or questioned such title, the City could prove the easement as one of the elements to be considered in awarding damages resulting from the establishment of the buliding line. In an ordinary condemnation case, the commissioners or a jury on appeal could consider the effect of a valid easement by prescription over the lands being condemned upon their value notwithstanding the paper title to the lands.

The existence of the sidewalk easement was a material factor in these cases and was conclusively proved. The City was, therefore, entitled to have the jury charged in accordance with the first of its alternative requests.

If, however, the testimony left a question as to the existence of the sidewalk easement or its extent, the question was for the jury and the City's second alternative request should have been charged. The refusal of the Trial Judge to so charge was erroneous.

(b)

The following request to charge was made in behalf of the City and refused. Exception to the refusal was noted (Case, p. 217, ll. 25-26; p. 222, ll. 14-17):

"Neither the Duncan Hood Company nor "Cullis and Lewis are entitled to any dam- "ages to their properties caused by changes "in the curb line or sidewalk in front there- "of."

There was but a single issue in these cases. It was in regard to the damages and benefits to the properties of the Duncan Hood Corporation and Cullis and Lewis resulting from the *establishment of the building line* (Case, pp. 3-5; 15-17). The establishment of such line involved no changes in the curb line or sidewalk in front of the properties of these owners and if there were such changes they were the subject of proceedings separate and distinct from those for the establishment of the building line.

If the properties of the Duncan Hood Corporation and Cullis and Lewis were damaged by changes in the curb line and sidewalk, such damages must have been allowed in the proceedings therefor. In any event, these property owners were obviously not entitled to recover damages for changes in the curb line and sidewalk in the present cases.

The refusal of the Trial Judge to charge the last mentioned request was erroneous.

V.

Interest on the amounts of the verdicts of the jury was erroneously included in the judgments entered thereon.

The verdict of the jury in favor of the Duncan Hood Corporation was for $10,781. and that in favor of Cullis and Lewis was for $2,868. Interest on such sums from the date of the ordinance establishing the building line to the date of entry of

judgments was calculated by the Trial Judge and added to the amounts of the verdicts in the rules for judgment and judgments ordered entered for the amounts of the verdicts with such interest. The interest in the case of the Duncan Hood Corporation amounted to $2,231.67 and the judgment in its favor was for $13,012.67, exclusive of costs. The interest in the case of Cullis and Lewis amounted to $593.67 and the judgment in its favor was for $3,461.67, exclusive of costs (Case, pp. 6, 18).

The addition of such interest to the amounts of the verdicts and inclusion thereof in the judgments was erroneous.

Assuming that building lines can only be established by the exercise of the power of eminent domain and that the establishment of such lines constitutes a deprivation of property within the meaning of the Fourteenth Amendment to the Constitution of the United States and a taking of property for public use within the meaning of Article I, paragraph 16, of the Constitution of the State of New Jersey, and, therefore, that such lines can only be established upon payment of compensation to the owners of property affected thereby, the act under which the building line was established in the present cases provides for such compensation and is constitutional in that respect.

Just compensation to the property owners in these cases, however, did not require the addition of interest to the verdicts of the jury.

Neither the act under which the building line was established nor the act under which the appeals to the Union County Circuit Court were taken provided that damages occasioned by the establishment of the building line should be determined as of the date of the ordinance establishing the line, nor does the issue as framed so provide.

The Trial Judge did not instruct the jury to fix the damages as of the date of establishment of the building line. He told the jury only that it should take into consideration the condition and surroundings of the properties at or before the time the ordinance was adopted; that the damages should be determined according to the condition of the properties on the date of establishment of the building line; and that the jury could consider the value of the properties before and after the establishment of the building line (Case, p. 210, ll. 11-19; p. 211, l. 40—p. 212, l. 10; p. 214, ll. 3-9; ll. 23-30).

Thus, the jury was directed to ascertain damages according to the condition and value of the properties before and after the establishment of the building line, but it was not limited to rendering verdicts therefor, and, for aught that appears in the record, the verdicts were for all damages up to the date they were rendered, including interest, if the jury believed the property owners were entitled to any.

It is said by Lewis in his Treatise on the Law of Eminent Domain that (Third Edition, Vol. 2, p. 1324, sec. 742):

> "Interest when allowable and to the extent "allowable should be computed and included "in the award or judgment, and the presump- "tion is that it has been so included."

In the case of *Acquackanonk Water Company* v. *Weidmann Silk Dyeing Company,* 98 N. J. L. 413; affirmed 99 N. J. L. 175, interest on the verdict of a jury upon the trial of an appeal from an award of commissioners under the general condemnation act of 1900 was calculated by the Trial Judge and included in the judgment. The case cited has, however, no bearing on the present cases for the reasons that the general condemnation act of 1900

expressly requires compensation to be fixed as of the date of the filing of the petition for appointment of commissioners, and in that case the condemning party had been in possession of the subject matter of the proceeding from the date mentioned.

In the present cases, neither the act for the establishment of the building line nor the act under which the appeals were taken provide that the damages shall be fixed as of the date of establishment of the building line and the City had no possession of the properties at that time. The City could not enforce the ordinance until after the damages had been finally settled and paid (Home Rule Act, Article XX., section 23: P. L. 1925, p. 233).

Conclusion.

We respectfully submit that the judgments in these cases should be set aside and new trials ordered.

Robert J. Bain,
Clement K. Corbin,
Of Counsel with the City of Summit,
Appellant.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.
(6243)

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

In the Matter of the award for damages and the assessment for benefits accruing from the establishment of building lines on Springfield avenue from Woodland avenue to Kent Place Boulevard in the City of Summit.	
DUNCAN HOOD CORPORATION, a corporation of the State of New Jersey, *Appellant-Respondent,* *vs.* CITY OF SUMMIT, a municipal corporation of the State of New Jersey, *Respondent-Appellant.*	*On Appeal from Union County Circuit Court.*
GEORGE H. CULLIS and CLIFFORD H. LEWIS, co-partners doing business under the firm name and style of CULLIS AND LEWIS, *Appellants-Respondents,* *vs.* CITY OF SUMMIT, a municipal corporation of the State of New Jersey, *Respondent-Appellant.*	*On Appeal from Union County Circuit Court.*

BRIEF OF RESPONDENTS.

1.

Statement of the Cases.

These are joint appeals by the City of Summit from judgments in favor of two property owners, for damages resulting from the establishment of a building or "set back" line along Springfield avenue, across the lands of such owners. The proceedings were instituted under the Act of March 29, 1917 (2 Supp., p. 2401), which provides that after the establishment of such a line "no building, structure, or part thereof, shall be erected between said line and the street."

The ordinance establishing this building line was adopted December 4, 1924 (Exhibit 1) and provides in section 2 that after its passage

> "No new building, structure, or part thereof, shall be erected *on the property between said building line and the street.*"

The set back line in question is peculiar in that it does not extend through the city block in which respondents' properties are located. These properties are on the south side of Springfield avenue, in the block running from Maple street on the east, to Kent Place Boulevard on the west. The block is devoted exclusively to business, Springfield avenue being the principal business street of the city. Commencing at Kent Place Boulevard and running eastwardly, the set back line cuts into the properties for a depth of seven feet, and abruptly stops at a point in Hood's land twelve feet west of the easterly line of the property. On both sides of the property in these cases, the stores and buildings were built out to the street line, so that these two buildings were recessed with respect to the adjoining buildings. East of these

properties, the buildings are not required to be set back, but toward the west the owners of the land fronting on the street are required to set or keep their buildings back seven feet from the street line, thus making an abrupt jog or corner in the middle of the block, where the properties of these respondents are situated.

The record shows that up to about the year 1900, some stores were erected along this block leaving an open space between the buildings and the street line, and, in some cases, with a flagging laid to cover the entire area between the building and the curb. This was the situation with respect to respondents' properties (p. 40). Subsequent to that year, new buildings in the block were built right out to the street line, and with the adoption of that practice the older buildings were gradually extended or remodeled accordingly until all the buildings east and most of the buildings west of the respondents' lands presented a solid and uniform line upon and along the street line (p. 43). While this development was still in progress, the city established the set back line in question, seven feet in depth along the fronts of respondents' properties, the effect of which is to prevent them from following their neighbors and competitors in extending their stores and buildings out to the street line. The building of respondent, Duncan Hood Corporation, was purchased in 1922, and is a three-story brick structure, containing four stores, its face being about seven feet back from the property or street line (p. 113). The adjoining building of respondent, Cullis & Lewis, is a two-story frame building containing one store and is similarly situated.

The sidewalk, *i. e.*, the space between the curb line and the property line, as shown by the

maps in evidence, was ten feet in width throughout the entire block. However, coincident with the establishment of the set back line, the city also set back the curbstone a distance of seven feet in front of respondents' properties and west thereof, thus reducing the width of the sidewalk on the street from ten feet to three feet in front of respondents' stores, and forcing all pedestrian traffic to divert southerly and walk upon and over respondents' private property in order to traverse this block. The act under which the establishment of a set back line is authorized does not define any purpose for its establishment, nor does the ordinance in this case disclose the object of the exercise of the power, but that the establishment of a set back line constitutes a taking of private property within the meaning of the constitution, and that the power can be exercised only on payment of compensation is clearly shown by the decisions of this court and the Supreme Court in the following cases:

Vatter v. *Kaltenbach,* 129 Atl. 926; affirmed 102 N. J. L. 470;

Eaton v. *South Orange,* 130 Atl. 362;

Heller v. *South Orange,* 130 Atl. 534;

Scola v. *Senior,* 102 N. J. L. 26;

Franklin, etc. Co. v. *South Orange,* 132 Atl. 81; affirmed 134 Atl. 917;

Rudnevitz v. *Bigelow,* 133 Atl. 666.

BRIEF OF ARGUMENT.

POINT I.

There was no error in excluding testimony.

(a) (b)

The first and second grounds of appeal argued on (pp. 6-9) appellant's brief are based on the overruling of a question addressed in two forms to a real estate expert, embracing an assumption that the entire space between the face of respondents' buildings and the curb line was a public sidewalk. However, after some colloquy between the Court and counsel, the following occurred (p. 73):

> The Court: I am going to allow that question.
>
> Mr. Bain: Perhaps I can frame it a little differently.

The question was then restated by counsel in the following form:

> "Q Assuming that the Duncan Hood Corporation and Cullis & Lewis own a fee to the lands between their buildings and the curb line subject to some public easement for sidewalk purposes, what in your opinion was the damage to those two properties because of the establishment of this building line?"

which question was answered by the witness as follows:

> "A partial loss would have been sustained in my opinion."

(c)

The ground of appeal under this heading relates to a hypothetical question to another real estate agent who had no personal knowledge of values of land in the City of Summit, and, after

reciting the testimony of the previous witness, as to certain sales of land, concluded with:

> "In view of those sales, *would you say* that the property of the Duncan Hood Corporation and Cullis & Lewis have any greater value than $400 per front foot for the first hundred feet in depth?"

While the question was overruled, the Court turned to the witness and asked:

> "Q What did you value this property at per front foot as the land alone was concerned? A I valued it at $400 a front foot, 100 feet in depth."

There was therefore no exclusion of any testimony which the appellants desired to introduce.

POINT II.

There was no error in the admission of testimony.

As to the first question stated in (p. 14) of appellants' brief, the answer was stricken out (p. 116, l. 27).

The second question ("Did you have any other changes of rentals with any of your other tenants?") was answered, "Yes, I did"; to which *answer* only a qualified objection was made (p. 119, l. 25).

The third question ("State in detail what other changes you had in your rentals?") was answered, "The Public Service occupied two stores"; to which there was no objection or exception (p. 120, l. 1).

As to the last question (p. 116, l. 29), the record shows that only a qualified objection was made to the answer, and no exception noted.

There was therefore no legal error in the admission of any testimony. Loss of rents is admissible in evidence in condemnation proceedings. *Newark* v. *Weeks*, 71 N. J. L. 448, 456; *Lewis Eminent Domain* (Sec. Ed.) Par. 670.

The rule as stated in 20 Cor. Jur. 790, is as follows:

> "Where a tract of land is injured or partially taken in the exercise of eminent domain, it is proper in determining the damages, to consider its productiveness and the income which may be derived from it. Accordingly if the rental value of the land has been permanently decreased, it is a proper element of damage."

POINT III.

The land affected by the ordinance was the private property of the respondents on which they had the right to build prior to the adoption of the ordinance.

The errors assigned on p. 20, of appellant's brief are based on exceptions to charge, stated by number only (case, p. 217, l. 25). Such assignment is insufficient, *State* v. *Blaine*, 6 N. J. Adv. R., 506; *Napper* v. *R. R. Co.*, 6 Adv. R. 1036.

These grounds of appeal bring up the question of the right of the respondents in the seven-foot strip of their land between the front of their buildings and the street line; in other words, whether the public had acquired some right by prescription so as to deprive these owners of the right to claim exclusive possession of the land and damages for its taking.

The question is raised on the Court's instructions, first, that the owners had the right, before the adoption of the ordinance, to build

on the land, and secondly, that the effect of the ordinance was to prevent such building (8th and 9th grounds of appeal).

The notice of appeal to the Circuit Court describes the property as "Lot 7, Block 151, on Map dated Oct., 1925, by J. P. Broome, City Engineer * * * being 108 feet in width in front, 190.5 feet deep * * *" (p. 2) and the order framing the issue states the question involved as the damage to be paid to the owner of the lands, which are again described as situate on the southerly side of Springfield avenue, 108 feet in width and 190.5 feet in depth.

There was no suggestion or intimation in the order framing the issue that there would be injected into the trial a question of the rights of the respondents in their own lands, or that the issue as to the damages for the taking would be narrowed by a claim of prescriptive right in the public. No notice was given these respondents of the assertion of any such claim, and it is manifest that if the appellant here had believed that the public had acquired a right by prescription to use the lands of these respondents, then the ordinance to establish the set back line to prevent the respondents from extending their buildings beyond the present fronts would have been entirely unnecessary. The ordinance establishing the set back line was adopted December, 1924. It became effective immediately, but it was not until the trial in May, 1928, that this claim was raised without amendment of the issue as framed and without notice to the land owners. In 20 Corpus Juris 927, the rule is stated:

> "If the petitioner recognizes the person in possession of the land as its owner by instituting against him a condemnation pro-

> ceeding, no issue is raised as to the title of the land, and such person will not be required at the trial to prove his title, since the petitioner will not be permitted to deny it."

The brief of the appellant states (p. 4), and it is conceded, that awards of damages were made by the local assessors, and confirmed by the city council. Also that these respondents were dissatisfied with the awards made to them and appealed to the Circuit Court. We call attention to these facts, as stated and admitted by appellant, to show that the proceedings were originated or instituted on the assumption that the effect of the ordinance was to take respondents' property for public use, and that the respondents were entitled under the law to an award for the damages sustained. That was in December, 1924. However, three and a half years later, when the matter came on for trial in the Circuit Court, the city requested the Court to instruct the jury *that these respondents were not entitled to any damages whatever* (Case, p. 24, l. 20), because they had lost the right to build on their land, not by force of this ordinance, but by prescription. As a right by prescription is a hostile right, requiring some definite expression or assertion, it is of significance in this case that no one in the City Government thought of asserting it against these property owners at the time the ordinance was passed, or when the awards of damages were made by the assessors, or when the awards were before the council for confirmation, or until the city was brought into court on the trial of the appeal.

It is also admitted under Point III of appellants' brief, that the council for the purpose of the ordinance in question adopted a map, showing the building line running through the

respondents' properties, 6.7 feet back of the property lines. Counsel say that the city, by adopting the map, could not thereby vacate the public easement. But this argument does not dispose of the point that there never had been an assertion of the existence of a public easement on this land.

Four witnesses were unsuccessfully examined by the City in an effort to show that the general public had used this part of respondent's lands for sidewalk purposes in a manner and for such a length of time as to give the public a right of use by prescription.

It must be borne in mind that at the time this ordinance was adopted and for a number of years previously, the buildings on both sides of these two lots extended out to the street line, so that the two buildings of these respondents were in fact in a recess, seven feet back from the street line. The curb and the regular sidewalk, 10 feet in width, extended straight past these properties. In this situation, there was no testimony that any pedestrian having occasion to walk along this block, unconcerned with these stores, ever deviated from the regular sidewalk in order to walk across respondents' land. The only testimony of the use of the land in this recess was by shoppers in the stores or those who wanted to look into the show windows. As there was a paved sidewalk extending through the entire block, and the public naturally passed along the sidewalk, testimony that the public used the *sidewalk* is not sufficient to show a public continuous use of respondents' lands as a highway.

Thus the witness Twombly, who was a child seven years of age in 1908, testified that there were then flagstones in front of these buildings,

extending to the curb and including the sidewalk (p. 35). He was then asked "For what purposes were the original flagstones in front of these two buildings, and subsequently the concrete pavements, used? A Used by the public. Q As a sidewalk? A As a sidewalk." The mode, extent, and period of use was not asked or stated. Except for this witness *going to these stores* to buy animal crackers, and some ladies who "used to shop there" (pp. 37, 38) no other use of any part of the space or sidewalk in front of these stores was shown by his testimony.

The next witness, Milroy, testified that the concrete pavement in front of Duncan Hood property was used by pedestrians "for to walk on," and on cross examination, he testified that he saw the space in front of the stores used by people to *get into the stores and look into the show windows.* But "twenty years ago" there were only four or five buildings in the entire block (p. 51) most of the block being vacant lots, across which there ran a single line of flagstones (p. 52, l. 10; p. 53, l. 35).

Witness Flood testified that there was a "sidewalk" extending from the face of these buildings to the curb (p. 57). But on cross examination he testified that the curb line was straight, that in walking down the block "you could walk straight along parallel with the curb line," and "when you got down in front of the Duncan Hood property, you didn't have to go around the corner and walk close to that building;" he had no recollection of doing so; and that anyone traversing this block, did not to his recollection use any more of the sidewalk in front of these properties than they did in any other part of the block (p. 59). He further testified that *he could not say*

that anyone ever walked on respondents' land except to look into the show windows of the stores (pp. 60, 61).

Witness Henry, testified that he was familiar with these properties and the sidewalk in front of these buildings was used (no time stated) "for the general uses of approaching the show windows, and pedestrians passing up and down" but on cross examination he testified that *he never saw anyone deviate from the regular sidewalk except to look into the show windows* (p. 64).

We submit that this testimony is insufficient to show such a public use of respondents' areaway for highway purposes as to present a *prima facie* case of prescriptive right.

It is a very common thing in cities for store fronts to be built with large lobbies before the entrance, flanked on both sides with show windows, affording a place for shoppers to stand off the sidewalk, but it could hardly be asserted that such use gives use to a public right by prescription.

So in this case, while the evidence does not show that for 20 years before the passage of this ordinance, the public habitually dodged into and out of this recessed areaway, the only specific testimony of such use was in connection with going into the stores or to see what was exhibited for sale. The establishment of stores and the exhibition of goods in show windows constitutes an invitation to prospective customers, and such use is just as permissible as if the prospective customers had gone inside of the stores to see the goods. In the physical situation thus presented, the only inference to be drawn from the testimony is that the use of the area of respondents' lands between the exterior face of the build-

ings and the established street line, was by permission and invitation of the owners, and being permissive in its inception, could not ripen into a hostile right. *Penn. R. R. Co.* v. *Hulse,* 59 N. J. L. 54.

In the note (supported by a great mass of citations) to *Holm* v. *Davis*, 44 L. R. A. (N. S.) 89, it is stated:

> "It is the well settled rule that use by expressed or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since one of the elements essential to the acquisition of such an easement, namely, use as of right as distinguished from permissive use, is lacking."

"To establish a highway by prescription the land in question must have been used by the public generally as a way common to all, with the actual and implied knowledge of the land owner, adversely and under color and claim of right, and not merely by the owner's permission, and continuously and uninterruptedly for a period required to bar an action for the recovery of land." (29 Cor. Jur. p. 373.)

POINT IV.

It was not error to permit the jury to consider the physical situation and use of the surface of the land.

(b) (c)

Under these points the appellant complains of the instructions of the trial court to the effect that the jury might take into consideration the effect of setting back the curb line and narrowing the sidewalk in front of respondents' property.

The appellant overlooks the requirement of the statute that the board of assessors shall fix and determine the amount to be paid as damages to the owner or owners of the land affected by such building line, "*having due regard to the partial use of the land to be enjoyed by the owner or owners thereof.*"

It is obvious that if upon the adoption of the set-back ordinance the curb line had been left where it was, so that pedestrians could continue to walk straight through the block on the ten-foot sidewalk in the customary manner, these respondents could make some use of the seven-foot strip in front of their stores for storing or handling goods or for exhibition purposes—anything except the erection of a building. The record and the map show, however, that at the same time, or shortly after, the set-back ordinance was adopted, the curb was set back (p. 122) to within three feet of respondents' property line, and the roadway widened, so that the ordinary foot traffic along this business block, was then compelled to use respondents' land or walk out into the vehicular roadway. It is also manifest that if respondents should now attempt to make any use of this strip, such as is contemplated by the statute, it would not only interfere with the passage of pedestrians having occasion to pass this property, but would also obstruct the entrance and exit of customers at the stores. When the statute prescribes that the damages should be ascertained and fixed with due regard to any use the landowner may still have in the land, it would seem to be necessary to show, rather than to ignore or conceal, the physical situation created by the municipality. The City introduced evidence at the trial that the establishment of the build-

ing line was a benefit to these properties because the simultaneous setting back of the curb and widening of the roadway provided *increased parking and traffic facilities* (p. 97). And on cross examination of one of respondents' witnesses, counsel for the City asked (p. 179):

> "Q For what purpose is a building line established with reference to the property? A Well, to keep the buildings back a certain distance from the street."
>
> "Q And to *widen the street* and make the space between the fronts of the buildings wider? A Sometimes that would be true."

Both on direct and cross examination, counsel for the City endeavored to have the jury appreciate the *benefits* to this property by reason of the physical changes in the surface of the street as a result of the set-back ordinance, or the traffic advantages or opportunities afforded by reason of its adoption. As Mr. Justice Garrison said in the opinion for this court in *Hinners* v. *Edgewater, etc., R. R. Co.*, 75 N. J. L. 514:

> "Plaintiff in error, having insisted on this scheme as one that reduced its damages * * * cannot now obtain a reversal of the judgment * * * merely because of some academic or abstract errancy in such submission * * *."

The fact is that while the City adopted this ordinance as a set-back ordinance, it availed itself of that legislation to accomplish an incidental improvement, and on the trial introduced evidence to show the damages and benefits from the resulting physical situation.

To show the actual physical facts was not only required by the statute in this case, but is always admissible in condemnation proceedings, where the taking of private property and its manner

and mode of use is all within the control of the condemning agency.

Packard v. *Bergen Neck R. R.*, 54 N. J. L. 553.

Here, if the adoption of the set-back line did no more than to deprive the owners of the right to use their land for building purposes, leaving the physical situation as it was, including the right to use the land for their exclusive benefit in a manner not inconsistent with the law, the damages would have to be ascertained accordingly. But such was not the case; the City did not preserve or maintain the same physical situation, and did not afford the owners any right or opportunity to enjoy a partial use of the land on which the easement was laid by the ordinance.

We desire to call attention to the argument of the appellant on this point, where it is stated that any changes in the curb line and vehicular roadway were the subject of other proceedings, and that these respondents "must have been compensated therefor in the proceedings for such changes." This trial commenced on May 14th, and continued through May 15th and 16th, so that if it were a fact that the City had adopted any other proceedings for changing the street or sidewalk, or had taken any action to compensate these owners for turning their land into the public highway, the City had ample opportunity to produce the City Clerk or the record showing the fact. But no such proof was offered because no such proceedings had been taken. If they had been, then the building line ordinance would not have been necessary.

POINT V.

The respondents are entitled to interest on the verdict.

The verdicts in these cases represent the jury's findings of the net amount to which the appellants were entitled as of the date of the establishment of the set-back line by the ordinance of December 4, 1924. All of the testimony as to values was directed to that date (pp. 69, *et seq.*).

As the Court said in *St. Louis* v. *Hill,* 116 Mo. 527, 22 S. W. 861:

> "The day before the ordinance went into operation the defendant had the unquestionable right to build up the whole of his lot. The day afterwards he was as effectually prevented from building on the 40 foot strip, except under peril of punishment, as if the city had built a wall around it."

We have the same situation here. Under the statute and the ordinance, immediately upon the adoption of this ordinance, these owners were from thenceforth deprived of their domain, use and enjoyment of this property, the control and use of which passed to the public (p. 225). Under well settled principles of law, where property is taken for public use, it must be valued as of the time of the taking, and interest accrues on that valuation from the time of the taking, which, being merely a matter of computation and not opinion, may be calculated by the Court and added to the verdict in making up the judgment.

In *Acquacknonk Water Co.* v. *Weidmann, &c. Co.,* 98 N. J. L. 413, Black, *J.,* said:

> "Judge Silzer, the trial judge, allowed and calculated interest at the lawful rate on the verdicts, from the date of the filing the petitions. The basis of the court's action was founded on the fact that the condemnors

have been in possession of the property, *i. e.*, the water, since that time. The award made, and the amount found by the jury as compensation, was the amount due, as of the time of filing the petitions. It was to be paid under the statute as of that time. The interest was a mere mechanical process of calculation. We think the action of the trial court was founded upon a firm basis of reason. It was not error. Interest is by general principles allowed from the time of the appropriation of the property. * * * We fail to see where any right of the appellant has been taken away in this case, as the interest is a mere matter of calculation. Whether it shall be made as a matter of course by the jury instead of by the court seems to be quite immaterial. In either case it would be the same * * *. Interest from the date of the commissioner's award to the time of trial, or the coming in of the postea, should, as a general rule, be allowed."

Upon review by the Court of Errors and Appeals, the opinion of the Court (99 N. J. L. 175), was written by Justice Bergen, who said:

"As to the alleged error in adding the interest to the verdicts we are of the opinion that the action of the trial court in this regard was not error. The record shows that the condemnors were in possession and diverting the water from the time of the filing of the petition to condemn, and manifestly the landowners were deprived of their property from that date without just compensation. And where the statute does not on terms provide for an allowance of interest, equitable principles require that it be allowed. Metler *v.* Easton and Amboy Railroad Co., *supra.* But the appellants insist that it should be calculated by the jury and included in their verdict, as was done in the Metler case, where the jury found the interest as a separate item as directed by the court, Mr. Justice Depue, in the opinion of the court, saying: 'By the postea it appears

that the jury was directed to make the calculation of interest separately, that it might be submitted to this court whether the plaintiff was entitled to interest.' Thus recognizing the power of the court to disallow the interest, if circumstances equitably required it, and to order a judgment after eliminating the interest.

If this be so, then the converse of the proposition would be sound in law, and the court may add interest to make full compensation in a case where the jury is required by statute, and the instruction of the court, to find the damages as of the time of taking the land prior to the date of trial. As Mr. Justice Depue said, in the case last cited, 'interest on demands of this character, not being a matter of contract, or positive law, is allowed on equitable principles.' It seems to us that when a statute like the one under consideration restricts a jury in ascertaining damages to the date of the taking of the land, which is long prior to the trial, and the landowner is entitled, on equitable principles, to interest on the sum awarded for the value of his land taken, it is not an erroneous procedure for the trial court to add to the verdict by way of legal interest such sums as will compensate him for his property, and order judgment for the sum thus arrived at. There was no disputed question of fact not settled by the jury, and the ascertainment of the amount of the interest was a mere matter of calculation, and the only error in the proceeding complained of, if it was one, was that the court calculated the interest instead of the jury, which does not affect the substantial rights of any of the parties.''

We respectfully submit that the judgments should be affirmed.

EDWARD G. PRINGLE,
MAXIMILIAN M. STALLMAN,
Of Counsel with Appellants.