

## New Jersey Court of Errors and Appeals.

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Between

ABRAM SPEER,  
Respondent & Complainant below,

and

ERIE RAILROAD COMPANY,  
Appellant & Defendant below.

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} On Appeal.

### **Brief for Appellant.**

It is not intended by this brief to cover the whole case, but to add to the main brief certain considerations as to the matter at issue.

A great deal has been said by counsel in argument and by the Vice-Chancellor in his decision as to what would constitute a "suitable and convenient" crossing, and what should be regarded as such a crossing for one of the parties. But we prefer to turn back to the deed, to consider the situation of the parties at the time the deed was made, and to try to ascertain what the parties provided for by the deed, and what they regarded as a suitable and convenient crossing.

**The parties to the deed provided for a crossing with gates or bars to be maintained forever.**

Just prior to the making of the deed, the Montclair Railway had laid out its route which passed over one of the ends of a field used by Speer for agricultural and pasturage purposes. The railroad separated the field into two unequal portions. Speer made the deed, putting into it such provisions as would best protect his interests and would insure that the railroad should be kept fenced off from his other land by the railroad company and that he should have communication between the severed portions of his field. These two objects are named in the order we have stated; they were to be performed in that order, and it is probable that in so stating them, they were considered to be of first and secondary importance, as stated. In other words, the tract was to be fenced, and then the crossing was to be provided.

**The tract conveyed was to be fenced on both sides before any crossing should be made.**

The deed so states without any ambiguity or uncertainty. The railroad company, for itself and its successors doth "agree to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the work of grading on said tract is commenced."

In other words, as soon as it received title and before grading the land to lay its track, the railroad was to fence the tract conveyed on both sides. That is to say, it was to fence it along the *whole* of both sides—the fence was to extend not only over the part which might not be used for a road to the track crossing, but also over that part

which might be so used. The agreement is for a fence throughout.

The situation contemplated by the parties then, immediately after the deed was made, and before grading, was that the railroad should have fenced its right of way on both sides, thus separating Speer's field into two portions divided by a tract of land owned by the railroad, and bounded by two fences, one on each side of the railroad's right of way. No duty was imposed on the railroad then to make any crossing—because

**The crossing was not to be constructed until the right of way was graded and the rails laid.**

The deed, after providing for fences, goes on to say that the railroad company shall provide Speer "with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct."

The deed contemplated action by both parties before the crossing was constructed. The rails should be laid and Speer should direct where the crossing should be located. Considerable time might, therefore, elapse between the time when the deed was delivered, and fences made, and the time of the location and construction of the crossing. And the active duty so to be performed by the railroad was only to provide a crossing "across the track of said railway." The deed may imply that Speer should have access to the track so as to cross it, but there is no active duty put on the company to construct approaches.

**The provision for fence is and must be a continuing burden on the land. At all times and under all circumstances must the fence be maintained by the owner of this tract.**

It is expressly stated that the fences must be maintained. Not so the crossing. But there can be no question that the agreement for fencing is a restriction and covenant running with the land (*Coudert vs. Sayre*, 1 Dict. Chy., 386 395). The fences must be maintained on both sides of the tract, along the full length of both sides, over the part which may be used for an entrance to the track crossing, as well as the other parts of such sides, forever.

It is a primary rule in the construction of written instruments, that the instrument must be considered as a whole and that force and effect should be given to every word, if it is possible to so construe them without involving an absurd or utterly unreasonable conclusion, or contradicting other plain words of the deed.

“What may be considered another aspect of the rule that the instrument shall be considered as a whole, is the requirement that every clause, *and even every word* shall be given effect, if this is in any way possible, and no part will be rejected unless absolutely repugnant to the general intent. Consequently, such a general construction must, if possible, be adopted that every part will be in harmony therewith” (*Am. & Eng. Ency. Law*, Vol. 17, p. 7).

*Mass.-Corbin vs. Healy*, 20 Pick. (Mass.), 514.

*N. Y.-Harty vs. Doyle*, 49 Hun, 410.

*Barhydt vs. Ellis*, 45 N. Y., 107.

*Miller vs. Hannibal, &c.*, R. R. Co., 90 N. Y., 430; (43 Am. Repr., 179).

"A word not plainly inserted by accident or mistake is never to be thrown out entirely while there is a plain and natural construction which can be given to it not manifestly destructive of the general intent of the sentence" (Phila. vs. River Front R. Co., 133 Pa. St., 134).

Wager vs. Wager, 1 S. & R. (Pa.), 374.

Smith vs. Natl. L. Ins. Co., 103 Pa. St.,  
177 (49 Am. Repr., 121).

(Corbin vs. Healy, 20 Pick. (Mass.), 514):  
"When both parts of a deed may well stand together consistently with the rules of law, they shall be construed to have that effect, rather than to be held repugnant."

(Miller vs. Hannibal & St. Jo. R. R. Co., 90 N. Y., 430): "It is the imperative duty of the Court to give effect if possible to all the terms of an agreement. The construction is to be made upon the whole instrument, and not upon one or more clauses detached from the others; where two clauses, apparently repugnant, may be reconciled by any reasonable construction, as by regarding one as a qualification of the other, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent provisions."

(Barhydt vs. Ellis, 45 N. Y., 107): "Effect must be given, if possible, to every part of an agreement, and it is only when there is an inconsistency or repugnancy which is totally irreconcilable, that a discrimination will be made as to which part shall be made to yield to the other."

**The rule of construction that an instrument should be considered as a whole and that force and effect must be given to all the words, makes it plain that gates or bars must always be maintained at the crossing.**

A gate is part of a fence. When closed it is a continuation of the fence. A fence is not necessarily fixed and stationary. There are movable fences. A gate is only a fence that may be conveniently moved. *A fortiori*, bars such as were erected in this case, at the crossing constitute a fence. Often only by close inspection can one discover where bars exist in a rail fence. They constitute a fence in every particular, the only distinction being that the fence at the point where bars exist can be readily removed and replaced.

It has been expressly decided that gates are part of a fence (*Estes vs. Atlantic, &c., R. R.*, 63 Maine, 308; *Chicago, &c., R. R. vs. Harris*, 54 Ill., 528), and that bars are part of a fence, (*Ill. Cent. R. R. vs. Arnold*, 47 Ill. Rep., 173. Compare, also, *Van Duzen vs. Lehigh, &c., R. R. Co.*, 29 Vroom., 8).

By erecting these fences, and putting bars in them where Speer directed, the railroad fully performed its agreement with Speer as to fence construction. These bars were part of the fence.

Look at the case, a moment, from Speer's side. Suppose the railroad had refused to provide bars or gates at the crossing, or had neglected to maintain them. Could not he have recovered damages if his cattle escaped and were run down? Could he not have enforced the performance of this duty by specific performance? Could the railroad have said that it did not agree to maintain the bars in the fence? No Court would have sustained such a claim for a moment.

The construction given this stipulation by the

Court below, disregards the rule of giving force and effect to every word of the agreement. It construes the stipulation of the agreement as to fences as referring not to the whole of both sides, and says they must not maintain gates or bars, only as to a part of both sides, viz., that not occupied by the way for the crossing. But the agreement says "both sides" without any exception as to crossing.

The rule we invoke gives full force and effect to every word, and is the proper construction unless it leads to plainly absurd or unreasonable conclusions, or is inconsistent by the plain meaning of other parts of the deed.

**Bars or gates at the crossing are not absurd, unreasonable or inconsistent with the plain meaning of other parts of the deed.**

The Vice-Chancellor held to the affirmative of this proposition. In this he was mistaken. Great stress is laid on the force of the words "suitable and convenient." Let it be again noted that the road crossing which the railroad should construct is not a suitable and convenient road crossing across the land conveyed, but only across the part of that land on which the track is laid. It is "a suitable and convenient road crossing across the *track of said railway.*" The railroad did not agree to make this crossing "suitable and convenient" except at the place where it crossed the track. In other words, at this point it was to put down planking or otherwise mitigate the inconvenience of wagons crossing rails. It was under no duty, at other parts of said land to do anything actively to facilitate crossing. Yet the Vice-Chancellor construes the provision as if we were to construct and maintain a suitable and convenient road across the land not occupied by the rails. Not only, this, but he holds that we

must provide and maintain a suitable and convenient *entrance* into our lands through the fences, to the extent of removing *bars and gates*.

Now, the deed said nothing of the sort. It does not provide for "a suitable and convenient road crossing across the tract hereby conveyed," which would be the natural words to convey the meaning that the Vice-Chancellor reads into the deed. It provides only for a crossing across railroad tracks.

The deed then is silent as to whether the entrance to our land should be suitable and convenient.

There are then three things plainly stipulated for by the deed: 1st, the tract conveyed must be kept fenced for all time; 2d, Speer should have a road crossing across the railroad track; 3d, that crossing should be suitable and convenient.

The question arises, what kind of an entrance should Speer have into the track conveyed?

Plainly this entrance must be through bars or gates. In no other way is the stipulation fulfilled that the land shall be kept fenced on both sides, without limit as to time and circumstances.

The parties having agreed then that the land shall always be kept fenced, it is not unreasonable or inconsistent with his crossing being suitable and convenient that bars or gates should be maintained. It is not a road crossing across the land open and unfenced, that is provided for, but across a tract of land with fences on both sides of it, forever to be maintained. The only crossing that can be suitable and convenient to a tract of land so situated and encompassed, is by an entrance through gates or bars.

This is the construction put on the deed by the parties for over thirty years, and until this litigation began. The Vice-Chancellor reads into it another construction not provided for by the parties and contrary to the express words of the deed and the construction put on it by the acts of the parties.

**The railroad can lawfully demand that it should maintain such fences, and therefore, bars or gates, forever.**

The railroad would have the right to fence this land unless the right was taken away by the deed. This is unquestionable.

It is interested in having these fences and bars or gates maintained to prevent trespassing on its track and land. This will not be denied.

It is more important to the railroad to fence across this way than along the other parts of the sides of the tract in question. This is too plain for argument.

The deed does not, either by its words or by implication, take away this right to maintain the fence, and therefore, bars.

The effect of the deed was to impose the *duty* on the railroad of maintaining the fences. The railroad's *right* to maintain the fence, if it chose to do so, was not affected. The minds of the parties met in an agreement by both that the tract conveyed should be fenced and should remain fenced. Speer having so agreed, and exacted of the railroad that it should bear the cost of fencing, cannot now disaffirm what he agreed to and compelled the company to undertake, because the result may be that his land is not now so adaptable to improvement, in the way most likely to enhance its value.

It follows, therefore, that what the parties meant by a "suitable and convenient crossing," was one suitable and convenient to the situation of the land which they contemplated should always exist,—a tract used for railroad purposes, fenced on both sides.

It is claimed that the stipulation as to the crossing was for the benefit of Speer, and he can waive the fence across the way. We deny that this can

be lawfully done. He cannot impair the effect of his contract that the whole tract should be fenced. This would be to substitute another contract for the one made by the parties. The railroad has rights which it is entitled to have enforced, as well as Speer. If the maintenance of this contract, unimpaired, result in any hardship as to Speer (which we deny), then this result follows from the contract which Speer devised and framed in words. If he omitted anything to make his crossing adequate and beneficial at some future time, it was his own fault. In the words of the homely proverb, "He made his bed; let him lie in it."

That the Court of Errors was right in holding that this crossing was a mere wagonway, connecting Speer's severed land, is abundantly justified by the admitted facts of the case and probabilities. In 1870, Speer's field was, in great part, a pasture. Speer's first object would be to protect his cattle from escape and injury. This he provided for by compelling fences before grading should commence. His next object, secondary in importance, would be to provide for his going between the severed portions of his field. So follows the agreement for the crossing. It is most improbable that he looked ahead 30 years, and saw visions of his land being sold in building lots for villa sites. Yet, it is this far-off, distant prospect that it is claimed Speer had in view; that he saw this crossing turned into a connection between two roads, with villas built on each side. For 30 years the crossing remained, either disused or constructed with bars across it. When it was finally destroyed, no suggestion is made of this necessity for adapting the land for villa sites. The complaint is that the railroad is not fenced, and that *the crossing is not fenced*. See the letter put in evidence by complainant (p. 169). What is that letter but a demand that the whole line of the railroad be

*fenced*, so that his cattle should not escape? It is plain that Speer understood the contract perfectly, and that the railroad was to maintain fences across the crossing.

**The fact that bars were originally constructed is strong evidence that it was the intention of the parties that the way should be and remain a closed way.**

The cases cited by the Vice-Chancellor as denying the right to maintain gates, are all cases where gates were not originally established. In *Welsh vs. Wilcox*, the Court says: "If the obstruction had existed at the time of the grant, the right to gate would stand on stronger grounds." In *Williams vs. Clark*, the Court says the fact that the crossing should be convenient and that the company constructed and maintained an open crossing, "sufficiently shows that what it intended to grant is a free right of passage."

The practical construction of an agreement by the parties, must be always a chief factor in determining the intention of the parties. We have shown that the parties agreed in the deed that the way should be fenced. If the deed had been silent as to an agreement for a closed crossing, the erection of gates would throw the burden on the complainant to show that they were not agreed to. This burden he has not met, even as against a deed silent as to obstruction across the way.

The parties having agreed to a closed crossing, it is unnecessary to speculate as to whether a crossing with gates or bars is as suitable and convenient as an open crossing. The law will hold each party up to its agreement and will force Speer to take the closed crossing that he contracted for. Whether the crossing is called "a wagon-

way," "a mere agricultural crossing" or "a crossing for all purposes," will not affect the damages which ought to be awarded. The damages awarded by the Vice-Chancellor are based on depreciation of the value of the land, by reason of Speer not being allowed to turn his pasture field into building lots, on his imaginary plan. It is conceded by complainant that this cannot be done unless each villa site owner has a right to pass across the railroad by an unobstructed crossing to the Valley Road. As the gates or bars might lawfully be maintained, the land could not be laid out in the way Speer desires, and Speer would have to improve it in the better way suggested by defendants. An award of damages of \$250 for such a crossing, would be an outside valuation, if the field were still used for pasture, which it is not.

It does not follow from our argument that the railroad company might arbitrarily obstruct Speer's crossing by gates or fences. If it has the legal right to fence in its land and maintain it in this condition, no Court will deprive it of this right. Nor will courts measure the advantages of exercising such rights to one party or the other.

We submit that the deed gives us this right, and we also show that the right to prevent trespassers coming upon our land is a valuable right. In demanding that that right should be preserved, the railroad would not act arbitrarily, but would be trying to protect its right of way and its business conducted on the railroad from mischief and injury. Gates and bars are more important to the railroad at the end of public highways, connected with other public highways, than they would be as against trespassers from Speer's fenced-in fields.

Nor will the Court deny the railroad company its right to maintain gates, because gates opened by the parties using the crossing would be dangerous. A level crossing must needs be somewhat

dangerous. It is suggested (p. 317, line 25, &c.), that the right of way should be fenced, probably at Speer's expense, and a lane constructed 200 feet long and 12 feet wide, crossing the tracks. Would not such an arrangement be manifestly dangerous? A horse and wagon could not be turned to the right or left to avoid an approaching train but must either go backward or forward. This would be more dangerous than to allow free action to right or left; to have the driver open gates before crossing and after crossing put up the bars. The fact is that such a crossing, used by many persons, could only be made safe by gates operated by an attendant. This would be a charge on the dominant tenement (see the cases cited on page 317. Also *Phillips vs. Dressler*, 122 Ind., 414; 24 N. E., 226). (This was the case of the reservation of "the road" and "right of way over the road now established.") (*Brill vs. Brill*, 108 N. Y., 511. *Short vs. Devine*, 146 Mass., 127; *God. Easements*, Bur. Ed., 331.) If by reason of changes of circumstances the owners of the dominant tenement wish to increase the use of it they must pay the extra expense, and in this case, gatemen. Such expense capitalized would amount to much more than the damages claimed.

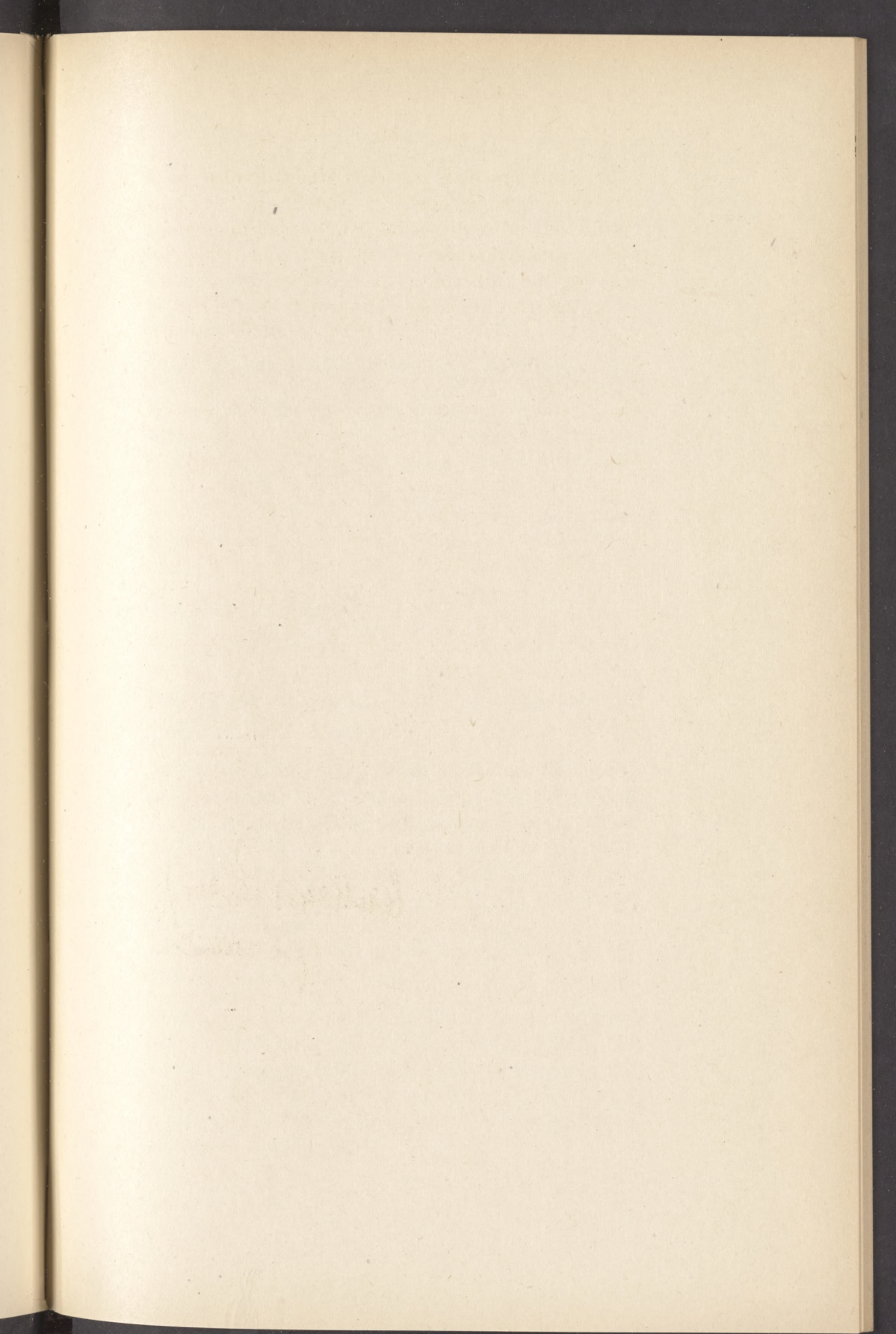
If the crossing would necessarily become more dangerous, who created the danger? Manifestly Speer, by his own action in dividing up the property and dividing the easement for his own advantage. When a railroad creates extra danger by construction or use of a crossing, it must bear the expense of flagman (*Matthews vs. Penna. R. R.*, 7 Vroom, 531). The rule should work both ways, and if the use of a private road is made more dangerous by the owner of the right to use such road, he ought to furnish the necessary protection.

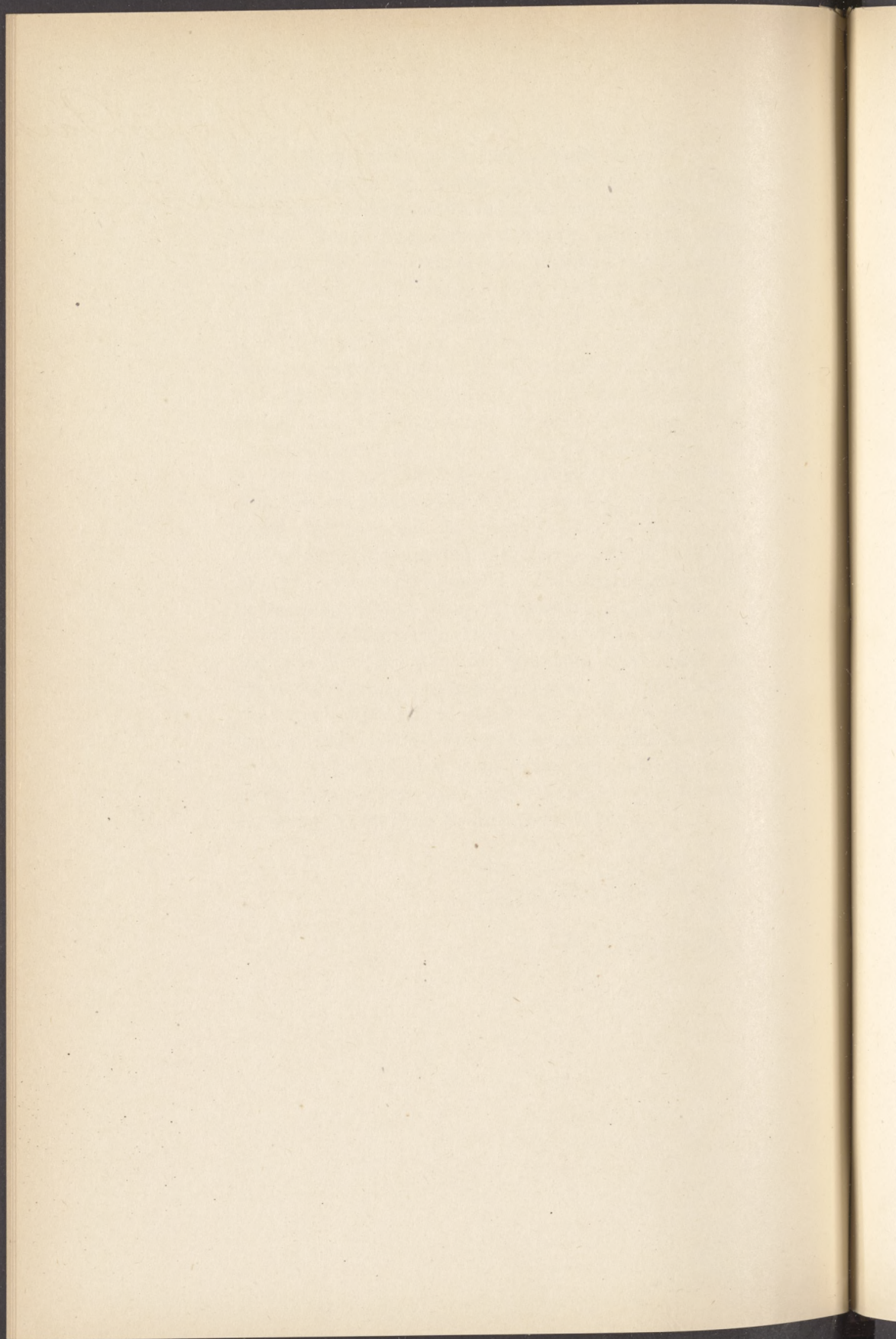
It does not seem to us that the deed implies that the crossing should be "suitable and convenient" only for Speer. It has been decided that a "suit-

able" road crossing between lands divided by a railroad might be lawful, although the way was circuitous and required the land owner to go along a road along the railroad 300 feet, and then after crossing the railroad, a like distance, by a public street, back to his lands (Ellsworth vs. Central R. R., 5 Vroom, 94). Evidently in that case the word "suitable" was construed as not being altogether descriptive of the land owner's rights. So also the word "convenient" ought not to be construed as applicable solely to the landowner. The circumstances of the case were to be considered. It is certainly not convenient—indeed, a hardship—that the company should be compelled to leave its right of way open, or either maintain fences, or suffer them to be maintained across part of its right of way, with cattle guards. And cattle guards do not prevent people from trespassing as bars do.

We, therefore, respectfully submit that this crossing was not one for all purposes that could be divided up, as proposed by complainant, but that if the Court should hold otherwise, it was a crossing that was agreed to be barred or gated; that as such it was valueless as a connection between the proposed new streets and Speer's land could not be developed according to his fanciful plan.

Leahurst Park  
of Linn





*Brief of R. Wayne Park  
November term.*

**New Jersey Court of Errors and Appeals.**

Between

ABRAM SPEER,  
Respdt. and Complt. below,

and

THE ERIE RAILROAD COMPANY,  
Applt. and Deft. below.

On Appeal from  
Court of Chan-  
cery.

On appeal from decree as to the value of a destroyed railroad crossing.

Point 1. This Court has decided that "the crossing involved in this case was a mere wagon way connecting portions of the complainant's lands which had been severed by the construction of the railroad, and was protected by bars and a fence which the deed compelled the railroad company to maintain." The Vice-Chancellor decrees damages as if the crossing connected two public streets opened to the railroad through this land.

Point 2. The Vice-Chancellor errs in holding that the crossing is available to every lot that could be sold from the land, and attempts to evade the Marino and Pipe Line cases decided in this Court by suggesting that various lot owners might hold the way in common.

Point 3. The decree awards exorbitant damages in any view of the case.

### Facts.

John A. Speer in 1870 owned a tract in Montclair fronting four hundred feet on the west side of Valley Road and extending westerly about two thousand feet to Upper Mountain Avenue, preserving about the same width. It was wholly used "for pasturage and farming purposes and said Speer had a wagon road running through said premises "from Valley Road Westerly" (Bill, P4, l. 20), and thereupon John A. Speer conveyed to the Montclair Railway its right of way north and south across the lands near Valley Road, one and eleven one hundredths acres, for Four hundred and eighty-seven dollars and fifty cents (Bill, p. 2) reserving a crossing as follows:

"The party of the second part doth for itself  
 "and its successors agree to make and maintain  
 "the necessary fences on both sides of said  
 "tract of land, which shall be built before the  
 "grading on said tract is commenced, and shall  
 "provide the party of the first part with a  
 "suitable and convenient road crossing across  
 "the track of said railway where the party of  
 "the first part may direct."

The crossing was made with sliding bars in the fence on either side of the railroad.

The complainant became heir of John A. Speer, and the defendant succeeded to the Montclair Railway Company.

In 1898, under the electric railway crossing act, the railroad was ordered by the Chancellor to raise its tracks, and did so in 1899 or 1900 (Ans., pp. 12, 13, 14, Exhibits, pp. 175 to 181). May 19, 1901 Speer filed his bill, alleging that this destroyed the crossing and praying its restoration. The defendant answered that Speer refused a crossing at

grade, demanded a tunnel, refused access to a new street nearby on the south (pp. 16 to 19) and really wanted a street under the railroad in order to sell his land in lots.

After evidence the Vice-Chancellor held (Opinion, p. 150) that the stipulation, though without words of inheritance, inured to Speer's heirs and assigns (p. 151). He held that the right of crossing "is an "unlimited right," a right of passage for all purposes" (p. 154, l. 2); that the location vertically could not be changed (p. 155, l. 12); that Speer cannot be compelled to take damages (p. 156, l. 12), and April 13, 1903, he decreed a tunnel twelve feet wide and high (p. 162, l. 25).

On appeal the decree was reversed and the opinion (p. 182), after distinguishing the law as to railroad crossings by public ways from those of private ways, continues:

"The crossing involved in this case was a "mere wagon way connecting portions of the "complainant's lands, which had been severed "by the construction of the railroad, and was "protected by bars and a fence, which the deed "compelled the railroad company to maintain" "p. 183, l. 24).

It declares that an expensive tunnel would be inequitable; that the new grade-crossing offered and refused was fair (p. 187, l. 2); but that the complainant, if he elected, could have damages for the loss of his crossing, and if he did not so elect that the bill should be dismissed (p. 188, l. 10), and decree was made accordingly (p. 188 to 190).

On this question of damages, further testimony was taken, and the Vice-Chancellor has decided (Opinion, p. 310 bottom): "If the crossing is to be "regarded as a mere farm or agricultural crossing "and not a crossing for all purposes \$500 would "be adequate compensation. But if the crossing is "to be regarded as a crossing for all purposes for

“which the land is or may be adapted, then I think “the damages would be somewhat greater.”

He says the opinion on appeal gave no dissent from his view that the deed gave an unlimited right, a right of passage for all purposes (p. 311, l. 8); that grantees of single building lots have the same right (pp., 312, 313 and 314); that fences and bars could not be maintained by the railroad (pp. 315, 316 and 317), and that the damages should be Three thousand dollars (p. 319). Decree (pp. 319 to 321) was made accordingly.

The railroad company appeals on the ground that only nominal damages or much less should have been awarded.

The Vice-Chancellor entirely disregards the definition of this crossing by the Court of Appeals on p. 183, that it was “a mere wagon way connecting portions of complainant’s lands that had been severed “by the construction of the railroad and was protected by bars and a fence which the deed compelled the railroad company to maintain.” The Vice-Chancellor’s decision is that the farm wagon way twelve feet wide could have been transformed into a public street, and this crossing used to give public access from one part of this street to the other as part of such public way. This is not law, nor would it be equity.

The damage by the loss of this crossing depends upon its character and its purposes—that it was purely agricultural and for the benefit of said lands as a farm—that it was for Speer or his heirs or assigns of the land on both sides, adjoining the railroad only; that it was for the benefit of the farm lands which he then possessed, and not for any and every individual lot that shall be taken out of these farm lands; that it was a private way for agricultural purposes and not practically for a public street; that it was fixed so as to be suitable and convenient to circumstances then existing, and not to

be altered so as to be suitable for all circumstances which might arise.

The defendants-appellants, insist that this is a purely farm crossing, for the benefit of a person owning adjacent lands on both sides of the railroad, and not for the benefit of any and every single building lot that may be carved out of it; that the development of building lots must be by public streets, of which this crossing cannot be part; and that as the whole present value is for building lots, the land value is not affected by the loss of the crossing; that, at any rate, the crossing should be guarded by bars and gates so as to protect the railroad, and so as to be only accessible to lot owners and their families and visitors, and that its value for the sale of lots is nothing; and that even if all lot owners could use this crossing as an open way free of gates it would not add to lot values.

This is a farm crossing, for the benefit of an owner on both sides of the railroad, and not for the benefit of single building lots on one side or the other. The cases end in the *Marino* case, expressly deciding this, and the crossing adds nothing to building lot values, which are the only value in the case.

To consider this <sup>ser</sup>ratim:

1. This reservation was without words of inheritance and in law was in gross for John A. Speer for life. It is only as the recitals as to fences show that it was for the benefit of Speer's adjacent farm land that it will be construed as an easement appurtenant to that land. The Vice-Chancellor quotes 151, line 25, Judge DEPUE's decision in the *Pipe Line Case*, 33 *Vroom*, 274, that:

“Although the grant was without words of inheritance, when the right is granted in a deed in the nature of a reservation, and it is

“manifest from the recitals in the deed that the plain purpose of the parties was to create a right for the benefit of the part of the whole tract which had been severed by the conveyance, the grant will be construed as creating an easement appurtenant to the premises, and will pass as such without the words ‘heirs,’ at least in equity.”

While there are no recitals in this deed to suggest any such presumption, the circumstances that the railroad cut the farm in two seems to make it plain, as stated in the Court of Errors, that it was “a wagon way connecting portions of the complainant’s land which had been severed by the construction of the railroad,” and that this is a covenant which in equity is to be regarded as for the benefit of the land which was so fenced off on either side. But such an equity is measured by the facts and circumstances, and by the character of the lands and of the way as settled, and will not be further enlarged than as required thereby.

2. It was to be “a suitable and convenient crossing where he should direct,” and, according to the Chief Justice’s decision, 2 Vroom, 209, when once located and ascertained by Speer cannot afterwards be re-located, or altered, or added to, by him (Vice-Chan. Decision, p. 15~~6~~, lines 1 to 7).

Its character was so finally settled over twenty years ago by the act of the parties and, if then finally settled suitably and convenient to the then circumstances and purposes, it is not to be “altered or added to” on a change of circumstances. As Speer says, page 28, line 4:

They built the crossing where the old wagon road had always been which was suitable to father and myself at that time.

3. It was not a way of necessity to a highway. The land on both sides of the track abutted on high-

ways, the west on Mountain Avenue and on the east on Valley Road. Both sides had access to the highway and needed no way to get there (Speer, 25, l. 4, and others).

4. It was located on an old farm wagon way used only for carting hay and driving cattle from the land west of the railroad to Speer's barns on Valley Road and the purpose of that way was purely agricultural.

Speer, page 25, line 34:

"As long as I can recollect there was a drive-way across there—used for farming purposes for getting up to the property. The crossing, 28, l. 5—was built where the old wagon road had always been (28, l. 25), and used to go over there with our horses and wagons and cattle and carting hay and such purposes—farming uses, 29, l. 34, we had to go over it every day pretty much with our cattle to drive over it, drive our cattle over it; 30, l. 34, a few years before tracks were elevated a double track was laid; 31, line 4 &c., it never was in suitable condition to drive over with a wagon after the double track was put down. I don't think I drove over with a wagon afterward. It was not filled in between the rails properly; was in a rough condition; page 31, l. 28, unsuitable for a farm road to go over; 43, l. 4 to 15, there was a bridge there over the brook washed away nine or ten years before (1892 or 1893) and never repaired; 45, line 24, not planked for ten years, for one or two years before they double tracked (Moore, page 84, line 34), which was in 1897."

Strauss, track walker, page 104, line 10, saw no indications of a crossing there in 1900, nor Dow in 1873 to 1875, page 105, nor Shelton, p. 107, or Moschzisker, p. 108, line 28 in 1900; nor Manning who was section foreman for twenty years (p. 118, line 35), and saw Speer drive cows there (119, lines 20-30). He never saw a wagon cross.

Speer shows how he regarded it in 1900, when he wrote the railroad (p. 169, l. 10) :

Won't you please repair your fence on the line of my property along Railroad just North of Valley Road crossing, and also make me a suitable crossing as I want to turn my cattle into pasture. As it now is it is not safe.

5. Its capacity was purely that of a farm wagon way. This road was about twelve feet wide. In the English cases, cited in the Pipe Line Case, the way in one case was eleven yards wide, and might be "street out," and the width is commented on as obviously intended for more than a farm wagon way, for which fourteen feet would be sufficient (*Newcomen vs. Coulsenn*, 5th Ch. Div., 133, and see p. 136). In the English Railroad case there were four ways—two of thirty feet wide and two of twenty feet width. But this single farm wagon was and is utterly unsuited for building houses on. Compare *Owen*, page 62, line 28, allowing fourteen feet width and twelve feet high for a load of hay, and 71, line 24, that the road is eight to nine feet wide (72, l. 4), with twelve foot bars.

6. It was by direction of both parties, barred on each side of the track by posts and rails twelve feet long, which could be taken down by Speer when he came through with his cattle, and which remained until after the destruction of the crossing by the embankment.

Page 96, line 30, Dana found them on east side.

Page 135, line 4, Speer says there was a wire fence put there ten or eleven years ago, with openings and posts and bars, the latter taken away within six months. 136, line 15, those on the east side were there within three weeks.

7. The way has been defined in this case by the Court of Appeals, where, after noting that the

original statutory provision as to wagon ways is intended for the benefit of the individual land owner, to secure him access from one part of his land to the other, and that this statutory provision did not exist in the Montclair Railway charter, the Court proceeds to construe the deed and facts in the following language :

“The crossing involved in this case was a  
 “mere wagon way connecting portions of the  
 “complainant’s lands which had been severed  
 “by the construction of the railroad, and was  
 “protected by bars and fences which he had  
 “compelled the railroad to make and main-  
 “tain.”

Such a crossing on such a wagon way cannot be enlarged beyond the benefit of this farm, and cannot be enlarged by the complainant, as he claims, into a communication between two new public streets as a roadway for anyone who should live upon such streets, and an integral part of their highway privileges.

8. The railway would be unable to protect an open crossing between public roads. The crossing protected itself when it went from one part of Speer’s enclosed lands to another part of those enclosed lands. He certainly had no right to make it absolutely open to all the public, who would let down the bars or open the gates, if gates were permitted to be placed there. This would constitute a new and public way, not from one part of Speer’s lands to the other, but from one public street to another.

9. In Pipe Line Case (33 Vroom), the person claiming the benefit of the crossing owned the *adjacent* land on each side of the track enclosed within his fences. The Court determined that by reason of this ownership, although it was only a part of the original tract, he had a right to a crossing. It was further determined that this right

was limited to passage between his two tracts on either side of the railroad, and did not extend to carrying a pipe line across his tracts and through the crossing. So, in this case, this crossing gives right of communication between the tracts on either side of the railroad, but does not extend to bringing in public streets through these tracts to this right of way for passage thereon.

10. This case likewise differs from the English Allotment case, cited in Pipe Line Case, 5th Ch. Div., 133, and by the Vice-Chancellor (pp. 311 and 312), where by an award under an Inclosure Act it was directed that certain allottees and the owner or owners *for the time being* of their allotments should *forever thereafter* have a way-right and liberty of passage for themselves, *their respective tenants and farmers*, as well on foot as on horseback, and with their carts and carriages, and to lead, drive, &c., cattle *from the common highway* over the east end of the allotments to their respective allotments, and in case the allottees should *street out* the way, the same should always remain eleven yards wide, but the road was not to be a road of right for any other persons whatever than as aforesaid.

Note that in this case the way is for the owner or owners, for the time being, forever thereafter, and for their tenants and farmers, much more for their assigns of part, and to get from the common highway by necessity, with the provision to street out the road eleven yards wide. No wonder that this provision, which was by Act of Parliament, and, therefore, in a nature public, was construed like ways of necessity to afford access to any portion of the land, no matter how small, and for all purposes to afford them access to the common public highway, which is the property and heritage of all.

No such circumstances appear here. The case cited was for a *street*. This is for a private way. The Vice-Chancellor has entirely disregarded this distinction in citing this case (p. 311, bottom, and 312).

11. This case differs likewise essentially from the English Railway case cited in the Pipe Line Case of the United Land Owners' Improvement Company vs. The Great Eastern Railway Company, 10th Chancery Appeals, 586, and by the Vice-Chancellor, page 314, top.

This railway ran through Crown lands, and was duly authorized and required at their own cost to make and construct such convenient communication across, over or under the railway as in the judgment of the Commissioners for Woods, &c., for the time being shall deem necessary for the convenient enjoyment and occupation of Her Majesty's lands, and these communications are to be kept in repair by the company.

Note that these communications are to be such as ordered by the Commissioners for the time being, and, hence, the question of convenience is one of the future and changes with circumstances from time to time. The word "Communications" includes not only private ways, but all sorts of communications, and would probably cover lights, telegraph, drainage, gas or whatever might be embraced in this word, including all the accessories of public streets, and without reference to how the land should afterwards be used or occupied. This is plain because the clause itself obviously refers to the use and occupation of the future.

This is shown by the character of communications that were established in the beginning; namely, four level crossings, two of thirty feet wide and two of twenty feet wide.

The Judges so construe the statute. JAMES,

law Judge, page 589, says the object was that the severance should leave the owner as fully master for all purposes as he was before, provided he did not interfere with the working of the line. Judge MELISH, page 590, says that the clause provides for full communication under any condition. The Judges note that these communications need not be by grade crossings, but over, under, or across. It is perfectly plain that this statute for the benefit of the Queen is to be construed in the strongest way in favor of public rights. It is entirely different from the present case, of a single agricultural right of way for the benefit of a single tract, and which is to be strictly construed so that it shall not impair a public work.

12. The case of *Marino vs. The Central Railroad Company*, 40 *Vroom*, 628, expressly decides that a right of way across the railroad appurtenant to each part of a divided tract is not transmitted to a grantee of a portion of said lands lying only on one side of the railroad tracks. The Central Railroad charter was very broad, making it the duty of the company "where the said road shall intersect any farm or lands of any individual, to provide and keep in repair suitable wagon ways over or under said road so that he might pass the same."

The Pipe Line Case is carefully quoted, page 632, saying that it contained a clause in all respects like that then under consideration, but that the Court did not deal with its construction, and after approving Judge DEPUE'S reasons (33 *Vroom*, 280, 281), the Court continued (p. 632):

"The like reasoning is applicable to a way established under the duty imposed by Section 9. It is the way between the lands of the same owner left on opposite sides of the railroad tracks. It is limited to these lands and not extended to other lands. Therefore, a grantee of part of such lands lying wholly on

“one side of the intersecting railroad does not fall within the provisions of Section 9 of the Act above stated. The right reserved and the duty imposed by that Section is only in favor of the person who owned the lands intersected by the railroad when the railroad right was acquired by condemnation, or his grantees of the whole or a portion of such lands *still intersected by the railroad.*”

The Pipe Line Case is thus construed for our benefit in this case, and compare the Pipe Line Case, 33 Vroom, page 275, where the easement originally belonging to the owner of the whole tract was held to have vested exclusively in the owner of the part of the tract “adjoining the lands conveyed to the railroad company and extending on each side entirely across the opening of the passage way referred to in the company’s deed.”

In view of this fact it is impossible to understand the Vice-Chancellor’s reasoning by which he would avoid the Marino case and extend this right of crossing to a right of opening a street to independent lots. He says that new streets had been laid out around the Speer tract, and the complainant’s plan for selling in lots (p. 314, l. 18), shows a road running east and west through the middle of the tract, touching the crossing east and west of the railway. “Now, it would be easy for the complainant to give to each purchaser of such a lot a right of way along the whole course of the road; or, if that did not satisfy the requirements of the Marino and Pipe Line cases, he could divide the land over which the road is shown, into as many undivided parts as there are lots; and with each lot he could give one of these parts. The grantee of such a lot would then own in fee simple land on both sides of the railway continuously from his lot to Valley Road.”

Thus the Vice-Chancellor would, as he claims, evade the decisions of this Court. The complainant’s right, in the absence of words of inheritance,

is solely in equity for the original purposes of the crossing, but the Vice-Chancellor would enlarge it to allow its use to a public street and individual lots, if only they owned the way *in common* and would give the assistance of equity to perpetrate this wrong.

In ways of necessity, page 220 (165), Washburn on Easements shows that the way ends when another mode of access is obtained.

On general principles, it seems that the right of way granted on agricultural lands for the connection of different parts of a farm cannot be enlarged into even a private road for access to various building lots and dwelling-houses. The first way is one created because of the absence of a street, but dwelling houses imply the presence of a street open to the public, and to allow the private way to connect such a public street with another public street is to make it practically public. It is no longer a way both ends of which open into a private close belonging to a private party. It is a road opening from one public street into another. These principles are sharply illustrated by Washburn on Easements (p. 239, 183, Section 18).

The way to a dwelling house, wash-house and stable does not justify the use of it for access to a field. A way to a cottage ceases if the cottage be changed into a tanyard. A way to a dwelling house may not be open to a field and cattle driven on the field of the grant of a small parcel of land, part of a large field devoted to the culture of crops, for the purpose of a yard to the house of the grantee, if a way were reserved across the same to the field; the grantor could not sell this field into house lots and thereby turn this way into one for the accommodation of a town or village.

The matter is carefully discussed with reference to various easements in Chapter 1 of the same book (see especially Section 38).

13. This being so, there are no damages to be assessed in this case. These lands are not now farm lands. A way will no longer be needed to connect parts thereof on either side of the railroad. The lands have no value for any purpose which would involve such a connection. They are expected to be used as building lots to be reached by public streets and will obtain value by such streets, whether they be constructed from Valley Way, Brookfield Avenue, Cliffside Avenue, or the original boundary of Mountain Avenue. If these streets are put across the railroad they will have to get under it at the expense of the town for the bridging. By the growth of the town and the extension of such public streets the complainant may obtain values for his lands many times as great as the farm value contemplated in 1870, but he must pay his share of the construction of these streets like any other land owner, and cannot make the railroad turn this right of private farm crossing into such a street, nor claim damages because they will not construct a street for him.

The damages are really infinitesimal, even if it be conceded that every purchaser of a lot has the right of way, but confined by bars or gates to them, their family and visitors, such bars or gates to be used only by them and replaced by them so as to close passage to others.

14. The law requires such bars or gates, and that they be closed by those using the way.

Private ways are always subject to have a gate. Otherwise the owner may have to fence off the private way. It is subject to be fenced in. It is his own land, except for purposes of passage over it. The ordinary way is by a gate. This is shown by the fact that private roads laid out by the statute may have gates placed upon them. Such a road is much more public than a private way, but by Section 30 of the Road Act the owner of any land over

which a private way or by-way may pass may hang swinging gates in the road, with a penalty for injuring or leaving open the gates.

Section 31 provides for swinging gates where such private road is laid out or altered so as to run upon the land or lands of any owner.

Section 21 of the Act concerning fences, allows any man to put up a strong gate as part of his partition fence and Section 5 of the Fence Act is made applicable to private roads.

The matter of railroad fences and gates has been tremendously litigated. In most states, and now in New Jersey, the railroad has to build all fences and maintain gates at the private crossings. There is difference as to who must keep them shut. In the Eastern States it is held that the person who uses the way must keep it shut. In the Western States it is held that the railroad must keep the gates closed.

The question usually arises in actions against the railroad for leaving the gate open so that cattle are run over. Some hundreds of cases are cited in Swanson against Chicago, Milwaukee & St. Paul, 49 Lawyers Reports Annotated, page 625.

On general principles the railroad has the right to fence off its lands. It must protect its trains and passengers from being derailed by stray cattle, or interfered with by mischievous persons. Numerous cases hold that the railroad has not a mere right of way but a full control of the surface of the ground, so that the previous owner cannot farm that surface or use it in any way.

Washburn on Easements and Servitudes, page 216 (160), in defining carriage ways, foot ways, horse ways, drift ways, says:

“And where one grants a right of way across his land, he may shut the termini of the same by gates, which the grantee must open and close when using the same, unless an open way

"is expressly granted" (Maxwell vs. M'Atee, 9 B. Monr., 20; Bean vs. Coleman, 44 N. H., 539, 544; Bakeman vs. Talbot, 31 N. Y., 366; *post*, pp. 186, 195.

On page 252 he repeats this statement in the following terms:

"It seems to me now settled that if the land owner is not restrained by the terms of the grant of a right of way across his land for agricultural purposes, he may maintain fences across such way, if provided with suitable bars or gates for the convenience of the owner of the way. He is not obliged to leave it as an open way, nor to provide swing gates, if a reasonably convenient mode of passage is furnished."

Bakeman vs. Talbot, 31 N. Y., 366;

Bean vs. Coleman, 44 N. H., 539;

Maxwell vs. M'Atee, 9 B. Mon., 20;

Cowling vs. Higginson, 4 M. & W., 245;

See State vs. Pettis, 7 Rich., 390.

Proceeding with illustrations of the owner laying sidewalks along a court, opening passages to cellars, swinging window shutters, running drains.

15. Bars or locked gates, with the key in the hands of the holders of the right, can alone prevent this becoming a public way.

The complainant claims that swing gates would simply be left open—*i. e.*, used by everyone (Taylor, page 256, l. 28).

16. Public policy demands that a private way across a railroad should be protected by the holder of the easement.

Passengers and trains are liable to destruction by a stray steer.

The railroad property must be fenced from malicious persons, and careless or mischievous boys.

17. With bars, the effect of the private cross-

ing on the value of lots is infinitesimal. Most of the complainant's witnesses agree to this.

R. B. Harris, page 215, lines 31 and 34, "the land would be worth very little more, if any." Page 223, line 12, "can't see that it makes much difference if there be a bank twenty feet high or a pair of bars on each side of the track." Page 224, "it would make it worth \$400 instead of \$300 an acre."

*Cf* page 225, line 28.

Parsons, page 235, top, "the difference would be hard to tell."

Dewitt, page 251, line 9, "a way with bars would make little difference," and page 253, line 4, "no more valuable with gates," and see 252, line 17.

Taylor, page 256, line 24, thinks gates would not harm because they would not be closed.

See Hink, 278, line 34, "a twelve foot right of way would simply be objectionable and injure value."

18. In case every lot owner were entitled to an open crossing without gates or bars, which is all that is claimed by the complainant, the damage by its destruction would be nothing.

There is no pretence that it would affect front on Cliffside Avenue or Valley Road.

There is no dispute as to these values.

Cliffside Avenue is valued by R. B. Harris.

R. B. Harris	at	\$20.	p. 212
Parsons	at	\$15.	p. 234, l. 12
DeWitt	at	\$15.	p. 249, l. 13
Taylor	at	\$15.	p. 254, l. 19
Jacobus	at	\$15.	p. 263, l. 1
Van Dyne	at	\$15. to \$20.	p. 289, l. 24

Valley Road is valued:

\$25. a foot	R. B. Harris,	p. 214, l. 32
\$15. a foot	Parsons,	p. 234, l. 8
\$20. a foot	DeWitt,	p. 249, l. 29
\$18. a foot	Taylor,	p. 254, l. 20
\$20. a foot	Jacobus,	p. 263, l. 4
\$15. to \$20. a foot	Van Duyne,	p. 289, l. 28

The only land said to be affected is the nine acres within, and the value to that land is stated as follows:

\$200. an acre;	Crane,	p. 124, l. 15
\$300. an acre;	Harris,	p. 212, l. 19

The roadway will not meet the street proposed (56, l. 20). The location by Owen was by measurement, and note that it is north of the proposed road, as shown by comparison of Owen's map with that of complainant.

The land said to be affected by the loss of the crossing is marshy, boggy land.

Crossed by a large stream, Speer, 29, l. 38.

Water would settle East of R. R., 30, l. 8.

Not particularly boggy, Speer, 42, l. 11.

Suitable for water willows, Speer, 42, l. 34.

High water washed the bridge away, Speer, 43, l. 15.

Speer, p. 46, l. 10, the road is on stone foundation because it was marshy in some places.

Dana, p. 87, l. 20, for seven hundred feet west of the railroad it is soft, marshy, covered with tufts of swamp grass in very dry weather. In moist weather soft and boggy.

Dana, p. 93, top, says one and a half acres east of the railroad and six acres west are marshy.

I. Seymour Crane, low swampy land, 122, l. 24, and 281, lines 30 to 34.

R. C. Ryerson, this low land, 127, l. 30.

Frank Crane, saw cat-tails, 199, l. 34.

W. M. Taylor, roadway gone, 258, l. 34.

W. B. Jacobus, had to be careful, 266, l. 22.

Harris, low ground and subject to be wet, 271,  
l. 18.

Hink, brush, underbrush, weeds and cat-tails,  
277, l. 30.

Holmes, somewhat low, 284, l. 34.

Van Duyne, quite flat and wet and marshy, 288.

l. 24, could not dig 6 inches without water, 289,  
l. 12.

19. The effect of a crossing as claimed by complainant, is stated as follows:

I. Seymour Crane, 125, l. 10, a tunnel would not affect the value unless like that on Valley Road.

Ryerson, 128, l. 34, access by private right of way would not affect value.

Hink, 278, l. 33, a twelve-foot way would be subject to objection and injure the property.

Other witnesses talk of \$500 to \$1,000 an acre, but they do not meet the fact that no sensible man would try to develop this low ground into a tract fit for fine residence property by a twelve-foot passage with a grade crossing, if this could be avoided, as it can.

20. Far cheaper and better access could and can be got from Brookfield Avenue along the railroad, costing only \$10 a foot, while Valley Road front would be saved, costing \$25 a foot.

Value on Brookfield Avenue, Harris, p. 222, l. 5.

Harrison, 270, l. 20, sold at \$10 and part at \$8, and made such sales before and after 1900 (p. 272, l. 33).

By options for a way which Speer declined (Exhibits Option 1 and 2, pp. 297 and 299), the Erie would have furnished him a tract 50 feet wide along the west side of their railroad to Brookfield Road, and spent only \$275 therefor. This would

have given him direct access to Valley way without any gates or obstructions, and without crossing the railroad.

After declining such an offer, the complainant has no rights in equity. He declined a better access.

Complainant's expert, Taylor (p. 259, l. 12), says that as a prudent owner, he would have sought such access to Brookfield Road.

Hink, whose business is land opening and development, outlines the proper plan. On pages 278 and 279, he states that the inland is worth \$400 an acre, and that the right of way did not at all affect this value, because residents would object to enter by a twelve-foot crossing, and because the buildings are inferior on Valley Road north of this property, tenement districts, and if they had access it would really be an objection to the other property on the west side of the railroad; that the proper way in his judgment to develop would be to open up a road from Brookfield Avenue along the line of the railroad, and then give a sort of a park next the railroad and then macadamize and develop the rest to Mountain Avenue.

Ira Seymour Crane has the widest experience and standing in business and land in Montclair. He values the inland at \$300 an acre and says a twelve-foot crossing would make no difference.

He says, If the property were developed as laid on the map, with a twelve-foot right of way through it, it would not be worth any more, probably not as much as if it were developed with a roadway through to Edgemont Road; if it were developed with the right of way across the railroad twelve feet wide, the class of people that would be apt to buy that property, I think, would probably depreciate the value of the price of property on Valley Road or Mountain Avenue, so that it would not

*pp 252, 25*

bring as much money as it would developed to Edgemont Road, or, in other words, if there was a road of the regular fifty feet width from Mountain Avenue to Edgemont Road, in the regular way, I am under the impression that the property would sell for more money than it would developed through the twelve-foot right of way.

It need not be particularly Edgemont Road, no, sir; west of the railroad, down by the brook, probably, would be even better, because it would make a better drainage all the way through, and, in other words, if it were developed with a full width street, the whole property would give better net results than it would if the roadway were cut through with a twelve-foot opening under the railroad or above, taking fifty feet road on either side down to the railroad and twelve feet at least across the railroad—or underneath, either way.

Harrison Van Duyne, whose experience in laying out Essex County property is beyond any other man, states (p. 290): that it is less desirable to open a street, even with a good grade crossing over the railroad to Valley Road, than to go out parallel with the railroad to Brookfield Avenue, at the corner of Valley Road. The latter would be shorter and avoid the turn of Valley Road to the east, would be more in the line of travel to Montclair centre, and save the valuable front on Valley Road by cheaper development to Brookfield Avenue, avoiding a grade crossing and possible gates.

This evidence should be read. It is uncontradicted by complainant's experts. It gives reasons and explains and justifies itself.

If the crossing were there and open, it would be profitable to abandon it and open a full width road to Brookfield Avenue.

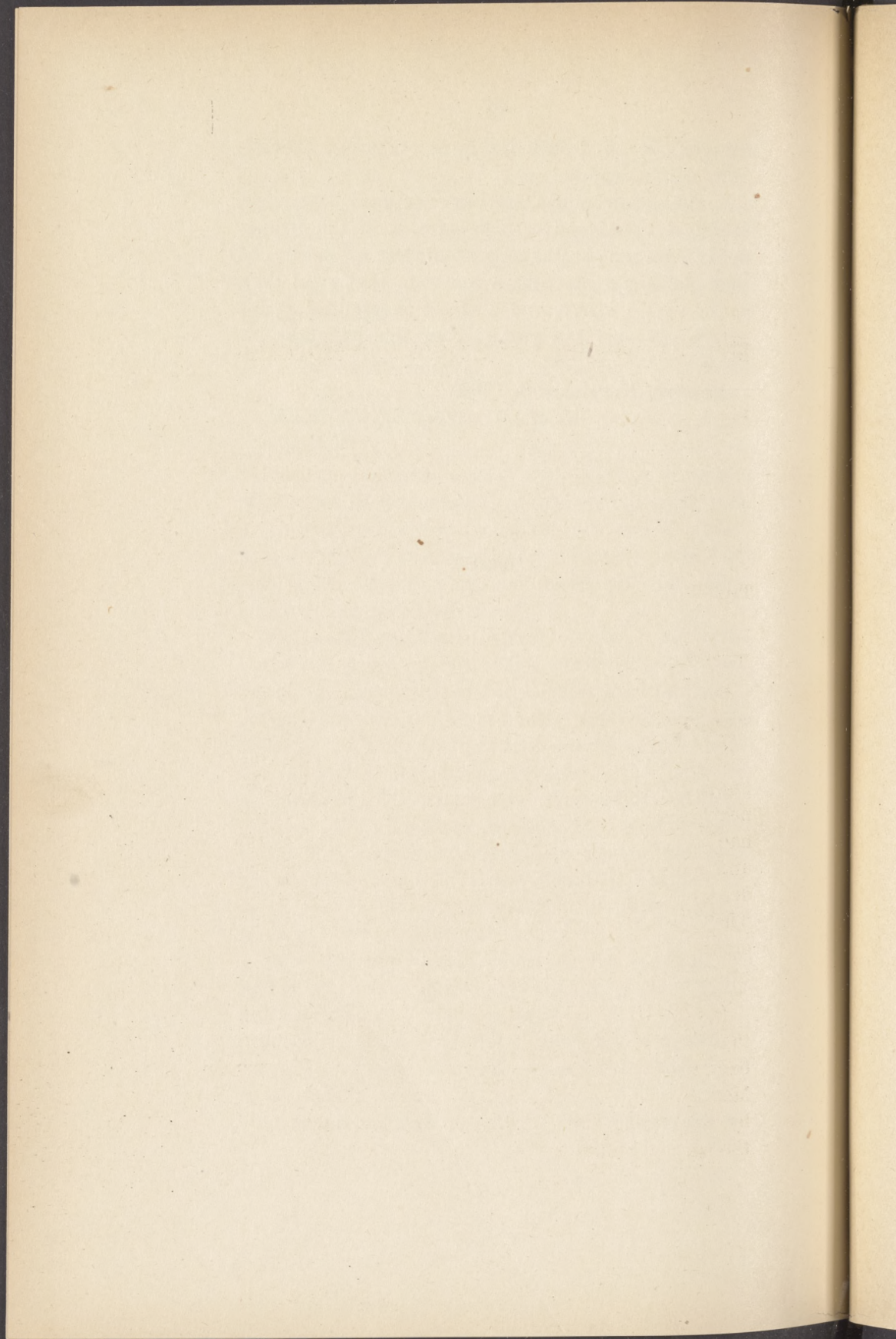
The crossing gave no value to the property for its

present uses, but only for farm purposes. Dwellings need a street.

It could not be used for sewer or gas. Drainage, therefore, would have to be carried to the Brookfield Road, and drainage is absolutely essential. If they could get out with a sewer to that road they could with a street, and a street is essential to lot values. No private way such as this will take its place.

Newark, November 8, 1906.

RICHARD WAYNE PARKER,  
Of Counsel.



# N. J. Court of Errors and Appeals.

Between

ABRAM SPEER,  
Respondent and Complainant  
Below,

and

ERIE RAILROAD COMPANY,  
Appellant and Defendant  
Below.

On Appeal from  
Court of Chan-  
cery.

## BILL FOR RELIEF.

[Filed May 19, 1901.]

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

Complaining shows unto your Honor your orator, Abram Speer, of the town of Montclair, in the county of Essex and State of New Jersey, that prior to the twentieth of June, eighteen hundred and seventy, John A. Speer, who was your orator's father, resided in the township of Montclair, in the county of Essex, and was the 10 owner of a certain tract of land situate in said township of Montclair, fronting on Valley road and extending from thence westerly about two thousand feet to the highway now known as Upper Mountain avenue, in the town of Montclair; that said tract of land was about four hundred feet in width at or near its frontage on Valley road; that in the summer of eighteen hundred and seventy the

Montclair Railway Company, a steam railway corporation chartered by the Legislature of the State of New Jersey, was engaged in the construction of its railway line from Jersey City, westerly, through Bloomfield, Montclair and other municipalities, to Pompton, and that the route surveyed by it for its line of railway crossed the aforementioned lands of said John A. Speer a distance of about three hundred feet westerly from said Valley road; and that at said time said Montclair Railway Company entered into negotiations with said John A. Speer for the purchase of a right of way across the said premises at the point desired by it for that purpose, and that in pursuance of and as a result of said negotiations, the said John A. Speer, by deed dated June twentieth, eighteen hundred and seventy, conveyed said right of way to said Montclair Railway Company; that said deed of conveyance was duly acknowledged, and was recorded in the office of the register of Essex county, July fifth, eighteen hundred and seventy, in Book D 13 of Deeds for said county, on pages 267 and 268; and that said deed of conveyance is as follows:

[One 50c. stamp canceled.]

This indenture made the twentieth day of June, in the year one thousand eight hundred and seventy, between John A. Speer, of the township of Montclair, in the county of Essex and State of New Jersey, of the first part, and the Montclair Railway Company of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of four hundred and eighty-seven 50/100 dollars, to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey to the said party of the second part, its successors and assigns, in fee-simple, all that parcel of land situate in the township of Montclair, in the county of

Essex and State of New Jersey. Bounded on the north by land of Clemens Sigler, on the south by land of Bessie L. Rodman, on the east by a line parallel with and fifty feet distant from the located center line of the railway of said company and on the west by a line parallel with and fifty feet distant from said located center line, and the land of I. D. Sigler, containing one acre and eleven-hundredths of an acre of land.

The party of the second part doth for itself and its successors agree to make and maintain the necessary 10 fences on both sides of said tract of land, which shall be built before the work of grading on said tract is commenced, and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct.

To have and to hold the lands and premises above described, with the rights, interests and appurtenances thereunto belonging, to the said party of the second part, its successors and assigns, forever. And the said John 20 A. Speer covenants and agrees to warrant and defend said premises in the peaceable possession of the said party of the second part, its successors and assigns, against all persons lawfully claiming the same or any part thereof; and that he has a good unencumbered title in fee-simple to such premises, and lawful authority to convey the same.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN A. SPEER. [L. S.] 30

Sealed and delivered in presence of

Z. S. CRANE.

State of New Jersey, Essex county, ss.—Be it remembered that on this twenty-ninth day of June, 1870, before me personally came John A. Speer, to whom I made

known the contents of the above deed of conveyance, and who is to me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same and signed, sealed and delivered the same as his voluntary act and deed.

Z. S. CRANE,  
*Master in Chancery.*

Received in the office July 5th, A. D. 1870.

10 Your orator further shows that as appears by said deed of conveyance, the party of the second part, the Montclair Railway Company, did, for itself and its successors, agree to make and maintain the necessary fences on both sides of said tract of land which should be built before the work of grading on said tract was commenced, and should provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part might direct.

Your orator further shows that at the time said deed  
20 of conveyance was made the said John A. Speer occupied a dwelling-house on the east side of said Valley road and used the whole of said tract of land for pasturage and farming purposes, and that the said Speer had a wagon road running through said premises from Valley road westerly, and that his barns and other outbuildings were west of said right of way of said railway company, and that when said railroad was constructed across said premises in eighteen hundred and seventy or eighteen hundred  
30 and seventy-one, the said John A. Speer did direct said railway company to provide him with a suitable and convenient road crossing across the track of said railway at a point or place which was a little north of the center of said tract of land, and which place was where said Speer's private roadway then was and for many years had been.

Your orator further shows that the line of said railroad

was constructed across said premises substantially at grade with said premises, and that in compliance with said agreement the said railway company did construct said crossing at the place directed by said Speer, so far as was necessary to construct the same, by putting in a moderate filling of earth and planks up to and between the rails of its said tracks, and maintained the said crossing to the satisfaction of said Speer, and his heirs until the time of the injuries complained of.

Your orator further shows that his father, said John 10  
A. Speer, died seized of said premises, intestate, on or about the — day of —, eighteen hundred and eighty —, leaving as his sole heir-at-law your orator; and that your orator thereupon became seized in his own right in fee-simple, of all of the real estate of which said John A. Speer died seized, including the said tract intersected by said railroad line.

Your orator further shows that the said agreement to provide the party of the first part with a suitable and convenient road crossing across the tracks of said rail- 20  
road was an agreement and covenant running with the land, and inured to the benefit not only of said John A. Speer, but also of his heirs and assigns, and hence to the benefit of your orator; and that after your orator became the owner of said premises the said railway company continued to maintain the said road crossing for the benefit of your orator, and that the same was used by him in passing to and from the several portions of his said farm up to the time of the injuries complained of.

Your orator further shows that the said Montclair 30  
Railway Company, after making the conveyance to it as hereinbefore stated, became insolvent, and that its railroad and other property was transferred to and became subsequently the property of the New York and Greenwood Lake Railway Company, and that said New York and Greenwood Lake Railway Company afterwards became the property of the Erie Railroad Company, and that for some years prior to the time of the injuries com-

plained of, and also since the time of said injuries, the said railway line and property has been owned, operated, controlled and maintained by said Erie Railroad Company, and is now owned, operated, maintained and controlled by said last-mentioned company.

Your orator further shows that in the fall of eighteen hundred and ninety-nine and the early winter of nineteen hundred, the said Erie Railroad Company determined to elevate its tracks in the town of Montclair for the purpose of avoiding and getting rid of grade crossings at some of the public highways in said town of Montclair, and that in pursuance of its said plan of elevating its said railroad tracks, said Erie Railroad Company constructed an embankment for the support of its roadbed and tracks upon the right of way which crossed the premises of your orator, and is described in said deed of conveyance, and that said embankment built by said Erie Railroad Company upon its said right of way above mentioned is about sixteen feet above the grade of your orator's land, bordering on both sides of said right of way, and that the said embankment between your orator's lands was filled in solidly, and the road crossing which had hitherto been maintained by said Erie Railroad Company to enable your orator to have convenient access to his said lands lying west of said railway line, was completely and wholly destroyed, and that no other convenient road crossing across the track of said railroad line was furnished or constructed or provided by said Erie Railroad Company for the use of your orator, so that your orator was deprived of all access to his said lands lying west of said railroad line, except by means of public highways, which require your orator or his teams or cattle to go long distances to reach his said lands lying west of said railroad.

Your orator further shows that at the time of the elevation of said tracks and the construction of said embankment and the destruction of his said road crossing, he spoke to the foreman of the gang of workmen employed by

said Erie Railroad Company and informed them that your orator was entitled to have a convenient road crossing across the said tract of railroad land, but that no attention was paid to such notice by said foreman or said railroad company, and that on March twenty-third, nineteen hundred, your orator addressed a communication to Mr. T. H. Pindell, superintendent of Greenwood Lake Division of Erie Railroad, requesting said superintendent to make a suitable crossing across your orator's said land, so that your orator might be able to turn his cattle to pasture on said land lying west of said railroadline, but that no attention was paid to his said request. 10

Your orator further shows that since September, nineteen hundred, he has, through his attorney and counsel, endeavored to induce said Erie Railroad Company to comply with the reserved rights of your orator as above stated, and to furnish him with a suitable and convenient road crossing across the track of said railway at the point where such road crossing existed for thirty years prior to the construction of said embankment, but that said Erie Railroad Company refused to comply with such request. 20

Your orator further shows that by reason of the destruction of said road crossing and of the refusal and failure of said Erie Railroad Company to furnish your orator with a suitable and convenient road crossing as reserved in said deed of conveyance by John A. Speer to said Montclair Railway Company, your orator has been subjected to great inconveniences and has been wholly deprived of convenient access to his said lands lying west of said railroad line, and has been unable to use said lands for the pasturage of his cattle or in any other profitable manner, and that the destruction of said crossing has been and continues to be a great injury to your orator and to the value of his said lands on both sides of said railroad line. 30

In consideration whereof, and forasmuch as your orator is without adequate remedy without the assistance of this Honorable Court, and can only obtain relief in this Hon-

orable Court, where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said Erie Railroad Company, the defendant in this suit, may full, true and perfect answer make to all and singular the matters aforesaid, but without oath, which is hereby expressly waived, and that the said defendant, the Erie Railroad Company, may, by the order or decree of this Honorable Court, be ordered or decreed to provide your orator with a suitable  
10 and convenient road crossing across the track of said railway, either at the place where such road crossing was established as hereinbefore stated, or where your orator may direct, in accordance with the rights reserved to said John A. Speer and to his heirs and assigns, as stated heretofore, and that your orator may have such other or further relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to  
20 grant unto your orator the State's writ or writs of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said Erie Railroad Company, commanding it by a certain day and under a certain penalty, therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience, and your orator,  
30 as in duty bound, will ever pray, &c.

HALSEY M. BARRETT,  
*Solicitor and of Counsel*  
*with Complainant.*

## ANSWER.

The answer of the Erie Railroad Company, a corporation, to the bill of complaint of Abram Speer, complainant.

I. These defendants, answering said bill of complaint, say that they are ignorant whether or not, as alleged in said bill, John A. Speer, prior to June twentieth, eighteen hundred and seventy, was owner of a certain tract situate in said township of Montclair, fronting on Valley road, and extending westwardly about two thousand feet to the highway known as Upper Montclair avenue in said town, and being about four hundred feet in width at or near its frontage with Valley road; and they are ignorant whether or not the said John A. Speer died intestate, seized of said premises, as in said bill alleged, leaving the said Abram Speer, his only heir-at-law, who now owns or is possessed of the said tract, or any part thereof, and leaves complainant to make such proof of such facts as he may deem advisable. 10

II. These defendants admit that about the summer of eighteen hundred and seventy the Montclair Railway Company was engaged in constructing its railway line from Jersey City through Montclair and other townships, and that the route of said Montclair Railway, as laid out, crossed a certain tract of land in said township then claimed by complainant to have been there owned by John A. Speer, and being of about the same dimensions as those set forth in the bill of complaint. 20

III. And these defendants say that said Montclair Railway Company was a corporation duly organized and existing under the laws of the State of New Jersey, and was incorporated by special charter entitled "An act to incorporate the Montclair Railway Company," approved March eighteenth, eighteen hundred and sixty-six, and the supplements and amendments thereto; that previously to June twentieth, eighteen hundred and seventy, the 30

said Montclair Railway Company filed its survey of the location of its right of way in the office of the Secretary of State, and said right of way, as so surveyed and filed, crossed the said tract; that these defendants are ignorant what, if any, negotiations the said Montclair Railway Company or its agents, entered into with said John A. Speer for the purchase of its right of way across said lands, but they admit that the said John A. Speer, by deed dated June twentieth, eighteen hundred and seventy, 10 a copy whereof is set forth at length in complainant's bill, and which was recorded as therein stated, in consideration of four hundred and eighty-seven dollars and fifty cents, conveyed the tract of land in said deed described to the said railway company, as and for part of its right of way, whereon the tracks of said railroad should be laid.

IV. And these defendants further answering say that the said Montclair Railway Company, about the year eighteen hundred and seventy, laid railroad tracks upon said lands, and commenced to operate its railroad there- 20 over, as part of its main line, and made certain mortgages upon said railroad, which, having become in default, were foreclosed, and, under such foreclosure, the said lands, right of way and franchises and privileges of the Montclair Railway Company were sold and conveyed to trustees, who afterwards conveyed them to the Montclair and Greenwood Lake Railway Company, a corporation of New Jersey, and afterwards, under foreclosure of certain other mortgages, the said right of way, land and premises, franchises and privileges owned by the Mont- 30 clair Railway Company were sold under foreclosure to the New York and Greenwood Lake Railway Company, who continued in possession thereof, operating the same as a railroad, until the year eighteen hundred and ninety-six, when the said land and the said railroad route, rights, franchises and privileges originally of said Montclair Railway Company, were leased to the Erie Railroad Company, a corporation, for the term of ——— years. And these defendants admit that the said Erie Railroad

Company are now in possession and occupation of said tract of land described in said bill of complaint, and of the right of way and property formerly of the Montclair Railway Company, and are operating said railroad under and by virtue of the franchises and rights originally of the Montclair Railway Company, in accordance with the terms of said lease.

V. And these defendants further say that, at the time said lands were first taken by the Montclair Railway Company, and said deed of conveyance made, the said tract of land claimed by said bill of complaint to have been owned by said John A. Speer, was vacant land, generally lying idle and uncultivated, and when used at all, used only for pasture and farming purposes. And on information and belief, the defendant denies that said John A. Speer had any barns and outbuildings on any part of said tract claimed to have been owned by him as lies west of said right of way, but say that the fact was that the said John A. Speer occupied a dwelling-house on a lot on the east side of Valley road, and separated by the said Valley road from the said tract of land claimed by said bill to have been owned by him, and that his barn and outbuildings were on the same lot with his dwelling-house, and they deny that said Speer or his successors ever had any wagon road running across said land, or that the said John A. Speer directed that a crossing should be constructed on any part of the tract of land so conveyed to said Montclair Railway Company, and they deny that any crossing was ever constructed across said railroad or the tract so conveyed to said Montclair Railway Company at any point thereon, and say that if any such crossing was stipulated for by the said Montclair Railway Company, the same was abandoned and lost by said John A. Speer and the complainant by reason of non-user.

VI. And these defendants deny that any planking was ever put between said rails for any such crossing, or any filling or approaches made for any crossing by any of the railroad companies owning or possessing said land.

VII. And these defendants deny that, by the terms of said deed, or otherwise, there is any agreement or covenant in said deed relative to constructing and maintaining any crossing, which is an agreement or covenant running with the land and inuring to the benefit of the heirs and assigns of said John A. Speer, or that any crossing maintained across said railroad was used by the said John A. Speer or Abram Speer in passing to and from the several portions of his farm at any time.

- 10 VIII. And these defendants further answering say that about December, eighteen hundred and ninety-eight, the North Jersey Street Railway Company was constructing an electric street railway along Valley road, in the township of Montclair; that said Valley road then crossed the railroad of the New York and Greenwood Lake railway at a level, at a point about three hundred feet southerly from the tract so conveyed to said railway company by said John A. Speer. And defendant says that, in accordance with an act entitled "An act to regulate crossings at points not within the limits of cities of this State of steam railroads by steam or electric railroads hereafter to be constructed," approved March twenty-second, eighteen hundred and ninety-five (*P. L.* 1895, *p.* 462), the said North Jersey Street Railway Company filed its petition in Chancery of New Jersey, alleging that it was constructing an electric trolley railway along said Valley road, and across said tracks of the New York and Greenwood Lake railway, and that it was necessary to effect a crossing of the steam railroad, and thereby made
- 20
- 30 application to this court to define the mode in which said crossing should be made, and to cause reasonable notice of said application to be given to the municipal authorities of the town of Montclair and also the Erie Railroad Company; and thereupon make a decree defining and regulating the mode and manner of such crossing, and thereupon said petitioner's application was set down for hearing before this court on December twenty-seventh, eighteen hundred and ninety-eight, and notice was di-

rected to be given of said application to said town of Montclair and the Erie Railroad Company, which said notice was then and there duly given; that the matter came up to be heard before said Chancellor on the twenty-seventh day of December aforesaid, and was continued from time to time, all parties appearing and being heard, until the thirty-first day of October, eighteen hundred and ninety-nine, when a decree was made by said court, in the presence of counsel for said North Jersey Street Railway Company, counsel of the New York and Greenwood Lake Railway Company and the Erie Railroad Company and of the town of Montclair aforesaid, wherein it was recited that all parties had agreed, and public safety required, that the grade crossing should be avoided at said point of intersection of said railroad lines on Valley road aforesaid, and that said parties had agreed upon a plan and mode of avoiding such grade crossing as thereafter decreed, and thereupon it was by the Chancellor decreed, among other things, that it was reasonably practical, and public safety required, that the crossing of said steam railroad by the said electric street railway at grade at said Valley road, in the town of Montclair, should be avoided, and that it was necessary, and public safety required that, in order to avoid such grade crossing, the tracks of said steam railroad should be elevated, and that the grade of said Valley road should be lowered so as to permit the cars of said street railway company to pass under the said steam railroad, and that in order to enable the passage of the said electric railroad to be effected it is necessary to reconstruct and rebuild such portion of the railroad tracks on the line of the New York and Greenwood Lake Railway Company in said town of Montclair as is shown upon a certain map thereto annexed and made part of said decree, and that the portion of said railroad line to be rebuilt should be constructed as shown upon and in accordance with a certain profile map marked *Exhibit "B,"* and filed with and made part of said decree, and that the

grade of Valley road at said point of intersection should be lowered so as to allow and leave a clear head room of thirteen feet between the grade of said Valley road and the bridge of said New York and Greenwood Lake Railway Company, as shown on said profile map.

IX. And these defendants further say that said plan and mode by which such grade crossing should be avoided was, on the thirty-first day of July, eighteen hundred and ninety-nine, consented to and approved by the town  
10 counsel of the town of Montclair, and their counsel, learned in the law, was thereupon authorized to consent to the entry of said decree of said Chancellor, approving and requiring such mode of avoiding such grade crossing, and the town surveyor of Montclair was directed to supervise said work, so far as the same related to any change or changes in grade of streets in Montclair.

X. And these defendants further say that, by said plan and mode of avoiding said grade crossing, and said maps therein referred to, it became necessary for said  
20 Erie Railroad Company and the New York and Greenwood Lake Railway Company to raise the said tracks at said Valley road about ten or twelve feet over and above the then level of said road, and that in order to raise said tracks at said point, the same of necessity had to be raised from a point about five hundred feet northerly of said crossing, and an embankment had to be constructed upon the tract of land so conveyed to said Montclair Railway Company by said John A. Speer of about twelve feet in height.

30 XI. And the defendants further answering say that the plan so decided upon was the only practical way in which such overhead crossing could be constructed; that immediately after the signing of said decree they proceeded to raise the said tracks and construct the said overhead crossing, and in so doing built an embankment of about twelve feet in height on the said land so conveyed to the Montclair railway by said John A. Speer; that the said elevation cost more than twenty-seven thou-

sand dollars, two-thirds whereof was paid by said railroad company, and one-third by said traction company; that the said work was done under the supervision of the engineer of the said town of Montclair, and to the satisfaction of the town council, and has been duly accepted and approved by them, as these defendants are informed. And these defendants say that the said work would not have been done, nor the cost thereof incurred, except for the purpose of rendering said Valley road safe and to protect the life and limb of persons passing thereon, and because of the desire of these defendants and of the town council of Montclair to provide for the public safety. 10

XII. And these defendants say that during the progress of said work of constructing said overhead crossing no notice was ever given to the managing officers of these defendants of any claim of a right to a crossing on the railroad right of way by said Speer; that they are ignorant if said Speer spoke to a foreman of a gang of workmen then employed, in relation to said claim, as alleged by complainant, but say that if he did, it was not communicated to the operating officials or those having the management and direction of said work; that the first notice given to such officials was on March twenty-third, nineteen hundred, and when the work was practically completed, when said Speer addressed a letter to the superintendent of the New York and Greenwood Lake Division of the Erie railroad asking him to repair the fence alongside said tract of land, and also to make him a suitable crossing, as he wanted to turn his cattle into pasture, and that as it then was it was not safe, as said letter stated. 20 30

XIII. And the defendants further answering say that thereupon said superintendent communicated with said Speer, and learned that he claimed a right to a crossing by virtue of the said deed. And these defendants say that they were not bound to construct a crossing on said right of way; that the right to a crossing was personal to said John A. Speer, and not to his heir or grantee;

and, if it ever existed, has long since been abandoned, and had been extinguished by lapse of time. Nevertheless, these defendants were not disposed to provoke ill feelings or to stand simply on their legal rights, and therefore offered the said complainant to construct a crossing at a level over their railroad, if said complainant would construct the approaches thereto on his own land. And they say that even if there was any obligation on them to construct the crossing, which they deny, they

10 were not bound to construct the approaches thereto, and they so stated to said complainant. But complainant refused to entertain any such proposition or to construct said approaches, but demanded that these defendants should build a tunnel through the said embankment so that said complainant could drive his cattle and wagons through without the necessity of making any ascent to the crossing. On this proposition for adjustment of these defendants being rejected, these defendants, for the sake of

20 peace, and in order to have the question amicably adjusted, if possible, proposed to said Speer to construct an approach to a level crossing on their own right of way, and to make a road starting from a point in said Speer's land and leading up along and parallel with said embankment to a crossing to be constructed, and then across, and down again, by a like parallel road on the other side of the embankment, to another point in said Speer's land. This plan would cost these defendants about seven hundred dollars, was and is entirely practicable, and would answer every purpose that the said adjoining land is

30 adapted to; but said complainant refused to accept such a crossing as settlement of the dispute, but demanded that a tunnel should be built, or that defendants should buy his unimproved land, of about seven acres, on the west side of the railroad for ten thousand dollars, which was three or four times what it was worth, or pay him seven thousand dollars for a release of his claim to a crossing.

XIV. And these defendants say that to construct the said tunnel would cost between six and seven thousand

dollars, and would be a constant danger to the operation of said railroad and a continuous and large expense for maintenance. These defendants refused to make such tunnel, but in order, if possible, to adjust the matter amicably, they secured options on land adjoining their right of way on the west, with which land a road or street could be constructed from said complainant's land lying west of the railroad, along the west side of said railroad to the Valley road; that the distance from said land to the Valley road by the proposed route is about the same 10 as through a tunnel and across Speer's land lying on the east side of the railroad, and said proposed road would open up his eastern land by a highway free to all and running towards the station, and would furnish a safe and convenient means of communication between said Speer's two tracts of land. And these defendants say that if they are obliged, under the terms of said deed, to furnish said Speer with a road crossing, the said proposed new street or road and connections thereby made between said tracts of land owned by Speer, is and would be a 20 "suitable and convenient road crossing," and a full performance of any agreement contained in said deed. And these defendants say that complainant absolutely and peremptorily refused to consider this proposition, and declined the same, demanding again a tunnel crossing.

XV. And these defendants say that the said complainant is not, in fact, desirous of having a crossing constructed in order to pass and repass over said railroad with his cattle and wagons. He does not, in fact, care anything about such a crossing. On the contrary, he is 30 desirous of selling his property at a high price; and to that end wishes to compel these defendants to buy out his land at a price far above its value, or to construct a tunnel crossing. Such tunnel crossing he proposes to use in connection with a highway which shall run from Valley road westwardly, through the said tunnel and up to Cliffside avenue. This road would divide his whole land in about equal portions and allow him, as he thinks, to sell

building lots fronting on each side of said highway, throughout its entire length. Said complainant claims that by force of said deed, these defendants are compelled and compellable to provide a "suitable and convenient road crossing," not only for said John A. Speer and his said son, the complainant, but for each and every person who may hereafter become seized or possessed of any portion of said land, and for the public at large.

XVI. And these defendants submit that the said  
10 claims and demands of said complainant are unreasonable, extortionate and oppressive; that they are not bound to provide him any crossing; that if they are bound to provide a crossing, such crossing may be constructed at the present level of the rails, and they are not compellable to construct the approaches thereto; but it is said complainant's duty to make the approaches. But that if this court should hold that it is these defendants' duty to construct the crossing and the approaches thereto, the approaches to said crossing by a road parallel with  
20 the railroad fulfills the terms of any alleged covenant or agreement contained in said deed.

XVII. And these defendants further say that the claim of said complainant that a tunnel should be constructed under said tracks is wholly unreasonable. The land, at the time said deed was made, was and is now generally low, marshy and wet, and suitable only for pasture, and has been chiefly used as such for the last thirty years; that the intention of the parties to said deed was only for a crossing suitable for cattle. Such a  
30 crossing was not necessary in order to enable the owner of said land to get access to the land on either side of the railroad, for both tracts fronted on public roads, and communications between them could be easily effected by use of such public roads. And these defendants further say that since the execution and delivery of said deed by John A. Speer to the Montclair Railway Company a new street or road has been laid out and opened, called Cliff-side avenue, which said avenue crosses the westerly part

of the tract through which said railroad was built at the distance of about eleven hundred feet westerly from said railroad; that by opening of Cliffside avenue the said westerly portion of said tract has been given a frontage on two sides of a public street which did not exist at the time of said deed, and a shorter and more convenient means of communication provided, by means of public roads, between the easterly and westerly parts of said whole tract than was possible when said deed was made. And these defendants say that recently a new street has 10  
been laid out, graded and opened, running about at right angles from Valley road to Cliffside avenue, which said street is nearly parallel to said Speer's southerly line and about two hundred feet distant. Also another new street, crossing the last-mentioned street at right angles, has been laid out, graded and opened, which last-mentioned street runs from Watchung avenue up to said Speer's southerly line, and there stops; that the same can be easily extended across said Speer's land, and would, if so extended, cross said Speer's land about midway be- 20  
tween the railroad and Cliffside avenue; that should said new street across said Speer's land be so opened, the said tract lying between Cliffside avenue and the railroad, if capable of improvement, will be improved and developed in lots fronting on Cliffside avenue and said new street, and a right of way through said land and across the said railroad will not only be useless, but detrimental to the said lots fronting on said new street. Said new streets now also afford a closer connection between 30  
said Speer's various tracts of land, by public roads, than formerly existed, and a better route between said tracts lying on the east and west of said railroad than by a way across said railroad and the said low marshy tracts. And these defendants annex hereto a rough sketch map of the said Speer's tracts of land and of the various roads now existing in the vicinity thereof, marked *Schedule A*; and they say that by said deed it was not intended that the public should have any rights in any crossing then

provided for, nor was it intended that the right then given, if any, should be divided up and parceled among all persons that might thereafter own any portion of said lands.

XVIII. And these defendants say that the construction of a crossing at grade or by a tunnel would be of no benefit to the adjacent lands or to the complainant, and the value of any right thereto, if complainant has such right, is of trifling value; that these defendants are still  
10 able and willing to dedicate and lay out a roadway or street adjoining their right of way on the west, from said complainant's land to Valley road, as described in paragraph XIV. of this answer. Said roadway or street would be a full and complete performance of the stipulation of said deed, and also of great advantage to said complainant and his land lying on the west of the railroad, and give such land a short and convenient access to the Valley road and a convenient means of communication with the various other tracts owned by said Speer,  
20 by roadways or streets graded and worked without expense to said Speer, whereas the land of said Speer, being marshy and low, any road that might be constructed over the same, and across or under the railroad, would have to be raised above the surrounding marsh, and would necessitate expensive ditching and filling to lay out and open for use.

XIX. And these defendants say that they are exercising public franchises, and any inconvenience or damage which said Speer has suffered or may hereafter suffer by  
30 not having a crossing over or under their railroad, has been caused by the necessity of providing for the public safety, as decreed to be done by the Court of Chancery, and that these defendants ought not to be caused to suffer by reason of such necessity and said order. And they say that the said complainant is not entitled to any crossing, whether over or under their said railroad, but in case this court should hold otherwise, then they say that he is not entitled to a tunnel crossing or to compel these

defendants to build approaches to a level crossing, and these defendants are only bound to construct a crossing over their tracks at the present level; and if said complainant wishes to use the same it is his duty to construct the approaches thereto and provide the land therefor. And in any event, the construction and opening of a road along their railway, or the level crossing, with parallel approaches, as described in paragraph XIV. of this answer, would be a full compliance with any rightful demand which said Speer may have by reason of said 10 deed.

XX. And these defendants say that the cost of constructing the approaches to a level crossing or a tunnel crossing would be far in excess of the value of either means of crossing the said railroad to complainant and his land; and that in no case should these defendants be compelled to construct such approaches or tunnel, but that in lieu of constructing said approaches or tunnel these defendants should be allowed to furnish complainant with said street or road to Valley road along their 20 right of way as full compensation for not constructing said approaches or tunnel. Should, however, the court decree that said complainant has a right to claim that such approaches or tunnel be constructed by these defendants, and that the said proposed new road or crossing by parallel roads do not provide said Speer with a suitable and convenient road crossing, then they say that the deprivation to said Speer of such crossing can be amply compensated to him by damages, and they say that these 30 defendants ought not to be compelled to construct said tunnel or approaches, but that the damages, if any, suffered or to be suffered by said complainant because of the said approaches or tunnel not being constructed should be ascertained under the direction of this court, and on the said damages having been determined, these defendants should be allowed to tender and pay the same to complainant in satisfaction of and exchange for all and any rights or claims he may have to demand a level cross-

ing or the approaches to a level crossing or a crossing by tunnel; and on such tender or payment being made, said complainant should be decreed to release and surrender all rights, claims and demands for the construction of said approaches or crossing at a level or by a tunnel, and these defendants' land and right of way should be decreed to be freed and discharged of any easement or right of way or other claim of said complainant therein or thereon.

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

ERIE RAILROAD COMPANY,  
 By T. D. UNDERWOOD,  
*President.*

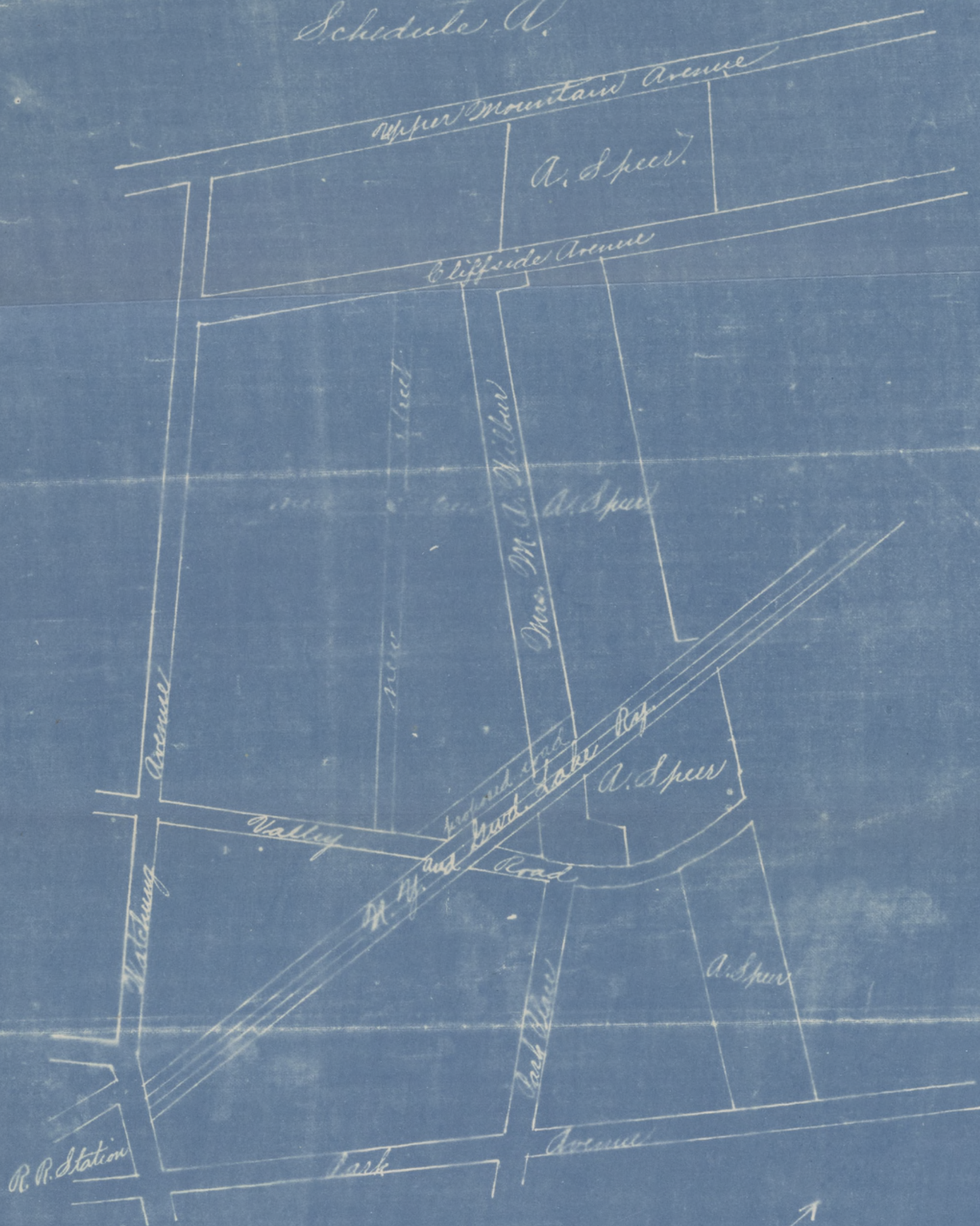
Attest [L. s.]  
 O. W. MIDDLETON,  
*Secretary.*

City, county and State of New York, ss.—The answer of the defendants, the Erie Railroad Company, was taken this third day of October, nineteen hundred and one, before me, under the common seal of the said corporation, as  
 20 by their said seal thereto affixed appears.

A. L. TRAVIS,  
 [L. s.] *A Foreign Commissioner of Deeds  
 for New Jersey in New York.*

[Consent given that answer be filed as of term, and mailed clerk, October 4th, 1901.]

Schedule A.



Scale - 400 feet = one inch.



## TESTIMONY.

Before his Honor Vice Chancellor Stevens.

*Mr. Halsey M. Barrett*, for the complainant.

*Mr. Cortlandt Parker, Sr., Mr. Cortlandt Parker, Jr.,*  
and *Mr. Chauncey G. Parker*, for the defendants.

Transcript of shorthand report of the evidence taken upon the trial of the above-stated cause, this nineteenth day of February, nineteen hundred and two, at the Chancery Chambers, Newark, New Jersey.

*Abram Speer*, sworn in his own behalf. 10

Direct examination by *Mr. Barrett*.

Q. You are the complainant in this suit?

A. Yes, sir.

Q. Are you a son of *John A. Speer*?

A. Yes, sir.

Q. And you reside on *Valley road, Montclair*?

A. Yes, sir.

Q. You are a son, you said, of *John H. Speer*?

A. Yes, sir.

Q. Where did he reside during his lifetime? 20

A. *Upper Montclair*.

Q. On the same premises that you now reside on?

A. The same premises.

Q. When did your father die?

A. 1880.

Q. Can you fix the date any nearer than that—do you remember the day of the month?

A. It was in spring—in *May*, I think.

Q. In *May*, 1880?

A. Yes, sir. 30

Q. At the time of his death did he leave a will—your mother survived him, didn't she?

A. No, sir.

- Q. Did he have any children other than you?  
A. No, sir; not at the time of his death.  
Q. He had had other children?  
A. Yes, sir.  
Q. How many?  
A. Two.  
Q. Were they both dead at that time?  
A. Yes, sir.  
Q. Had either of those children been married, or left  
10 children surviving them?  
A. No, sir.  
Q. Neither of them had been married?  
A. No, sir.  
Q. Then, at the time of your father's death, you were  
his sole heir-at-law?  
A. Yes, sir.  
Q. Do you know whether your father left a will or  
not?  
A. He left none.  
20 Q. Was an administrator appointed of his estate?  
A. I administered it.  
Q. Were you born on the premises on the Valley road  
where you now reside?  
A. Yes, sir.  
Q. How long did you continue to live there?  
A. I was born there and lived there, with the exception  
of six, seven or eight years, all my life.  
Q. When was that period of six, seven or eight years  
that you lived somewhere else?  
30 A. After I was fifteen or sixteen years old I went to  
learn my trade, at Newark.  
Q. Did you reside in Montclair while you learned your  
trade?  
A. No, sir; I was here in the city of Newark.  
Q. How old are you?  
A. Seventy years old if I live until the 26th day of  
May, next.  
Q. You were born May 26th, 1832?

A. Yes, sir.

Q. What property in Montclair, on Valley road, did your father own in June, 1870?

A. He owned the property from Mountain avenue down to the Valley road.

Q. That is on the west side of Valley road extending to Mountain avenue towards the west?

A. Yes, sir.

Q. Now, in June, 1870, did he own it then?

A. Yes, sir; he died in 1880.

10

Q. Yes?

A. Then he must have owned it in 1870.

Q. Where was the property on which his house was located?

A. That was on the east side of the Valley road.

Q. And the barns and outbuildings, were they on the east side of the Valley road?

A. They are on the east side of the Valley road.

Mr. Barrett—I made a mistake in the bill, I alleged that they were on the wrong side.

20

Q. They were on the east side and adjacent to the house?

A. On the east side of the house; yes, sir.

Q. Back of the house?

A. Yes, sir.

Q. How many acres were there in the tract on the west side of Valley road and extending back westerly to Mountain avenue?

A. Probably fifteen acres, or in that neighborhood.

Q. For what purpose did your father use that land prior to June, 1870?

A. Farming.

Q. And do you know whether or not there was a road or a driveway upon these premises prior to 1870?

A. As long as I can recollect there was a driveway across there.

Q. What was that used for?

A. Farming purposes—for getting up to the property.

Q. Was it a mere wagon track or was there any rounding up or construction to the road?

[Objected to as leading.]

A. The road had been filled in probably with stone from time to time and covered up with earth.

The Court—Have you a map of the property?

Mr. Barrett—Yes, sir; but I haven't proved it yet; if there is no objection, however, I will use it now and prove it afterwards.

10 Mr. Parker—You may use it.

Q. I show you a map entitled map of land of Abram Speer, of Montclair, New Jersey, made by James Owen, civil engineer, and ask you if you recognize that as representing all the tract of land lying between Valley road and Cliffside avenue?

A. Yes, sir.

Q. This map shows, in nearly the center, a dotted wagon track; state whether or not that represents the place where the roadway was that you have described?

20 A. That is about as near as I can state it.

Q. Is it near the center of the tract?

A. Nearly the center of the tract; it is a little wider at the lower end than it is at the upper end.

Q. This map shows the construction of the line of the Erie railroad—the New York and Greenwood Lake division of it; see whether apparently that indicates the location of the railroad line across these premises.

A. Yes, sir.

30 Q. Mr. Speer, you inherited these premises on the death of your father?

A. Yes, sir.

Q. Have you ever sold them?

A. Not this land; no, sir.

Q. You own it still?

A. I own it still.

Q. On both sides of the railroad?

A. Yes, sir; both sides.

Q. Do you remember when that Montclair railroad

was constructed through Montclair and across this tract of land?

A. About 1870.

Q. Where were you living then?

A. I was living there.

Q. Do you know of your own knowledge whether your father, John A. Speer, made a conveyance to the Montclair Railway Company of a strip of land across this tract?

A. Yes, sir. 10

Q. Do you know that of your own knowledge?

A. I was present when it was done; he refused the first deed that was offered to be signed by my father.

Q. Were you present finally when the deed was made and executed?

A. Yes, sir.

Q. By your father?

A. Yes, sir.

Q. And when it was delivered to the railroad company? 20

A. Yes, sir.

Mr. Barrett—I have a certified copy of that deed from John A. Speer to the Montclair Railroad Company. It is set forth in full in the deed and admitted by the answer, and I would like to offer that deed in evidence.

[Marked *Exhibit No. 1*, for the complainant.]

Q. How soon after that deed was executed did the railroad company proceed to construct this line of railroad? 30

A. I cannot tell you exactly how soon, but it was very soon, and probably within a few months.

Q. When the railroad was originally constructed in 1870, how did it run, as compared with the level of this ground?

A. Pretty close to it; it was graded up above the ground probably about eighteen inches or somewhere in that neighborhood.

Q. Do you know whether at the time of the construction of the railroad your father designated, or pointed out, the place at which there was to be a crossing of the railroad?

A. I don't know that he pointed out any particular place for it, but they built a crossing where the old wagon road had always been, which was suitable to father and myself at that time.

Q. What work was done for the purpose of making  
10 that crossing over the railroad passable?

A. Well, it was sloped out at each side to make the grade convenient to go over and planked.

Q. To what extent was it planked?

A. There was planking put on the outside of the rails, and it was filled in inside between the rails.

Q. At first it was a single track, wasn't it?

A. Yes, sir; a single-track road.

Q. After the crossing was thus completed, was it used  
20 by your father, during his lifetime, or the remainder of his lifetime?

A. It was used by my father and myself; father was the owner of the land at that time.

Q. And used for what purpose?

A. To go over there with our horses and wagons and cattle, and carting hay and such purposes—farming uses.

Q. Was there at that time any other means of getting from your father's house and barns to the portion of the land west of the railroad?

A. I think there was.

30 Q. What was it?

A. At that time there was a way to get up there by going probably two or three miles around on the westerly side to get up on the mountain side; Cliffside avenue was there at that time; I don't know that Mountain avenue was.

Q. Then the only way would be to make a circuit of the public streets and get in somewhere in the rear?

A. We could get over on our own land on this road that was built.

Q. Any other way?

A. No other way that was very convenient.

Q. Was there any other way except the way you have spoken of?

A. I don't know; I think there was not—not to that land.

Q. Did your father continue to use that crossing during his lifetime?

A. Yes, sir; he used it somewhat, not a great deal; he was getting pretty well along in years and I used it 10 for him.

Q. At that time, in the seventies, you were living with him; what were you doing?

A. I was farming.

Q. State what use you made of that crossing; how much land did your father or you own there?

A. In the neighborhood of forty acres all told.

Q. All in this immediate vicinity?

A. Some of it is on the west side and some on the east side of the Valley road. 20

Q. But that was the farm?

A. Yes, sir.

Q. How much was there west of the railroad?

A. I should think there was about thirteen acres at that time; I don't know but what there was more, because there was more west of Mountain avenue.

Q. How much was there west of the Valley road?

A. Well, that is what my statement was, as I supposed.

Q. That is the way you understood my question?

A. Yes, sir. 30

Q. About fourteen acres then?

A. Somewheres in that neighborhood.

Q. What use did you make of this railroad crossing?

A. Well, we had to go over it every day pretty much with our cattle, to drive over it—drive our cattle over it.

Q. Was there any stream of water west of the railroad crossing on this land?

A. Yes, sir; a large stream—part of Toney's brook.

Q. West of the railroad?

A. West of the railroad.

Q. Was there any stream of water east of the railroad and between it and the Valley road?

A. No live stream.

Q. What was it?

A. Well, when we had a heavy freshet of water it would settle down through there, or after a heavy rain there would be water through there.

10 Q. Do you know whether at any time after the construction of this crossing, by grading up to the tracks and putting planks alongside of the rails, whether that planking or crossing was ever repaired or re-constructed by the railroad company?

A. Oh, it was repaired a great many times.

Q. About how often; have you any means of knowing?

A. That would be pretty hard for me to tell; I don't know just how often, but every time the road was tracked or leveled up, &c., the planking was generally torn up and put down again; sometimes the planking was brought down from Valley road, and I was speaking to the man who constructed it and had charge of that branch of it when it wasn't in favorable condition, and he told me that sometimes he was bothered to get materials to put down, but as quick as he could get it he would attend to it.

20 Q. Did he attend to it after you spoke to him?

A. Well, sometimes it would be a few weeks before he would do anything, and sometimes he would do it right away.

30 Q. What was the condition of this crossing in the fall of 1899, when the Erie railway elevated their tracks?

A. Well at that time it was a double track, and in not very good condition to go over.

Q. How long before had it been changed from a single to a double-tracked road?

A. Well, I cannot tell you just the date when that was done, a few years perhaps.

Q. A few years?

A. Yes, I think so.

Q. What do you say was the condition of this crossing then when the double track was completed?

A. Well, it was never in a suitable condition to drive over with a wagon after the double track was put down.

Q. In point of fact, did you drive over the crossing with a wagon after the double track was put down?

A. No, sir; I don't think I did; I have no recollection of doing it.

Q. What was the condition, so far as observation went, 10 so far as anyone could see, of that crossing at the time the double track was constructed?

A. You mean in regard to crossing over this track?

Q. Yes.

A. Well, it wasn't very good; it wasn't filled in between the rails properly.

Q. State the condition of the crossing after the double track was laid?

A. Why it was in a rough condition.

Q. What would a person see as to that farm road or 20 crossing at the time the double track was laid; what picture would present itself to a person looking at it—what would he observe?

A. Well, there was the railroad track there.

Q. I mean as to the condition of the farm road and the approaches?

A. Well, it was very unsuitable for a farm road—to go over; that is all I can say.

Q. How far back from the line of the tracks on each side did the grading or approach to the tracks extend? 30

A. At that time?

Q. Yes.

A. Probably fifteen feet—not at the present time, but at the time it was graded, although I never measured it.

Q. At the time this double track was constructed, was there any change made in the grading up of the approaches to the track?

A. No, sir; nothing more than to fill in and widen this track out.

Q. Now, as to the condition of the wagonway that crossed, what was done about that?

A. There was nothing particular done about that.

Q. I mean by the railroad company?

A. No, sir.

Q. Was there anything done by you?

A. No, sir.

10 Q. Do you remember what became of the planking that had been there when it was a single-track road?

A. Well, what wasn't torn out was carried away by parties.

Q. It was taken away, was it?

A. Yes, sir; it was taken away by parties.

Q. You say you don't remember driving any vehicle across the double track way; didn't you do it?

A. It wasn't suitable to go over, and that wasn't all, I had no particular business over there just at that time.

20 Q. Did you drive cattle or any other thing across there?

A. Yes, sir; cattle.

Q. Was that land ever used for pasture for anybody else's animals except your own?

A. Yes, sir.

Q. For how many years had you been allowing other cattle to be pastured there?

A. About three years.

Q. Three years from when?

A. Three years from now—last season.

30 Q. Then along in 1900?

A. From last fall, say.

Q. Do you remember when the railroad company elevated these tracks so as to get rid of the grade crossing of the Valley road?

A. No, sir; I don't remember it.

Q. Well, you remember the fact, don't you?

A. Yes, sir; I remember the fact, but I don't remember just the time it was done.

Q. Do you remember whether that work of elevating the tracks was commenced in the spring of 1900 or earlier than that?

A. I think it was about that time.

Q. How much, as far as you know—how greatly were the tracks raised at that time; how much of an embankment was made or built at that time for the purpose of the railroad company?

A. I think the embankment was about sixteen feet high. 10

Q. Sixteen feet higher than it was, or sixteen feet high above the level of the land?

A. Above the level of the land at the present time probably.

Q. How much higher was that than it was before?

A. That would be about fourteen feet, I should judge; I didn't measure it.

Q. How was this embankment constructed; I mean was it constructed solid or was there a passageway left for your crossing? 20

A. It was constructed solid—filled in.

Q. Do you remember how soon that work was completed?

A. No, sir; I do not.

Q. Did it take several months?

A. Probably more than a year.

Q. Did you, at any time during the construction of this embankment or elevation of the tracks, have any conversation with any of the persons engaged in that work, with respect to preserving your crossing? 30

A. Yes, sir; I spoke to one man who was the engineer, or I supposed he was, because he was using an instrument there, and I stated to him that I was entitled to a crossing across there; and that appeared to be something unexpected to him.

Q. Can you fix about the date of that conversation?

A. No, sir; I cannot.

Q. Do you know the name of the man?

A. No, sir.

Q. What was the condition of the work at that time?

A. Well, they had ten feet more of earth to put on, I think he told me; they had certain stakes put up, and I asked how high they were going with the embankment, and he said they had got ten feet more to put on it, and I then spoke to him about my crossing.

Q. Then they had put in apparently about four feet of filling at that time?

10 A. Well, there was some previous to that, you must remember, but they did fill in some later; these stakes were up before the filling in.

Q. What did he say when you told him this?

A. He didn't make any answer any further than to ask me where, and I pointed out the spot to him; it was right where we used to use it.

[Objected to.]

Q. When he asked you where it was, what did you say?

20 A. I pointed out the place where my crossing had previously been.

Q. And how near to this place where you and he were then standing was it?

A. Right on the railroad track—that place.

Q. Directly opposite, where the crossing had been?

A. Nearly so.

Q. Did you have any other conversation at any other time with any other person in charge of or engaged in that work of elevating the Erie railway tracks?

30 A. I spoke to the superintendent of the road.

Q. Do you know what his name was?

A. Pindell, or something of that kind.

Q. Pindell?

A. Something of that sort.

Q. Where did you talk to him about it?

A. On the Valley road where they were building the bridge.

Q. When was that conversation?

A. Well, I can't tell you the date of it now, but I don't know but what I have the date in a letter.

Q. How long after your conversation with the engineer was it?

A. Well, it may be a couple of months.

Q. What was the situation of the work; how near completion was it at that time as regards the filling in of the embankment?

A. Well, it was all filled in with earth, but whether it was filled in high enough or not, I cannot say. 10

Q. What reply did Superintendent Pindell make to you?

A. He wanted to know what kind of road I wanted, or what kind of crossing, and I told him I wanted a crossing so that I could get through there with my hay and such things—that I wanted a suitable crossing; he was very pert, he says, "Yes, you want a \$10,000 crossing for two or three loads of hay; what kind of hay?" that was his reply.

Q. What reply did you make to that? 20

A. I turned around and walked away from him, and when I got away a short distance he says, "We will send somebody out to see about this;" some time after, probably a week or two, a gentleman called on me and wanted to know where the crossing was, and I went down and showed him; I don't know what his name was.

Q. Did he say whether or not he represented the railroad company?

A. He said he came, or was sent, by the railroad company. 30

Q. Did he have any instruments—surveying instruments—with him?

A. No, sir; I stated to the other man at the same time as we had our conversation that I would do better with him than that; that I would sell him the land on the other side of the road for that money, and they need not make any crossing.

Mr. Parker—I will ask to have all this testimony taken subject to our objection.

Q. Have you, since the completion of the embankment, made any demand upon the railroad company to construct a crossing for you there?

A. I have, through my counsel; my counsel sent them a letter asking them to fix me a suitable crossing.

Q. For what purpose have you been able to use that land since the elevation of the tracks?

A. I haven't used it at all.

Q. Why not?

10 A. Well, it wasn't very accessible to get to, or very handy to get to, to go across there; I could not pasture there, and the people that I had been hiring the pasture to said it would take them longer to go around with their cattle, and the man's time would be spent going around with the cattle, so they didn't hire the pasture.

Q. When these tracks were elevated in 1900, what way was there by which you could get to this land without crossing the tracks, and without going over private property?

20 A. We could go by Bellevue avenue and strike Cliffside avenue or up Watchung avenue and up Cliffside avenue to my property.

Q. Now the first way, by going up Watchung avenue and then west, and then down Cliffside avenue, how great a distance would that be from your house until you could get to the westerly side of your land on Cliffside avenue?

A. About three-quarters or seven-eighths of a mile, I suppose.

30 Q. And the other way, going down Valley road and so on up to your land to the west?

A. Well, there is not much difference.

Q. Is it about the same distance?

A. I should not think there was much difference; my property lies midway between the two streets.

Mr. Barrett—I have letters here which Mr. Speer and I wrote to the Erie Railway Company demanding that crossing.

Q. Have you with you a copy of a letter which you wrote to Mr. Pindell on March 23d, 1900?

[Witness handed counsel a letter.]

Q. Who made this copy?

A. I had that made.

Q. Did you compare it with the original?

A. Yes, sir.

Q. And signed by yourself?

A. Yes, sir.

Q. And mailed the original?

10

A. Yes, sir.

Mr. Barrett—I offer this copy in evidence.

[Counsel read same, and it was marked *Exhibit No. 2*, for complainant.]

Q. Did you get a reply to that letter?

A. Yes, sir.

Q. What is the date of your reply?

A. I think it is the one which was received March 29th.

Q. Is that the first reply you have?

A. Here is one of April 13th, 1900.

20

Mr. Barrett—I will read this letter. It is headed “Erie Railway Company, March 29th, 1900, Mr. A. Speer,” &c.

[Counsel read same. Offered in evidence. Marked *Exhibit No. 3*, for complainant.]

Q. Did you make any reply to that letter of Pindell’s of March 29th, 1900?

A. Yes, sir; I wrote him that the property at that time belonged to John A. Speer—the deed was in his name; so that he could locate the property.

30

Q. Was that all you wrote him?

A. Yes, that is about all; I answered the question he asked me.

Q. Did you keep a copy of that letter?

A. No, sir; I don’t think I did; I merely answered his question; but here is one that came afterwards.

Mr. Barrett—I offer that in evidence and will now read it.

[Counsel read same. Marked *Exhibit No. 4.*]

Q. Did you receive any other communication or letter from Mr. Pindell after that letter of April 13th?

A. I think not; no, sir.

Mr. Barrett—I want to call attention to the fact that this letter is apparently a mistake in reciting the letter of ours as of April 23d; it should have been March 23d.

Q. Did you afterwards meet Mr. Pindell on the premises?

10 A. No, sir.

Q. You testified a few moments ago to a conversation with the superintendent of the road on the premises, was that Mr. Pindell?

A. Well, I suppose it was the same man.

Q. Was it after this letter was received or before?

A. I think it was before.

Q. You had had a conversation, then?

A. Well, I am not sure about that; I could not be positive about it—yes, it was after that letter.

20 Q. He says, “I expect to be in that vicinity in a few days; shall be glad to go over the matter with you;” did he meet you, as stated in that letter?

A. No, sir.

Q. Did anybody else, representing the company, come to see you in response to this letter or in accordance with this letter?

A. Yes, sir.

Q. Who came?

30 A. I don't know the gentleman's name that came to see me, but he said he was about the last representative of the company to attend to such things for the railroad company; that it was generally left to him to fix up or settle up, and I went over the ground with him and spent I suppose a couple of hours following the road down to the Watchung depot, or Park street now.

Q. When was that?

A. I have no particular date of it, but I think I left

his address with you at that time on a telegraph dispatch; I asked him for his address.

Q. Here is an envelope of the Western Union Telegraph Company, with the name James Keegan on it; is that the name of the man with whom you had that conversation, and did that man write this address on this envelope for you?

A. He didn't write any address at all; he handed me an envelope that had been addressed to him, and I don't think that is the one. 10

Q. You are not sure about that?

A. I am not sure; I don't recollect.

Q. If this is not the one that the gentleman handed you, do you know what this is?

A. No, sir; I do not.

Q. You don't know who James Keegan is?

A. No, sir.

Q. When did you put the matter in my hands to endeavor to settle with the Erie Railway Company?

A. Well, I cannot give you the date of that at present; 20 I have it at home, but I haven't got it here.

Q. Do you remember how long it was after your correspondence with Mr. Pindell in April, 1900?

A. Well, it was shortly after that.

Q. Was it during that summer?

A. Yes, sir; I think it was.

Q. Has the railroad company done anything towards giving you the crossing desired under or over their track?

A. No, sir.

Q. Has the situation with respect to this embankment 30 at the railroad crossing changed any since the railroad was put there; how is it to-day?

A. Well, I haven't been on it in some little time, but I think it is about the same.

Q. What do you mean by in some little time?

A. Well, two months.

Q. It is directly opposite your house?

A. Yes, sir; three hundred feet or better from it.

Q. You can see it every time you go to Montclair ?

A. I see it every time I go out of doors pretty much.

Q. That is all.

Cross-examination by Cortlandt Parker, Jr.

Q. You say you have been living on this place all your life ?

A. Pretty much, except a few years.

Q. And have no business ; are you engaged in any business ?

10 A. No, sir ; not now.

Q. Were you ever in any business ?

A. I am a carpenter by trade.

Q. And you live on this place where your farm is ?

A. Where my father's farm was ; yes, sir.

Q. You keep cows there ?

A. Yes, sir.

Q. How many cows do you keep ?

A. Well, four or five, and at times three or four.

Q. What time did you keep three or four cows ?

20 A. Well, when my father was living.

Q. Since your father died how many cows have you kept ?

A. Sometimes I have two, sometimes three.

Q. Do you keep a horse ?

A. One, at the present time.

Q. How many have you heretofore kept ?

A. Two.

Q. You never had more than three cows and two horses ?

30 A. Yes, sir ; I had more than three cows and two horses.

Q. At any one time ?

A. Yes, sir.

Q. How many ?

A. I think I had four.

Q. Well, that is the most you had, four cows ?

A. Well, sometimes more than that; sometimes I raised some young stock.

Q. How many acres of tillable land have you got?

A. At the present time?

Q. Yes.

A. Probably twenty-five acres.

Q. They are all on the east side of the Valley road, are they not?

A. No, sir.

Q. Where are they? 10

A. Some on the west side.

Q. Whereabouts?

A. Right opposite this.

Q. Opposite your house?

A. Opposite my house.

Q. Between your house and the railroad?

A. No, sir; opposite, on the east side—on the east side of the Valley road it runs right down here [indicating on map].

Q. You have tillable land on the east side of the Valley road? 20

A. Yes, sir.

Q. You have no tillable land on the west side?

A. Yes, sir; I have.

Q. Where?

A. On the west side of the railroad.

Q. Whereabouts?

A. West of the railroad.

Q. How far west?

A. Well, the depth of that property up to Cliffside avenue is something over twelve hundred feet. 30

Q. Do you call that farming land?

A. I have farmed it and raised crops on it.

Q. What part of it did you farm?

A. I farmed the western part of it; I had corn growing on it.

Q. Up near Cliffside avenue you farmed it?

A. I did not farm that.

Q. How far from Cliffside avenue did you farm?

A. Probably four hundred to five hundred feet.

Q. And between four and five hundred feet from Cliffside avenue and the railroad you never farmed that?

A. I used that mostly for pasture; it was well watered by a stream of water through there.

Q. There is quite a little brook running through there, is there not?

A. Yes, sir.

10 Q. It is boggy land, is it not?

A. Well, I don't know as it is particularly boggy land.

Q. What kind of land would you call it?

A. Pasture land.

Q. Which is suitable for pasture?

A. Yes, sir; suitable for pasture and suitable for farming.

Q. Water willows grow down there, don't they?

A. Well, I don't know what water willows are.

Q. What kind of willows do grow there?

20 A. Well, willows will grow in most any land—in different kinds of land.

Q. Don't you know what water willows are?

A. No, sir; I don't know what you call water willows; I know what they call pussy willows.

Q. Well, do they grow there?

A. They would grow there if they were allowed to grow.

Q. It is suitable land for willows to grow—it is wet ground?

30 A. What is that?

Q. It is suitable land for willows that grow in wet land?

A. It is suitable land for willows that grow on dry ground, too.

Q. Well, just answer my question, please; repeat it?

[The stenographer read the question, as follows: "Q. It is suitable land for willows that grow in wet land?"]

A. They would grow there, yes.

Q. Now you say you used to have a wagon track across here [indicating] ?

A. Yes, sir; a road.

Q. How did you get across the brook ?

A. There was a bridge across it.

Q. There is no bridge there now, is there ?

A. No, sir.

Q. How long is it since there has been any bridge there ?

A. Probably nine or ten years. 10

Q. Since the bridge was there ?

A. Yes, sir; there was high water came there and washed it away.

Q. And after that bridge was washed away you never repaired it ?

A. No, sir; not after it was washed away.

Q. How could you have driven up there and across that brook that leads from your house ?

A. I could drive over that brook anywhere with my wagon if I could get across the railroad. 20

Q. Well, could you drive across the brook ?

A. Yes, sir.

Q. Is it not a brook three or four feet wide ?

A. There is no width to it at the present time; it is filled up pretty much.

Q. Was it not three or four feet wide ?

A. Yes, sir; it was when the bridge was there.

Q. Now, to get through that brook from your house you don't have to go around to Watchung avenue, do you ?

A. Well, there is no other way, only Bellevue avenue, 30 to get there, unless you go over the railroad embankment.

Q. Well, why cannot you go over Bellevue avenue ?

A. I can do that, or go over Watchung avenue.

Q. Is not Bellevue avenue nearer to your house ?

A. No, sir; I don't think there is much difference between them—between Bellevue avenue and Watchung avenue.

Q. What is this new avenue that has been laid out through Harrison Place?

A. Well, I don't know as there has been anything done there, that the town has accepted.

Q. Well, I am not asking you what the town has accepted, but there is a new street there through Harrison Place, is there not?

A. I don't know but what there is.

Q. You don't—don't you know there is?

10 A. Well, if you will define to me what a street is I will answer your question, whether you mean a public street or a private street.

Q. I want to know if there is not a road or street running up through Harrison's property, parallel with your land, that runs between the Valley road and Cliffside avenue, through which anybody that wants to can drive or walk?

A. I don't know that there would be any objection to anybody going over there.

20 Q. Then you say there is such a street?

A. They have opened something of that kind.

Mr. Barrett—I object to that. It doesn't touch our land, and it doesn't make any difference whether there is such a street there or not.

The Witness—That street has only been recently built, if it is built at all.

Q. When was it built?

A. This spring.

Q. Is it there now?

30 A. Yes, sir; it was built last spring, I think.

Q. Before the filing of your bill?

A. What is that?

Q. Before your bill was filed?

A. No, sir.

Q. What?

A. No, sir.

Q. When was your bill filed?

A. I can't tell you when exactly; my counsel filed the bill.

Q. Now, this right of way running through your tract of land—you say there was filling in on the railroad track?

A. The railroad was filled in, and it has cut me off from the roadway.

Q. I mean where it went across the tracks of the railroad company; you say there was filling in there?

A. You mean on the ground? 10

Q. Yes?

A. There has not been since they filled in that bank.

Q. Since the road has been built—was there ever any filling in there?

A. Only the farm road, and that was a great many years ago, I presume.

Q. Didn't you say there were planks laid down there, and it was filled in between the tracks?

A. Yes, sir; for a number of years; that was put there for me to go across. 20

Q. How many years?

A. Probably twenty to twenty-five years—over twenty years, at least; I haven't kept any record or account of those things; it has not been planked in for ten years, at any rate; not since they double-tracked the road and for some little time before.

Q. Before they double-tracked the road there was none?

A. No, sir; not for a short time.

Q. Well, just before? 30

A. Not for a year or two; I cannot tell you the time exactly.

Q. Might it have been for as long as five years before?

A. I don't think it was as long as that.

Q. You don't think it was five years?

A. No, sir.

Q. But there had been no planking there for the last ten years?

A. There was plank there for a great many years.

Q. Well, but for ten years since now—since 1892 there has been no planking there?

A. For the last ten years there has not been; is that what you mean?

Q. Yes.

A. Well, I cannot tell you about that.

Q. You say this road was built with stone thrown in?

A. Yes, sir; it was built with a stone foundation.

10 Q. It was built with stone thrown in because it was boggy, marshy land, wasn't it?

A. It was a little marshy in some places.

Q. Exactly.

A. Yes, sir.

Q. When was the last time you ever drove over there with a horse and wagon or carted hay?

A. Well, I can't tell you; I have no recollection of that.

Q. Was it ten, fifteen or twenty years ago?

20 A. Less time than that.

Q. Less than what?

A. Ten or fifteen years ago.

Q. Ten years ago?

A. Somewhere about ten years ago.

Q. That is the last time you ever used that road?

A. That is the last time I remember using it with a horse and wagon.

Q. When was the last time you ever drove cattle across there?

30 A. They were driven across up to the time they commenced to fill in; after they commenced to fill in I could not drive over.

Q. How did you rent this land for pasture—to what people?

A. I rented it to different people.

Q. Who did you rent it to?

A. Some of my neighbors.

Q. What are their names?

A. Mr. Halstead, Mr. Dupree and Mr. Boyd.

Q. Where do they live?

A. In that neighborhood.

Q. Which side of you?

A. Both sides of my property—both sides of my house.

Q. You could get to this pasture-land from Cliffside avenue?

A. Certainly you could.

Q. And you could have rented it to people that lived up on the other side of the railroad; they could have gone through Cliffside avenue? 10

A. The first one that spoke to me about the pasture was Mrs. Fox, but after she looked at it she said, since the railroad was there that her man would spend half of his time in driving the cattle to pasture, so she couldn't take it.

Q. But you never attempted to rent the pasture to anybody living on the west side of the railroad, have you?

A. Oh, yes; Mr. Halstead lived on the west side of the railroad? 20

Q. Well, could not he go up Watchung avenue to get to it?

A. He did go there part of the time, and he would have probably went further if the railroad had kept up their fences.

Q. Then the trouble wasn't with the elevation, but because the railroad didn't fence there?

A. And it wasn't in a suitable condition to keep cattle in.

Q. You were afraid they might climb up the bank and get on the railroad track? 30

A. I didn't care whether they did or not; I wasn't afraid of it at all; they probably were afraid.

Q. So that the fact was that they gave up the pasture there because the fences were not maintained?

A. No, sir; that wasn't the fact; the fact was they could not get over there; Mr. Boyd and Mrs. Fox

couldn't get over there without coming all the way around Cliffside avenue, and my own cattle the same way.

Q. And it was that that prevented one or two of your neighbors from putting cattle there—I mean the fence?

A. Yes, some of them.

Q. But they have rented it for cattle, haven't they?

A. Yes, sir.

Q. I mean since the elevation?

A. Oh, no, sir; not since the elevation has been finished?

Q. Did you use any part of that land for agricultural purposes—I mean to raise crops—since the elevation of the railroad?

A. No, sir.

Q. Now, about this talk you had with Mr. Pindell, you told him that they need not build a crossing; that you would take as much as the crossing cost for your rights, didn't you?

A. Not in that way at all.

20 Q. What did you tell him?

A. He told me that it was going to cost \$10,000; he said, "That I wanted a \$10,000 crossing for a few loads of hay," and I said, "Well, I would do better than that, I would sell them the land for that money, and they need not build me anything."

Q. You wanted to sell them the land for \$10,000?

A. I would do that, and I told him so.

Q. How many acres of land?

A. Ten acres, I presume, but I haven't measured it.

30 Q. He offered to construct a crossing for you going up the embankment, didn't he?

A. No, sir.

[Objected to as not cross-examination.]

Q. Did anybody offer to construct a crossing going up one side of the embankment and down the other?

A. Not him.

Q. Who did?

A. Well, I can't tell who it was, but that was the gen-

tleman that I have spoken of some time ago who said he was about the last man to see about it; he said he could build a suitable crossing, or that they could build me a way over alongside of the railroad track, and I told him I didn't care about driving up over there; that I didn't care about driving up alongside of the track.

Q. He proposed to give you a crossing going up one side of the embankment and then crossing the railroad, and then down again on the other side of the railroad; didn't he offer to give you a crossing out from your land 10 in that way?

A. He said that they would fill me in a suitable crossing in that way on my property.

Q. Didn't I understand you to say that Mr. Keegan proposed to put an embankment on your land that would take you straight up from your land alongside of the track, and then across over the track, and down on the other side?

A. He said they could do that.

Q. And that they would do it? 20

A. He said it could be done; he didn't say they would do it; but I told him I didn't want it that way.

Q. Didn't he propose to give you a crossing that would run entirely on the railroad land?

A. He proposed to bring me over to the westerly side by going to a crossing on the Valley road; he would get me in that way to my land on the west side of the railroad.

Q. He said he would give you a road?

A. He said it could be done, but he didn't say he would 30 do it.

Q. What did you say to that?

A. I told him I didn't want to go that way at all; I wanted to go where the old road had been.

Q. Didn't he say also that the railroad would give you an approach that led up alongside of the bank of the railroad on their land to the top of the embankment, and then cross the railroad track and then down the other side?

A. I didn't understand it so.

Q. Well, now, why didn't you take this way of getting out of the Valley road?

A. Well, it didn't look to be very safe.

Q. Why not?

A. It was right adjoining the railroad track, and I don't consider those tracks safe for people to drive alongside of.

Q. What was your sole objection?

10 A. That was one thing; it wasn't my sole objection; my objection was simply that I was entitled to a crossing there as my deed called for, or my father's deed called for, at right angles with the road.

Q. And you wanted an under-grade crossing or none?

A. I thought I was entitled to it.

Q. Now, didn't you tell Mr. Keegan that you proposed to run a street through your property and sell building lots, and that then you would turn the crossing over to the public?

20 A. I did tell him that I proposed to build a street up through there and sell building lots, if I could.

Q. And then turn the crossing over to the public?

A. Turn it over, if I could, to the public.

Q. You offered to sell the property to him for \$10,000, didn't you?

A. Before there had been any trouble.

Q. And you offered to settle your claim for \$7,000, didn't you?

A. Yes, sir; before all these costs had been made.

30 Mr. Barrett—I object to all this testimony, with reference to any efforts of compromise or adjustment. Any testimony as to propositions intended to relieve the situation and which might amount to a substantial compliance with the deed I make no objection to, but as to all testimony with regard to pecuniary negotiations for a lump sum, or a waiver of his rights or transfer of the property, I think, has nothing to do with the case, and is immaterial.

Mr. Parker—On the question of good faith, it seems to me that the efforts on the part of the defendant to make a crossing is competent.

Q. When do you say you retained Mr. Barrett in this matter?

A. When did I retain him?

Q. Yes.

A. It was after I saw this Mr. Pindell, and after I found I could not do anything with them.

Q. There were proceedings taken in Chancery to have 10 the railroad company elevate their tracks at Valley road?

Mr. Barrett—Don't answer that question.

Q. Did you know about those proceedings when they were going on?

A. No, I didn't know anything about the Chancery proceedings on that matter.

Q. You never knew anything about it?

A. No, sir; I hadn't any particular knowledge of what was going on between the railroad companies, but I knew there was some talk about the trolley company and the 20 railroad company, but further than that I didn't understand anything about it; I didn't know anything about the fill they were going to put in there.

Q. You knew they were going to elevate the tracks over the Valley road?

A. Well, I didn't know whether it was the trolley or whether it was the Erie Railroad Company that was going to elevate the track; I didn't pay any attention to it, and I didn't see any correspondence about it at that time.

Q. Didn't you know that if the Erie Railroad Com- 30 pany did elevate their track over the Valley road it would necessitate raising the track along your property?

A. Certainly, but I didn't know as it was going to make any difference to me.

Q. When did you know that?

A. When I saw the work going on, but I have no date for it.

Q. When they commenced to do their work there was

the first time you knew of the proposed elevation of the tracks?

A. Well, there had been some talk of it, probably, around the neighborhood that they were going to do something of that kind, but I didn't understand much about it.

Q. Your property is enclosed in on both sides of the railroad, is it not?

A. Yes, sir; there are fences there.

10 Q. How long has that fence been there?

A. Ever since the railroad was built, in 1870, I think.

Q. When the railroad was first built, the railroad ran in the middle of the land which they bought of your father, didn't it?

A. I think so.

Q. And between those tracks and the fence you say there was a slight elevation on the roadbed?

A. You mean on each side of the track?

Q. Yes, each side of the track?

20 A. I didn't say that.

Q. Well, was there a road or bank built up between the lines of your fence and the track?

A. It was made suitable for me to go over the fill.

Q. Well, was there a road built up?

A. Do you mean from my land?

Q. Yes.

A. No, sir; that was all done on their land.

Q. There was no rise then on your land?

A. No rise particularly.

30 Q. How far about was it from the railroad tracks—the rails to the fence on each side?

A. Well, they bought one hundred feet, and the track I suppose is five feet wide.

Q. Then it was about forty or fifty feet on each side?

A. I suppose so; I never measured it.

Q. You spoke about pasturing cows on your land; how much did you get for pasture there?

A. \$15 a season.

Q. Each cow?

A. Yes, sir.

Q. How many did you have?

A. Five or six, including my own.

Q. That is all.

*James E. Owen*, sworn on the part of the complainant.

Direct examination by Mr. Barrett.

Q. You are a civil engineer by profession?

A. Yes, sir; a civil engineer and surveyor.

Q. How long have you been so?

10

A. Thirty-five years.

Q. How long in Essex county?

A. About thirty-two or thirty-three years.

Q. How long have you lived in Montclair?

A. Going on thirty years.

Q. Are you familiar with the land of Mr. Speer's, referred to in this matter?

A. I am; yes, sir.

Q. Did you prepare this map, or was it prepared in your office from surveys made by you?

20

A. It was; yes, sir.

Q. By you in person?

A. By myself; yes, sir.

Q. There is a plot of ground indicated here; what is the whole plot intended to represent?

A. The line defined in strict black lines represents the land of Abram Speer, between the Valley road and Cliff-side avenue.

Q. What is this dotted line—double-dotted line through the center [indicating]?

30

A. That represents the private roadway through the land.

Q. What is the dotted line nearest the embankment of the railroad?

A. That represents the foot of the slope.

Q. It is so marked, is it not?

A. Yes, sir.

Q. What do the solid black lines on either side of the right of way indicate?

A. They represent the limit of the land owned by the railroad company.

Q. A hundred-foot strip?

A. Yes, sir.

Q. Referred to in the deed?

A. Yes, sir.

Q. What is the blue line east of the railroad?

10 A. A small stream.

Q. Is it a running brook or a swale or a drain?

A. There is no continuous flow, but there is a good deal of water there in wet weather; in dry weather it dries up.

Q. What is the blue line across the property west of the railroad?

A. That represents a stream known as Toney's brook.

Q. Is that a true running stream or brook?

A. Always.

Q. Now, I refer to the figures 302 99/100 in red ink,  
20 just west of the line indicated as Toney's brook; what do those figures indicate?

A. They represent the height of this particular spot above mean high water in Newark.

Q. Commonly called tide-water?

A. Yes, sir; they are usually the levels taken from mean high water.

Q. Does that mean three hundred and two and ninety-nine hundredths of a foot?

A. Yes, sir.

30 Q. And the figures on the east side of Toney's brook, 312 and 64/100?

A. Yes, sir; that is the same, but I must correct those first figures; it should be 309 and 99/100; it looks like a 2, but it is a 9.

Q. Do all of the red ink figures indicated on this map, including these on the right of way of the railroad company, indicate the levels above mean high-water mark at Newark?

A. Yes, sir.

Q. What is the elevation of the land east of the railroad on the side toward Valley road at a point where this crossing is indicated?

A. Three hundred and twelve and eighty-one hundredths.

Q. That is the grade of the land where the railroad line adjoins Mr. Speer's land?

A. Yes, sir.

Q. What is the elevation of the center of the track at 10 this point or crossing?

A. Three hundred and twenty-eight and twenty hundredths.

Q. What is the difference between the elevation of the land at grade where Mr. Speer's line intersects or abuts the railroad land, and the elevation over the rail of the tracks as indicated on the map?

A. Fifteen feet and thirty-nine hundredths.

Q. That is all on the east side of the railroad; on the west side of the railroad, what is the elevation where the 20 railroad land abuts on Mr. Speer's land?

A. In the center?

Q. I mean at this crossing?

A. Three hundred and twelve and sixty-four hundredths.

Q. What is the difference between the elevation or grade of Mr. Speer's land and the elevation or grade of the rails, as shown on this map?

A. Fifteen and fifty-six hundredths.

Q. About how far east and west from the railroad 30 tracks does the embankment extend along east and west—along the surface of the ground?

A. As I understand your question, it extends the full length of Mr. Speer's land.

Q. I mean either way, east and west from the base of the slope?

A. The base of the slope, I should say, would be about thirty-five feet.

Q. On each side?

A. Yes, sir.

Q. Of the center line?

A. Of the center line of the track; in the center line of the property.

Q. As a matter of fact how are the tracks laid with respect to the center line?

A. Well, the original single track laid in the center of the right of way, then, when they widened it, they  
10 put the west track west of the center, which throws the whole track over on that side [indicating].

Q. And on account of that elevation, I understand you, that the base of the slope is about thirty-five feet from the center of the embankment?

A. About thirty-six or thirty-seven feet.

Q. When did you make this map?

A. I think it was last spring a year ago; I think in May.

Q. How did you find the location of the private road-  
20 way which you have defined on this map?

A. By measurements.

Q. What was the character of that roadway?

A. Well, it was a defined track or roadway slightly elevated above the sides and rounded in shape.

Q. How much above the grade of the land immediately adjoining it had it been rounded or raised?

A. I hardly think any—the least little bit; the grade height of the roadway was about even with the grade height of the ground.

30 Q. Was this true on both sides of the railroad track, east and west.

A. Not continuously so; towards the west of the track the difference of the roadway was not very marked.

Q. Had you ever seen this roadway before you surveyed it?

A. Yes, sir.

Q. How long had you known there was such a roadway?

A. Well, I had known the territory for thirty years, and I was intimately acquainted with this land for twenty years.

Q. You have been over that land for water purposes, have you not?

A. For water purposes; yes, sir.

Q. Was there a roadway there then?

A. Yes, sir.

Q. And it has been there ever since?

A. Yes, sir.

10

Mr. Barrett—I now suggest that it is not our business to prove what will be a suitable and convenient crossing at this time; that the railroad company has, under its acceptance of a sealed instrument, bound itself to furnish us with a suitable and convenient crossing, and they did furnish it, and under the pressure of public necessity in the operation of their road they destroyed it, and we are asking them to give us now a suitable and convenient crossing. They have not come in and denied their liability to make it or to furnish us with any such crossing. Now, if they come in and concede their liability to make us a crossing they are bound to show what sort of crossing they propose to give us, and to show that any crossing which they create is suitable and convenient for us. Then, I understand, it will be for me to rebut their testimony or to call witnesses to show our objection to their plan, or that their theory of a suitable and convenient crossing is not correct. It seems to me I have a right to reserve all further testimony on that subject until their testimony is in.

30

Mr. Parker—You know what the attitude of the company is now; it is all in their answer. We are ready to give you what we say is a convenient crossing.

Mr. Barrett—Until I know what attitude they propose to adopt, and until they disclose, by their testimony to the court what their theory of their obligation is, under this agreement, I do not think it is any part of our case

to go on and furnish further proof in regard to the crossing.

Q. You have testified that the elevation at the top of the rails of this railroad company's line, above the grade of the land, at the sides of the company's right of way—that it is about fifteen and six-tenths of a foot?

A. Yes, sir.

Q. Or say fifteen seven?

A. It would average fifteen feet six inches.

10 Q. You were the engineer for the town of Montclair at the time the agreement was made for the elevation of the Erie railway tracks over the Valley road and the lowering of the trolley tracks, were you not?

A. Yes, sir; I think I was.

Q. How near is that crossing on the Valley road to these premises of Mr. Speer's?

A. About a thousand feet.

Q. It has been suggested on the cross-examination of Mr. Speer that the railroad at one time offered to construct an approach and a crossing wholly within their right of way, going up one side of their embankment, on an elevation parallel with the track, then crossing the track and going down the other side in a similar manner; would that be a practicable crossing of these tracks for the owner, Mr. Speer, in his present uses of the property and for such future uses as the property may be adopted for?

[Objected to. Admitted subject to objection.]

[Question read.]

30 Q. I will divide the question by asking, first, would that be a proper, suitable and convenient crossing of the railroad for the use of the property as a farm, and for pasturage for Mr. Speer's own cattle and for the pasturage of other cattle?

[Objected to. Objection overruled.]

A. My opinion is that the form of the crossing suggested would hardly be considered suitable or proper.

Q. Now, what is the objection to it?

A. Well, it is rather an extreme suggestion, to my

mind, under any circumstances; it might be used probably for cattle, but would be unsafe to use with a horse and wagon; there would be a turn at right angles at the top of the embankment, the wagon crossing at right angles with the track.

Q. (By the Court.) The question is whether that is a suitable, proper and convenient crossing; do you think it would allow the passage of cattle across the track?

A. Well, I was about to state when I was interrupted that it might be used for cattle, but it would be thoroughly impractical for the use of horses and wagons. 10

Q. (Further direct.) What difficulty would attend the driving of cattle up and over and down such a crossing, or allowing them to go over of their own will?

[Objected to.]

Q. Well, I will strike out the words, "allowing them to go over of their own will?"

A. In the case of cattle, as far as they are concerned, I don't see very much trouble with them, any more than any ordinary crossing of a railroad; they would be outside the limits of the railway until they reached the top of the bank; of course, the danger would be in their crossing, but there would be more danger to a horse and wagon on account of it having to drive up alongside of the bank, then turn to cross over and turn again to go down the bank on the other side; of course, there is the risk of crossing as well. 20

Q. (By the Court.) Well, that risk is always attended wherever there is a railroad crossing, is it not?

A. Well, it would be peculiarly so in this case; the wagon would have to be driven up alongside of the track, with a short turn to cross over, and then again to drive down the other side, so that there would be more danger than in a straight crossing. 30

Q. Then, as I understand you, the objection is that the approach runs parallel with the track instead of approaching it at right angles?

A. That would be objectionable; yes, sir.

Q. Well, now, what other objection do you see in that connection, besides the lack of safety in this kind of crossing?

A. Well, there is a lack of safety, of course; yes, sir.

Q. Well, do I understand you to see any other objection or difficulty?

A. Well, the great trouble to my mind is having the driveway parallel with the track, and the limited amount of room you would have at the top in making your turn  
10 to cross the tracks; that, to my mind, would be a very great objection.

Q. Would there be any difficulty in a wagon going up the one approach and crossing over and going down the other side?

A. No practical difficulty in that.

Q. If it had been properly constructed there would have been no practical difficulty in a proper descent and ascent?

A. No, sir.

20 Q. Aside from it being a crossing over land operated as a railroad?

A. No, sir.

Q. (Further direct.) Suppose Mr. Speer opened up this land for building, and the opening of the private streets on the land where his private road now is, and should dedicate that street through all his land from Valley road to Cliffside avenue to the public, would the proposed crossing wholly within the right of way of the railroad be a suitable and convenient and safe crossing  
30 for such public use of it?

[Objected to on the ground that this easement is only for a private road; it is a private easement and it runs with the land. This crossing was reserved for the benefit of Mr. Speer's property, and when such a crossing is reserved for the benefit of the estate of the owner he contemplates such use of it as he chooses, with reference to the adaptability of the estate, or as occasion shall re-

quire, as well as the condition at the time that the right is reserved.]

The Court—You are asking this question in regard to a changed condition of affairs from a private right of way to a public roadway for the use of the general public.

Mr. Barrett—Mr. Speer has a right of way to open streets on both sides of the railroad, and if he had a suitable and convenient crossing as there was at first, any person to whom he should sell a lot on those streets would have the right to cross the railroad to the other land. I 10 understand that he is entitled to have a suitable and convenient crossing for the use of himself and his grantees for any purpose to which he may want to put his land.

The Court—I will overrule your question as irrelevant.

Recess.

After recess.

*James Owens* resumes the stand.

Further direct examination by Mr. Barrett.

Q. Is there more than one practicable method of con- 20 structing a suitable and convenient and safe crossing at the point where Mr. Speer's private right of way exists over the railroad tracks of the company?

[Objected to on the ground that the question of safety does not enter into the case at all.]

The Court—I think you may ask Mr. Owen what roads at that point could be constructed, as a matter of engineering. You had better put it in that shape.

Mr. Chauncey G. Parker—We have no objection to that. 30

[After argument]—

The Court—Mr. Owen has so far testified that a road crossing constructed in the particular manner you have described would not, in his judgment, be a suitable and

convenient road for a crossing. Now, can't you ask him how this track might be crossed?

Q. In what manner could a suitable and convenient crossing be constructed across the right of way of the railroad company at the place where Speer's private crossing existed?

A. To my mind, there are two ways of handling this question: one is to make an approach by filling over Mr. Speer's land and making a roadway crossing the railroad  
10 on a level; or the other way is to construct a bridge carrying the travel underneath the railroad track.

Q. (By Mr. Chauncey G. Parker.) A bridge or tunnel?

A. Well, technically, we would call it a bridge.

Q. (By Mr. Barrett.) In case a bridge or tunnel were constructed, how wide would it need to be?

Mr. Chauncey G. Parker—Isn't that going to be a little difficult for this witness to tell, when the covenant has not been construed; hitherto nothing but farm, possibly hay  
20 wagons, have passed over it, and that is the only thing that goes through, except cattle or horses?

The Court—Perhaps the better question would be to ask him how wide is a hay wagon.

Q. How wide and how high would this tunnel or bridge have to be to admit of its use for farm purposes, including the transportation of hay?

A. Our general practice, I think, is to allow about fourteen feet as about the limit for a load of hay; in width, fourteen to sixteen feet, and for the height, I think  
30 twelve feet would be sufficient.

Q. From your familiarity with this location, can you give us an estimate of the cost of construction of a bridge or tunnel, sufficient to take a load of hay through, having in view the construction of the railroad as it now is?

A. I am hardly prepared to say that; I haven't figured it out, and I think what I would state would be guess-work; my impression is it would be somewhere about \$5,000 or \$6,000.

Q. Now, if a grade crossing, with suitable approaches, were made, how long would those approaches be on each side of the track or embankment?

A. Well, to give a fairly decent grade, I wouldn't have anything steeper than seven or eight per cent.; that is quite a steep grade, still that is a comfortable mountain road grade, and that would take a distance of about two hundred feet from the edge of the track, east and west, on the land of Mr. Speer.

Q. How much of this two hundred feet—— 10

The Court [interrupting]—What do you mean?

Witness—Why, there is fifteen feet raise when you get eight per cent.; that would be about two hundred feet.

Q. (By the Court.) From where?

A. From the edge of the track.

Mr. Chauncey G. Parker—You don't mean from the edge of the land?

Witness—Or edge of the track, yes.

Q. (By Mr. Barrett.) How much of this approach would then need to be constructed on Speer's land? 20

A. Assuming two hundred feet, and the thirty-five feet off, that would be one hundred and sixty-five on Speer's land.

Q. On each side?

A. Yes.

Q. How wide at the base would this embankment need to be?

A. Well, it would vary.

Q. I mean at the junction of Speer's land with the railroad? 30

A. That would be sixty feet wide, about, at the junction of the railroad, allowing a slope of one and a half inches to the foot.

Q. Is that the usual allowance?

A. That's the usual allowance.

Q. Allowing a sixteen or a fourteen-foot roadway, what would it cost to construct this grade crossing with these approaches?

A. Approximately, \$1,500; it depends on what the material would cost you; but I would say somewhere about \$1,200 or \$1,500.

Q. State in what respect, in your opinion, the grade or tunnel crossing would be superior—I mean a tunnel crossing—would be superior to a grade crossing, in case the tunnel crossing is superior.

A. In the first place, it means a grade crossing of the track, which is desirable; secondly, it obviates filling on  
 10 Speer's land to the height of the new grade, and, incidentally, obviates filling the land alongside of it, in case Speer wanted to have pure farming land; in case it is used for farming land, it doesn't take any more land than their mere width of right of way, but of course slopes are necessary and that would take away land available for use.

Q. What is your judgment about the safety of a crossing of this sort, with approaches having eight feet elevations to the hundred, for the transportation of hay or for farm produce?

20 [Objected to as immaterial.]

The Court—That question, I think, can be answered by the court as well as by the witness. It is hardly a question calling for technical knowledge.

Q. What effect do you think would result to the value of Mr. Speer's land if an elevated approach were built on both sides, of the sort you have mentioned?

[Objected to as irrelevant.]

The Court—Well, isn't that competent. Is that a  
 30 suitable road crossing which deteriorates the value of Mr. Speer's land?

Mr. Chauncey G. Parker—If the action was for damages, and if that was the desire of the complainant, it seems to me it might be material for the court to consider the value of the loss of this land for a farm. Suppose this were a condemnation proceeding, and there were two schemes proposed, one a scheme by which the railroad should run through at grade, and the other a scheme according to which it would run on this embankment, in

awarding damages wouldn't the compensation be different in the one case than in the other, if the condemnation proceedings took in such circumstances as these; but in the present case there would not be any such alternative presented, because, under condemnation, we would have to take the entire land.

[After argument]—

The Court—In this case the deed is an absolute deed; it is a deed conveying the fee, and of course Mr. Speer can never have damages of any sort, however high this 10  
embankment may be carried. But he will always be entitled in this matter, I suppose, to have a passage from one side of his farm to the other. That is the situation then. Now suppose that the farm should be more valuable by reason of being connected with a tunnel than if it were connected by a crossing such as the railroad company proposes, assuming that there was a difference—I don't know whether there is or not, but assuming that there was a difference, wouldn't that difference be a proper subject of consideration in determining what was 20  
a suitable crossing? Suppose that in the one case the value of the land would be, I will say \$5,000, and in the other case only \$4,000, in determining the question of a suitable crossing, would not that be a proper matter to be taken into consideration?

Mr. Chauncey G. Parker—Suppose the court, after all said, should have to fix what was a proper crossing, and should hold that it was impossible to have such a crossing and that the plaintiff must take a certain sum in satisfaction, and then suppose the court should have 30  
experts to testify as to what that amount should be, I do not think the question of a tunnel would enter into the mind of the court at all, because the construction of the deed would exclude the idea of a tunnel. The deed uses the language "go across the track." Now if you went under, how would that be a compliance with the deed?

Mr. Barrett—The deed reads "tract."

Mr. Parker—I beg your pardon; it is "track."

Mr. Barrett—Section 9 of chapter 160, page 306 of the laws of 1867 provides as follows: “That it shall be the duty of the said company to construct and keep in repair good and sufficient bridges over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses and cattle across the said railway shall not be impeded thereby, and if the company neglect to perform the same, after giving  
— days’ notice to the company, by the person or the  
10 public officers having charge of the repairs or maintenance of said road so to do, such person or public officer may do the work or cause it to be done, and recover the value thereof from the company by common process of law.”

The Court—Is that the charter of this company?

Mr. Barrett—Yes, sir; of the company of which the Erie Railroad Company is the successor.

The Court—I don’t think it is worth while to argue this question any more now. It is a matter of debate, at  
20 least, as to what the word “suitable” includes. If one may take into consideration the effect upon the value of the separate pieces in order to find out what is a suitable crossing, then this evidence is proper. If that has nothing to do with the question, then the evidence should be excluded. But it is quite manifest, to my mind, that a good deal can be said on both sides of that question. So the court ought to have before him the evidence, and the Court of Errors and Appeals, should this case reach there, should have before it the evidence which would enable it  
30 to decide the case intelligently, if it should take the view that the word “suitable” does justify the court in considering the question of the effect of the crossing upon the value of the land. So I will admit this evidence, subject, of course, to counsel’s objection. If, when the court comes to consider the case, the court thinks that this evidence is irrelevant, it will be excluded. On the other hand, if the court thinks that it bears upon the question of suitability, then the evidence will be before the court

on which to form its opinion. The invariable practice of the court is to admit evidence of this character, so that both this court and the Court of Errors may have the entire case before them.

Mr. Cortlandt Parker, Sr.—You admit it tentatively?

The Court—Tentatively; yes, sir.

[Question repeated.]

The Court—That question, strictly speaking, is not proper, because it has not been shown that the witness is qualified to give an estimate of value. We all know, it is true, who Mr. Owen is, and if there is no objection to the question on that ground I will not exclude it on that ground. But if you object to the question generally, I suppose that is a ground of objection.

[Question read by the stenographer. Objected to.]

The Court—I exclude it, then, on the ground that Mr. Owen has not yet been shown to be competent to speak on the subject.

Mr. Parker, Jr.—We waive that ground.

The Court—Then I will admit the question. 20

A. The damage to the property would consist in the cost of making the part of the tract of land adjacent to the raised roadway in the same condition to the roadway as it originally was. That is what I understand it. The cost in dollars and cents would be hard to answer, but it would be the cost of making the land adjacent to the roadway—putting it in the same condition in reference to the roadway as it originally was.

The Court—I don't quite understand what you mean.

Witness—Raising the roadway throws the land lower 30 than the roadway. To make the property in the same relative position to the roadway as it was before, it would be necessary to fill the property to the level of the roadway.

The Court—That is not the question. As I understand it, the question is whether the land on both sides of the track would be more valuable if a tunnel were built than it would be if approaches were built.

Mr. Barrett—That is the question ; yes, sir.

Mr. Parker, Jr.—The character of the use of the tunnel is not described.

Mr. Barrett—As described by the witness, the tunnel would be fourteen by twelve feet. That is the question as the court has put it.

Q. (By Mr. Barrett.) What would be the relative effect on the value of the land if approaches were built instead of a tunnel crossing ?

10 A. Well, I can answer it in this way, if the judge will allow me, that the only difference between the two plans would be that with a tunnel the whole of Speer's land would be in accord with the roadway running through it, while with approaches it would not be, and it would be necessary to fill it also, to make it in accord.

Q. Have you any estimate of the cost ?

A. No, I have not gone into that.

The Court—I would not admit that any way. The cost of filling would certainly be a very improper comparison of value.

20 Q. What would you give as the actual money depreciation to Speer's land, on both sides of this railroad, in having an overhead instead of a tunnel crossing, having regard to the entire value of the tract ?

The Court—For use as to its present purposes.

A. I wouldn't like to answer that, because it isn't in my province.

The Court—Yes. You don't know ?

Witness—No, sir.

30 Mr. Barrett—Does the court decline to allow me to ask questions in regard to the relative danger of tunnel and overhead crossings ?

Mr. Chauncey G. Parker—That is apparent.

[After argument.]

The Court—I will allow you to ask the question.

Q. What elements of danger are involved in crossing the railroad at grade by approaches, that would be eliminated by crossing the railroad by means of a tunnel.

[Objected to.]

The Court—As I said before, it seems to me that the question can be answered, probably, as well by the court, or by anybody else, as by Mr. Owen. But still I will admit the question. I confess that I am not sure that it is a proper question for the witness to answer.

Mr. Barrett—I will withdraw the question, as counsel have admitted that a tunnel, from another point of view, is the better crossing.

The Court—I do not see how there can be any doubt of it. Everybody knows that there is greater danger crossing a track at grade than there is crossing it above grade or under grade. 10

Cross-examination by Mr. C. Parker, Jr.

Q. I understand you to say, Mr. Owen, that you noticed a wagon track across this land and put it down on your map?

A. Yes, sir.

Q. It was nothing more than an ordinary wagon track, such as farmers have that go about their land?

A. No, it is a little more definite than that. 20

Q. You thought so?

A. Yes.

Q. Where did you see it most clearly defined?

A. It is pretty well defined to the railroad track from Valley road—from the railroad track to where the bridge was across Tony's brook, and then for about three or four hundred feet up to an old fence line, and then, beyond the old fence line, about three or four hundred feet to the brook it is more or less defined.

Q. Your map shows a street as running up to Cliffside 30 avenue?

A. Yes, sir.

Q. So, as a matter of fact, Cliffside avenue has been laid out since this land has been taken by the railroad, hasn't it?

A. Yes, sir.

Q. How many years ago?

A. Twenty years or more; Cliffside avenue was opened, I should judge, somewhere about twenty years ago; it might be sixteen; something like that.

Q. Cliffside avenue runs alongside of a hill, doesn't it?

A. Yes.

Q. And the dirt was taken from one side and thrown on the other side to make the road?

A. Yes, sir.

Q. (By the Court.) How far from the crest of the  
10 mountain?

A. It must be two thousand, twenty-five hundred feet.

Q. Pretty well down the mountain?

A. Yes, east of Mountain avenue.

Q. (By Mr. Parker.) As a matter of fact, that road could not run up to Cliffside avenue?

A. Oh, yes.

Q. Isn't it very steep there; you say you couldn't get up?

A. Oh, no.

20 Q. Don't you remember quite a steep embankment up to Cliffside avenue?

A. Yes, quite steep, but quite possible to travel.

Q. What is the grade leading to Cliffside avenue?

A. I don't remember, particularly, but I should say not more than ten or twelve per cent.; I don't think there is any bar to travel there.

Q. If it could be made ten per cent. there, why not ten per cent. leading to the railroad track?

A. It might be made that.

30 Q. If it were made that way it would only require one hundred and fifty feet?

A. Yes.

Q. As a matter of fact, doesn't Speer's land, as it approaches Valley road from the railroad, rise toward Valley road?

A. Yes, sir.

Q. So that the embankment on the east side of the rail-

road would not have to be as long in order to reach the grade of the land.

The Court—I don't know whether I understand.

A. This ground is higher here [indicating on the map]; the ground at Valley road is higher than it is at the railroad, and also higher at Valley road than at the brook, which is east of the railroad.

Q. What is the grade between the brook and Valley road?

A. It rises twelve feet in about two hundred and fifty. 10

Q. Now, what is the grade between the brook and the railroad to the west side of the railroad?

A. Practically level there; almost exactly level between the edge of the brook and the railroad.

Q. Then what is the grade, going west from the brook, up to this old fence that you have described?

A. I didn't take those levels.

Q. Can you recall, about?

A. I should judge it rises—it begins to rise three or four or five feet in the hundred, and then increases to seven, and as you get to Cliffside avenue it might be a little more or less. It begins to rise from the fence described and continues up to Cliffside avenue. 20

Q. How wide was this wagonway that you speak of?

A. It is about, I think, according to my map, ten feet or eight feet; it is about eight feet, I think—eight or nine feet.

Q. If that was high enough, why should you have a fourteen-foot road to get up to this?

A. You couldn't drive up an eight-foot filling twenty 30 feet high; a little dangerous.

Q. How so; couldn't you have it fenced in?

A. Yes, but you would have to fence it wider than eight feet.

Q. How much would you have to fence?

A. Ten at least to allow room for one wagon; then, if you had a wagon load of hay, you might be bothered with it.

Q. But practically it can be used ten feet, fenced in?

A. I don't know of any roads ever fenced in ten feet; they are constructed ten feet wide, but there is a margin on each side.

Q. And doesn't that allow for a post and a bar?

A. Yes, but I should say twelve feet would be better than that; I don't think it would be wise to say ten feet.

Q. You don't think fourteen feet would be necessary?

A. Oh, no; twelve feet.

10 Q. How wide is a hay wagon?

A. Well, I don't know exactly.

Q. How far apart are the wheels?

A. Well, that I couldn't tell you; the only knowledge I have of the capacity of hay wagons, is as bearing on the question on the width of roads and bridges; the data has escaped my mind; Mr. Speer, or any farmer, would tell you about that; you know a load of hay on a hay wagon extends each side of the hubs.

20 Q. You would have to make all that allowance for a tunnel of course?

A. Yes.

Q. Where the lines are straight up and down at the side?

A. Yes.

Q. But you would not have to make that allowance for the road because the hay could hang out on each side?

A. Certainly.

Q. (By Mr. Chauncey Parker.) Is a hay wagon five feet wide between the wheels?

30 A. I think over, yes; I think a good many are broader than that, but that I would not be certain of; I am not prepared with figures on that.

Q. How far on Speer's land would you have to go?

A. Ten per cent. would be one hundred and twenty feet.

Q. How wide is it from Speers's line of Valley road to the east side of the railroad, measured along that alleged wagonway?

A. It is about three hundred and thirty feet.

Q. So that there would be room for—this thing wouldn't come within two hundred feet, about two hundred feet of Valley road?

A. Yes, sir.

Q. How far would it extend on Speer's land on the west side of Valley road?

A. Well, the same distance.

Q. Suppose the approach was not constructed at right angles to the railroad, but came up diagonally and had 10 a gentle curve at the top, crossing the railroad track?

A. Well, that's feasible.

Q. That would hardly—

A. [Interrupting.] It doesn't run—the present driveway (I don't know if we understand each other) and the railroad now are pretty near on an angle of forty-five degrees.

Q. Well, what I mean to say is this: suppose it came up still more on an angle and then crossed, with a curve?

A. No particular objection to a slight angle there— 20 nothing particular; I don't understand that makes much difference any way; the frontage of land on Valley road, I think, would be clear of the fill under any circumstances—that is, for an ordinary-sized lot.

Q. Now, apart from the difficulty of changing your course when you get up to the top of the embankment, there isn't any practical engineering difficulty about building approaches to go up alongside of and parallel with the railroad, and then cross and go down, is there?

A. No, except that it would be a good deal more costly 30 than a straight drive and a good deal more trouble to take care of, because of your banks all the time washing down; I don't think that plan is feasible, looking at it in the view of the railroad company.

Q. Do you think it would be an unnecessary burden on the part of the railroad company?

A. Yes, I think it would bother them a great deal.

Q. Well, excluding the idea of the burden on the rail-

road company, and the cost and expense they may be put to, is there any practical difficulty about constructing a crossing in that way?

A. No practical difficulty.

Q. The railroad is straight on each side of Speer's land for a considerable distance, isn't it?

A. Yes.

Q. The land around there is open farm land, without any buildings to obstruct the sight of persons approaching  
10 the railroad, isn't it?

A. Nothing in the way, as far as that's concerned.

Q. Persons coming up there, about to cross the railroad, could have a view in both directions for a long distance?

A. Yes; probably he would be coming with his back to one line of travel coming up to the track.

Q. But the thing could be so arranged that as he came up to the track he can have his face towards where the trains came from?

20 A. No, I don't think so.

Q. The westbound track?

A. Then you would have to fill up pretty wide on top.

Q. Still, you could do that, couldn't you?

A. Oh, you could do it, yes.

Q. (By the Court.) Are there any curves there?

A. Oh, no, sir; there is a straightaway track for a third of a mile one way and a half of a mile the other.

Q. Then it curves?

A. It curves coming up from Washington avenue, and  
30 then it is straight from Valley road to a point—straight to within about a thousand feet of Belleville avenue.

Q. (By Mr. Parker.) So, if there were a space sufficient at the top for one of these parallel roads approaching the crossing for a wagon to turn, there isn't any practical difficulty about persons getting across that track safely?

A. You asked me if there was any practical difficulty of constructing it, and I say there is none; I think that

a structure like that would not be proper under any circumstances.

Q. You don't like it then?

A. Personally, I don't like it; I don't think it is proper.

The Court—Isn't the question this: Suppose there was another train in view at the time that a man with a hay wagon was on the bottom of the approach; now, he goes with his back toward one of the trains; then when he gets up to the top he has a view both ways. Now, could 10  
a train come along in the meantime with so much speed that when he got to the top he found himself in such a position that he couldn't get over the track before the train reached the crossing? I suppose the thing to consider in reference to an approach constructed in that manner——

Mr. Parker, Jr. [interrupting.]—I think the witness has testified that an approach might be constructed so that the road might go up facing towards the westbound track, coming from the south, going to the north, where it meets 20  
the westbound track; then when he is there, before he enters the westbound track he can see the other track. But, of course, that is a matter of opinion.

The Court—I suppose that no approach would be safe or no crossing would be safe which would not be of such a character as to allow a wagon to get completely over the crossing before a train which was out of view, and was at the bottom of the crossing, came up to the crossing. That would be improper, wouldn't it? You see, a hay wagon is a pretty heavy thing. The testimony is that this 30  
is a pasture field and that wagons do go into that field occasionally. I suppose it is within the contemplation of the parties that hay wagons and wagons loaded with oats, straw, Indian corn, &c., that that sort of wagons would cross the track very heavily loaded, and it seems to me that an approach, in order to be safe, must be of such a character as to enable a man to cross the track before any

train, out of view at the time he commenced to cross, came near the crossing.

Q. (By Mr. Barrett.) Just one question. If these two approaches, one on each side of the railroad track, were concealed from each other, as they would be until one approached the summit, would it not be necessary to have the crossing wide enough for two vehicles to pass each other in order to make it suitable and proper?

A. Yes, it seems to me so.

10 Q. It would be impracticable to either back down or turn around on a narrow approach?

A. Yes, sir.

[Objected to on the ground that there isn't any evidence that there ever was a crossing of such a character.]

The Court—I don't think that need to be taken into consideration, because I do not think the passage of wagons is so frequent as not to allow them to pass each other, but I think there is difficulty of the character I have mentioned, to a man sitting on a hay wagon.

20 *Catherine M. Speer*, sworn on behalf of complainant. Direct examination by Mr. Barrett.

Q. You are the wife of Abram Speer, the complainant?

A. Yes, sir.

Q. And you have lived in the homestead of Mr. Speer's father, and his own home, for how many years?

A. Nearly forty years.

Q. And you live there now with Mr. Speer?

A. Yes, sir.

30 Q. Are you familiar with the property that has been described in Mr. Speer's testimony and which is shown on this map [indicating]—the tract of land lying between Valley road and Cliffside avenue?

A. Yes, sir.

Q. [Indicating.] This map shows, by dotted lines, the location of a private farm road across the property?

A. Yes, sir.

Q. Do you know where that road is?

A. I do.

Q. How long has it been there?

A. Well, it's always been there.

Q. When you say always, you mean as long as you have known the property?

A. Yes, sir.

Q. And was it in use during the period from 1870 up to the time the railroad embankment was raised?

A. It was.

Q. For what purpose?

10

A. For farming and for cattle.

Q. The roadway I am speaking of.

A. The roadway; we have always used it.

Q. And for what purpose?

A. Well, we had to use it to go up and down to go to Cliffside.

Q. And was it used for hauling farm produce?

A. Yes, sir.

Cross-examination by Mr. Parker, Jr.

Q. You have lived in this house on the other side of 20 Valley road?

A. This side; yes, sir.

Q. You were not concerned much with the property on the other side, were you?

A. Yes.

Q. How so?

A. Why, we used it always.

Q. Used it always?

A. Yes.

Q. You mean to say the cows were driven over it?

30

A. Yes.

Q. And the wagon went up there when; when did you send the wagons up?

A. They went over it, when we farmed it, two or three times a day.

Q. That is, when you were getting in the crops?

A. Yes, sir.

Q. And when planting the crops?

A. Yes, sir.

Q. What kind of wagons did you send up there?

A. Hay wagons.

Q. When you got in your hay, you sent hay wagons there?

A. Yes.

Q. What kind of crops did you get in?

A. We farmed oats, corn and potatoes.

10 Q. And the farming land was up toward Cliffside avenue?

A. Yes, sir.

Q. (By Mr. Barrett.) Did you ever see any planks between the rails on the crossing over the track at that point?

A. Yes, sir.

Q. Do you remember for how long a time that plank-ing continued there?

A. I don't.

20 Q. You don't remember when they were removed?

A. No, sir.

Q. (By Mr. Chauncey G. Parker.) When was the last time you saw the planks?

A. It might have been six or seven years ago.

Q. It might have been longer, might it not?

A. I don't think so; I have went over it.

Q. Is that the last time you went over it?

A. I haven't went over it since the embankment is there; it isn't very nice to look at, either.

30 *Lewis Cockefair*, sworn in behalf of complainant.

Direct examination by Mr. Barrett.

Q. Do you live in Bloomfield?

A. Yes, sir.

Q. Have you lived there all your life?

A. Yes, sir.

Q. How old are you?

A. I was born in 1826.

Q. And was John A. Speer an uncle of yours?

A. Yes, sir.

Q. Were you in the habit of visiting him at these premises on Valley road in his lifetime?

A. Yes, sir.

Q. How long ago did you commence to visit him there?

A. Oh, well, since I can remember.

Q. And have you continued that habit since his death, with his son, Abram Speer?

A. Yes, sir; but not so often, possibly, as when a boy; 10 I can't tell you how often; possibly once a month sometimes; sometimes possibly once in two months.

Q. [Indicating.] I show you the map made by Mr. Owen, where the dotted lines indicate a farm road——

[The character of the examination is objected to as not proper.]

The Court—Let the witness state his recollection.

Q. Did you ever observe a farm crossing or anything indicating a farm crossing running east and west across this tract of Mr. Speer's? 20

A. Yes, sir.

Q. How long ago did you observe that farm crossing?

A. As long as I can remember; I suppose sixty-five years ago.

Q. And how clearly was it defined on the surface of the ground?

A. Well, it was like many such roads; it was a wagon road.

Q. Had any work been done, and if so, what, in the nature of constructing it or making it suitable to drive 30 over?

A. My recollection of that road is that it was graded a little at some time; I don't know when, and I don't know that they continued to keep it in order; but it was a road anybody could see.

Q. Have you ever traversed it yourself?

A. A good many times.

Q. Have you been over it since the railroad was constructed in 1870?

A. Yes, sir.

Q. How recently?

A. I haven't been t'other side of the railroad since the embankment was put there, and I can't tell you; maybe four or five years ago me and Speer worked there together; that's the last time I remember.

Q. It was there then?

10 A. It was there then; yes, sir.

Cross-examination waived.

*Augustus T. Van Gieson*, sworn in behalf of complainant.

Direct examination by Mr. Barrett.

Q. Where do you live?

A. Upper Montclair.

Q. How near to Mr. Abram Speer's house?

A. Oh, four or five hundred yards.

Q. North or south of his place?

20 A. South.

Q. South of it?

A. Yes.

Q. How long have you lived there?

A. Sixty years at that place.

Q. How old are you?

A. I was eighty last September.

Q. You knew John A. Speer in his lifetime?

A. Yes, sir.

30 Q. And you have known his son, Abram Speer, all his life?

A. Yes.

Q. Have you ever traversed or been upon this tract of land that was formerly John A. Speer's and is now owned by Abram Speer, which extends westerly from Valley road to Cliffside avenue?

A. Yes, sir.

Q. Did you ever observe a private or farm roadway extending from Cliffside avenue on that land?

A. Yes, about in the center of the land.

Q. How long ago do you suppose you first remember having seen that?

A. Well, sixty-five years ago or over, when I was a boy.

Q. Have you been on that land recently?

A. Yes, sir.

Q. How recently?

10

A. About six weeks ago.

Q. Was the roadway then perceptible?

A. Oh, yes.

Q. What construction or work, if any, has been done that marks that as a road or indicates that there is a road there instead of a meadow?

A. Well, I don't know of anything, only part of the way it is turned up at the sides.

Q. Did you ever see that roadway used by Mr. Speer—John A. or his son?

20

A. Yes, sir.

Q. For what purpose?

A. Well, farming purpose, I suppose you would call it.

Q. How often did you see them use it for farming purposes?

A. When Mr. Speer was living I used to see him three or four times a week; my father owned land right close by it, and I used to go backwards and forwards.

Q. And since the death of John A.—

A. [Interrupting.] Yes.

30

Q. —who has used it?

Witness—What?

Mr. Barrett—Who has used it since the death of John A. Speer?

A. Abram.

Q. Abram?

A. Yes.

Q. For the same purposes that his father used it?

A. Yes.

Q. Do you remember whether you ever saw any plank-  
ing between the rails where this private road crosses the  
track of the Greenwood Lake railroad?

A. No, sir.

Q. You don't remember observing any?

A. I don't remember; I have crossed it, though, a  
number of times; but I don't remember about the plank-  
ing.

10 Cross-examination waived.

[Mr. Barrett, in behalf of plaintiff, offers in evidence  
the map to which reference has been made in the taking  
of the testimony, entitled "Land of Abram Speer, at  
Montclair, N. J. James Owen, civil engineer, 800 Broad  
street, Newark, N. J.," and the same is marked "*Exhibit*  
*5* for complainant."]

Complainants rest.

*Charles H. Moore*, sworn in behalf of defendant.

Direct examination by Mr. Parker, Jr.

20 Q. What is your business?

A. Civil engineer.

Q. How long have you been such?

A. About sixteen years.

Q. With what railroad are you connected?

A. The Erie.

Q. Have you had to do with the building of railroad  
bridges and estimating on the cost of them; is that part  
of your business?

A. Yes, sir.

30 Q. Did you make any estimate for a tunnel crossing at  
Speer's land in Montclair?

A. I have; yes, sir.

Q. When did you make it?

A. I made one this morning and another one a year or  
so ago, I believe it was.

Q. Will you tell us the cost of a proper and suitable tunnel crossing at that point?

A. About five thousand and some odd dollars.

Q. How wide would that crossing be?

A. Twelve feet.

Q. And how high?

A. A clear twelve feet.

Q. And to build approaches to a level crossing, and to build a crossing, starting from Speer's land, running up to the top and so down again, how much would that cost? 10

A. For a ten per cent. grade, about \$600.

Q. That is, for filling in and planking at the top?

A. For filling in and planking.

Q. Is a ten per cent. grade practicable?

A. Yes, sir; it is used.

Q. Assuming that you would make a crossing which you could approach on approaches entirely on the railroad track, and parallel to the railroad track, reaching a summit and so on down in like manner by a roadway constructed parallel with the track, how much would that cost; can you tell us? 20

A. Approximately \$700.

Q. Would that be a practicable crossing?

A. I would consider it so; yes, sir.

Q. (By the Court.) What is your answer?

A. I would so consider it.

Q. Your other crossing contemplated the use of Speer's land, I suppose?

A. Yes, sir; it did.

Q. (By Mr. Parker, Jr.) Did you have charge of the elevation of this track? 30

A. Yes, sir.

Q. When did it take place?

A. It commenced about the first part of April, in 1900, and—well, yes—I don't remember when the grading was finished; we finished everything in connection with Valley road in January, 1901.

Q. Why was this track elevated?

A. To have the crossing at grade with the North Jersey Trolley Company's tracks.

Q. Where—at Valley road?

A. Yes, sir.

Q. What was the total cost of that elevation?

[Objected to as not material.]

The Court—I don't think it is material. It seems to me that the cost of the construction is irrelevant; I cannot imagine from what point of view it could be  
10 relevant. If the railroad company was going to deprive Mr. Speer of a crossing to which he had a right, was it his business to approach the railroad company or was it their business to approach him? As I understand the evidence, it was not only shown by the deed, but it was shown on the ground that he had the right.

Mr. Chauncey G. Parker—We have other testimony on that point, as to the character of the way here.

The Court—I must take the evidence as it stands.

Mr. Parker, Jr.—We expect to show that there was  
20 never any planking, but that there were a couple of fences on either side of the track, and that the bars were taken down when Speer wanted to take his cattle across, and that there wasn't anything to indicate a crossing. I understand that to be the testimony.

The Court—I think that the cost of construction is irrelevant.

Q. Did you go over this land at all, Mr. Moore?

A. I went there and examined the tracks.

Q. When?

30 A. The first time in '97; at the time the second track was constructed there, I went there, at one time, for the purpose of examining all crossings, underneath or overhead, for the purpose of making estimates.

Q. When was that?

A. In January, '97, was the first time, and the next year I was up and down there continually.

Q. Was there any evidence of a crossing at this point?

Witness—Across the tracks?

Mr. Parker—Yes.

A. No, sir.

Q. Any planking between—anything of that sort?

A. No, sir.

Q. When did you examine them again?

A. I was there probably three or four times a week during the elevation of the tracks.

Q. Did you see any road across Mr. Speer's land?

A. I paid no attention to that, not finding any evidences on the track of a crossing. 10

Cross-examination by Mr. Barrett.

Q. If you didn't know there was any road crossing there you were not looking for evidence of it on the tracks?

A. I was; yes, sir.

Q. Did you just go along the main line to see what evidence there was of crossings on the tracks?

A. Yes, sir.

Q. Entirely without regard as to whether the land on either side indicated the existence of such crossings? 20

A. I presumed as there was no evidence between the rails of a crossing that there was no crossing there.

Q. When did you first do this?

A. In January, '97.

Q. And that was at the time of the construction of the double track?

A. Yes, sir.

Q. Speer himself has testified that those tracks were all removed just before the double tracks were laid, hasn't he? 30

A. I don't know.

Q. That double track was on the same grade as the single track had been?

A. A very slight difference.

Redirect examination by Mr. Parker, Jr.

Q. The double track was laid in '97.

A. Yes, sir.

Q. Did you go there before or after the double tracking?

A. Before; in order to make estimates of the material that would be required for crossings.

Q. (By the Court.) There was some evidence of there being an approach to this track, the evidence being that the approach was two feet higher than the actual level of the land, and that there was an approach to the single  
10 track anyway; was there any evidence on the ground of such an approach when you saw it?

A. There was on the east side, but there were no indications, that I could make out, that it was in use at all.

*Richard T. Dana*, sworn in behalf of defendant.

Direct examination by Mr. Parker, Jr.

Q. What is your business?

A. Civil engineer.

Q. Are you in the employ of the Erie Railroad Company?

20 A. Yes, sir.

Q. At my request did you make a map of the Speer tract at Montclair, and the surrounding ground?

A. I did.

Q. [Indicating.] Is this the map you made?

A. It is.

Q. When did you make it?

A. In December, last year—last December.

Q. What is the scale of that map?

A. Fifty feet to an inch.

30 Q. Will you just describe it, please?

A. This map shows the main tracks of the Greenwood Lake Division for a distance of about fifteen hundred feet, including all the property indicated here as being owned, between Valley road and Cliffside avenue, by Mr. Speer; the tracks run north and south approximately, as indicated by "Northbound" in the lower right-hand corner of the map, underneath the title; about four hun-

dred feet from the right of way of the track, on the west side, is a small brook running in a southwesterly direction, which, in fact, drains a portion of this land—the portion from the railroad track half-way down to Valley road; on the east side, included within the boundaries of the Speer property, the land is somewhat marshy, and is drained in wet weather by a very small brook running under the track in a culvert, east, between there and the Valley road crossing, and goes down across Brookfield avenue; the marsh land extends for a distance of about 10 seven hundred feet from the track in the direction of Cliffside avenue, and at that point, where there is a wire fence [indicating] the land rises somewhat, and then rises somewhat abruptly to Cliffside avenue; that portion is dry, pasturage land, I should say; between Valley road and the railroad the Speer land is about in the upper central portion, not shown on the map.

Q. What is the character of this land on one side of the track, marked “marshy ground;” will you describe it?

A. It is essentially level from the railroad track to about seven hundred feet west thereof; it is not very wet, but it is soft ground and marshy, and it is covered with tufts of swamp grass, I should say, these tufts being varying distances apart; in very dry weather, and of course when frozen, it is not wet; in very dry weather it isn't wet, but in moist weather it is moist and boggy.

Q. Did you examine the ground for any evidence of a road crossing there at all?

A. Yes.

Q. What did you find?

A. I saw on the east side—this road is not shown on the map; I saw on the east side of the tracks, near the fence—the fence is about the center of the property—evidence that there had been a traveled way; it was not very pronounced; on the west side of the tracks I didn't see anything at all. [Witness indicates on the map.]

Q. You looked for them, did you?

A. I looked for evidences.

Q. When were you there, do you say?

A. I was there about two months—I was there in last December and also about three weeks ago.

Q. You have a private street marked there?

A. Yes, sir.

Q. What is that?

A. Well, that is—in making the survey I noticed a street here [indicating], and that is it; it had recently been opened; this house had just been built—was in the  
10 course of being finished while I was there.

Q. Otherwise did it look like a street; just describe it?

A. It looked like any kind of a street that had just been opened; as I remember, it was curbed.

Q. That was called Brookfield avenue; is that a street that was opened there then?

A. That is a street.

Q. (By the Court.) Curbed, do you mean?

A. Curbed; it was in the process of being paved at this point [indicating].

20 Q. (By Mr. Parker, Jr.) How far is Brookfield avenue from Speer's land?

A. About in the center of the Speer property; from the inner edge of Brookfield avenue to the edge of the property is a distance of two hundred and seventy-five feet.

Q. Two hundred and seventy-five feet?

A. Two hundred and seventy-five feet.

Q. (By Mr. Parker, Sr.) This yellow line [indicating on the map]—

30 A. [Interrupting.] The Speer property is enclosed by a yellow line; no house on it whatever.

Q. [Indicating.] Is this where he lives?

A. Yes, sir.

Q. (By Mr. Parker, Jr.) How far is it from the west side of the Greenwood Lake property to Valley road, measured parallel with Speer's line?

A. Four hundred and fifty feet.

Q. How far is it from Speer's line to Valley road,

measured along the railroad track, along the west side of the railroad track?

A. Well, Brookfield avenue is the first straight line it strikes; that distance is four hundred and twenty feet.

Q. Four hundred and twenty feet?

A. Four hundred and twenty feet.

Q. How far is it from the south line of Speer's property to the crossing of Valley road by the Greenwood Lake railroad?

Witness—Along Valley road?

10

Mr. Parker, Jr.—Along Valley road, yes.

A. That's about three hundred and seventy-five feet; it is about three hundred and eighty-five feet; I will correct that.

Q. On the other side of the track, how far is it from Speer's property to Valley road, measured along the railroad?

A. Three hundred and thirty feet.

Q. I see something here [indicating] marked "Spring," at the head of a little brook; what is that?

20

A. This survey was made when the ground was—when it had rained, rather, a short time previously, and I am not sure that that is a living spring; it is rather more a wet place than anything else; but I have very little doubt that that is a living spring; I am not certain about it.

Q. Did you make an elevation of the track at that point?

Witness—Section?

Mr. Parker, Jr.—Yes, I don't know what your technical name for it is; whatever you call it.

30

A. Yes, sir.

Q. What does that little map show?

A. That is a little section of the elevation of the track at the point where a crossing is desired by Mr. Speer.

Q. How much elevation is there from the ground to the rails?

A. Fifteen feet.

Q. (By Mr. Barrett.) That fifteen feet is from the base of the rail instead of from the top?

A. Yes, sir.

Q. (By Mr. Parker, Jr.) Are you familiar with the construction of highways and roads?

A. Yes, sir.

Q. Is there anything impractical in building an approach to a crossing at Speer's, over the railroad at that point, on a ten per cent. grade, going with the approaches  
10 parallel with Speer's north and south lines?

A. There is not, sir; there are hundreds of cases of that.

Q. I mean substantially at right angles to the track?

A. No, sir; that is perfectly practicable.

Q. How wide would such a road be at the top?

A. Ten or twelve feet.

Q. And how wide at the bottom?

Witness—I don't understand.

Mr. Parker—How much of a fill would be required?

20 A. It depends on how high up it was at the track itself; with a fifteen-foot embankment the bottom of the slope would be, with a ten-foot road, fifty-five feet wide—between fifty and fifty-five feet wide.

Q. That would be on the railroad right of way fifty-five feet?

A. Yes.

Q. Will you tell us how much of Speer's land it would occupy?

30 A. I can make a little sketch of that; as you start up, the bottom of the embankment at this point [indicating] would be just the width of the road itself; as you approach the railroad track it would increase to fifty-five feet; half-way up it would be an average between ten feet and fifty-five, or thirty-two and a half feet.

Q. Is there anything impracticable about making an approach to a level crossing about the middle of Speer's land, then by approaches constructed entirely on the railroad's right of way and running parallel with the

railroad to the crossing, to the top, then across and so on down on the other side?

A. It would be entirely practicable—perfectly practicable—if you had enough width to start the road at the bottom; it might not be possible exactly at the top of the slope without infringing a little on their right of way; it is practically eighty feet at the bottom there, which would give you only ten feet from the roadway to start from; but the practical problem is simple; it has been done hundreds of times. 10

Q. Do you know of such crossings as that?

A. Yes.

Q. Have they been used?

A. Oh, yes.

Q. With what kind of wagons?

A. I don't remember of actually having seen loads of hay going across them, or special wagons, but they are undoubtedly used by ordinary farm wagons.

The Court—Isn't it a matter of some consequence to find out whether, standing at a point just below the crossing, a train would come into view from either direction; isn't that important in estimating the suitability of the road? If a train came into view at the bottom of the crossing for instance, only five hundred feet away, it would obviously be an improper crossing, while, if a train could be seen four or five miles away there would be no danger whatever. Consequently it seems to me important to know just how far off trains would come into view from either direction, while standing at the bottom of the approach? 20 30

Mr. Parker, Jr.—Very well, sir, I will try to get the information for you.

At this point the further hearing of the matter was continued until Thursday, February 20th, 1902, at ten o'clock in the forenoon, at the same place.

Before his Honor Vice Chancellor Stevens.

*Mr. Halsey M. Barrett*, for the complainant.

*Mr. Cortlandt Parker, Sr.*, *Mr. Cortlandt Parker, Jr.*,  
and *Mr. Chauncey G. Parker*, for the defendants.

Transcript of shorthand report of the evidence taken upon the trial of the above-stated cause, this twentieth day of February, nineteen hundred and two, at the Chancery Chambers, Newark, New Jersey.

*Richard T. Dana*, recalled.

10 Further direct examination by Mr. Parker.

Q. Can you calculate the number of acres of land and meadow on each side of the railroad belonging to Mr. Speer?

A. I can.

Q. Just state what that is?

A. The area between this dotted lined marked "fence,"—I refer to the first fence east of Cliffside avenue—and Cliffside avenue is approximately three acres.

Q. And what is the character of that land?

20 A. Upland.

Q. Farming land?

A. Yes, sir.

Q. For tillable purposes?

A. It could be from this fence.

Q. (By the Court.) In your answer you use the words "this fence;" you better describe it, so that it will appear on the stenographer's notes?

A. I mean east, up to the right of way of the railroad, the area is about six acres.

30 Q. What is the character of that land?

A. Marshy land; east of the railroad track, about half of the tract, between the railroad track and the Valley road is upland, the other half is marshy; the terri-

tory comprised in that tract is about three acres, making in all seven and a half acres of marshy land and four and a half acres of upland.

Q. (Further direct.) Now, the highland is on the eastern side—the western side of the track adjoining Cliffside avenue?

A. It is.

Q. The high land on the eastern side of the track is adjoining Valley road?

A. Yes, sir.

10

Q. Have you testified to the frontage on Cliffside avenue?

A. No, sir.

Q. State what it is?

A. Two hundred and twenty-seven feet.

Q. And the frontage on Valley road?

A. Three hundred and ninety-four feet and five-tenths.

Q. State how far back the upland extends from the Valley road?

A. About one hundred and seventy-five feet.

20

Q. I think you stated the distance from Cliffside avenue before, didn't you?

A. It is four hundred and forty feet.

Q. Now, state the distance along Brookfield avenue from Cliffside avenue to the railroad?

A. To the right of way?

Q. Yes.

A. Sixteen hundred feet.

Q. How far from the corner of Brookfield avenue and Cliffside avenue is Speer's property?

30

A. Two hundred and seventy-five feet where the frontage begins on Cliffside avenue.

Q. Can you give us the total distance from Cliffside avenue to Valley road across Abram Speer's place?

A. Seventeen hundred feet.

Q. And what is the total distance around by the road?

A. Twenty-eight hundred feet.

Cross-examination by Mr. Barrett.

Q. When did you enter the employ of the Erie railway?

A. About five years ago.

Q. You testified on your direct examination that you went up and examined this property about three months ago, I think you said?

A. About three weeks ago I went up on one occasion, and then I made the survey last December.

10 Q. You made the survey last December?

A. Yes, sir.

Q. That was before you went up and examined it?

A. I say I examined it on two occasions, the first occasion when I made the survey, and the second occasion was three weeks ago.

Q. When you made that survey, did you walk through Mr. Speer's property west of Cliffside avenue?

A. Yes, sir.

Q. Did you walk along this roadway?

20 A. I walked west to about here and I didn't notice it; I walked along here [pointing to the section of the territory between the brooks].

Q. You were not looking for this private road or roadway, were you?

A. On the occasion, three weeks ago, I looked for it.

Q. Well, take the occasion when you first went over there in December, were you looking for it then?

A. No, sir; not particularly, excepting that I was looking for all signs to put on my map; I was looking  
30 for indications——

Q. And is that the reason——

Mr. Parker—Won't you allow him to finish his answer.

Q. Did I cut off your answer?

A. I was going to add that I looked about the ground for signs of roads, brooks and all that sort of thing to put on my map, and I didn't see any such signs of a road that would warrant me in putting any on the map.

Q. That is west of the embankment?

A. West of the embankment.

Q. You did east of the embankment?

A. I did east of the embankment.

Q. If you were looking for the signs of a roadway which would warrant you in putting it on your map, and found none west of the embankment, but did find it east of the embankment, why didn't your map show that roadway east of the embankment?

A. Because I didn't consider it of sufficient importance; when I made the survey I didn't know the importance of this old road; I hadn't heard of it; and in looking for signs on the ground it didn't occur to me that the signs I saw were of such importance as to justify me putting it on the map. 10

Q. If you had found equal signs of such roadway west of the embankment, as you actually found east of it, you still would not have put it on your map, would you?

A. I think I would; it would depend somewhat upon the definiteness of the trail.

Q. You said you did find certain indications east of the embankment, but did not put it on your map; you did not find any indication west of the embankment and therefore did not put any there? 20

A. If I had found enough indications to show, or to indicate that there had been a much traveled highway there, or much traveled road, I would have put it on the map; but I did not find any such indications.

Q. Then all you mean to say is that you found no indication of it being a much traveled highway or much traveled road? 30

A. No, sir; east of the track the road wasn't very well defined, and west of the track the road is practically not defined at all.

Q. But perfectly perceptible, is it not?

A. East of the track?

Q. And is it not west of the track?

A. I did not perceive it.

Q. Then are we to understand that although you were

looking for a roadway and intended to show on your map everything of importance relating to the physical character of the ground, you were unable to find any signs that there had been ever a private road west of the railroad track?

A. I didn't say that at all.

Q. Very well then, what did you say?

A. I said that west of the railroad track I did not see evidence of a marked roadway.

10 Q. Marked roadway; what do you mean by marked roadway?

A. A well-marked roadway.

Q. What day was it you did this?

A. I don't know.

Q. Was there any snow on the ground at the time?

A. No, sir.

Q. Are you sure of that?

A. I am sure of it, but three weeks ago when I was there there was snow.

20 Q. But there wasn't snow on the ground there in December?

A. No, sir; not on the day I made my survey there was no snow.

Q. (By the Court.) In the line of the old road that you did see on the east side, did you notice fences on each side of the railroad track?

A. Yes, sir.

Q. Now is that fence composed of rails fitted into posts?

30 A. There had been an old pair of bars there on one side of the track.

Q. Which side of the track?

A. On the east side; I didn't see any on the west side; it is very plain, from the evidences on the ground, that there had been a farm crossing there originally when the track was laid on the ground, and that that farm crossing was used on this side (east side) of the track, but there was no evidence to show that it had been used very much on the other side; of course if it was used for a crossing,

it could have been used on both sides; and on this side [indicating], immediately adjacent to the track, it seemed as if it had been used for driving over between the brook and the track.

Q. (Further cross.) When you went on the property in December to make the survey, do I understand you to say you had no knowledge of the purpose for which the survey was being made?

A. No, sir; you do not understand me to say that.

Q. I did understand you to say that you had no knowledge of the purpose?

A. I had no knowledge of the extent to which this ancient road was entering into the question.

Q. Did you know that the question of this road was involved at the time you made the survey?

A. What do you mean by that; do you mean the question of the extent of the old road?

Q. No, I mean the question of the existence of it?

A. I did not know, when I made the survey, that the road had existed, but I knew when I got on the ground that there had been probably a farm crossing there; Mr. Speer himself told me there had been; I did not know there had been before that, and did not know the extent to which the old road figured in this case.

Q. What did you understand the use for which your survey was being made was?

A. I understood it was to be made to show the property owned by Mr. Speer; I was also informed—he himself told me that he was bringing a lawsuit against the company in the matter of the construction of a crossing about the middle of his property; that was all I knew about it.

Q. Then you didn't look especially for signs of a road crossing when you went on the ground in December, did you?

A. It is always easy to find the answer to a problem if you have the answer before you; I did not look with special reference and knowledge of a road having been

there; I did not know there had been a crossing at that point, but I looked for anything on the ground that would indicate any road there, or anything of that kind—roads or streams, or anything of that sort.

Q. How was it when you went there about a week ago?

A. I tried to say it was three weeks ago.

Q. Well, when you went there three weeks ago, and did not see the road west of the embankment, there was snow on the ground, wasn't there?

10 A. Yes, sir.

Q. Now, you have testified as to Cliffside avenue, and I think it appears on your map, doesn't it?

A. Yes, sir.

Q. Do you know when that avenue was laid out?

A. No, sir.

Q. Do you know what part of it is laid out now?

A. I know that it is constructed from Cliffside avenue as far as the railroad.

Q. All the way through, then, from Cliffside avenue  
20 as far as the railroad?

A. Yes, sir.

Q. What do you mean by constructed; what is its physical condition?

A. It is able to be driven and walked over.

Q. Wasn't that work done last fall?

A. I think it was; some of it; some of it was evidently done before that, because these two houses here [indicating] have been there at least a year.

Q. That is all.

30 Redirect examination.

Q. How much snow was there on the ground three weeks ago when you went there?

A. Probably an inch and a half.

Q. All over the property?

A. Yes, sir.

Q. What do you mean by saying that there were indications of a driveway there?

A. I mean by that that if the rail on this east side of the right of way—if it was marked up to the railroad land, and not marked on the other side, it would indicate that there had been evidently a crossing at that point, but not being marked on the other side it would indicate that it was not a continuous trail.

Q. You didn't mean to characterize the number of vehicles or the character of the crossing, did you?

A. No, sir; I didn't mean that.

Q. That is all.

10

*James Keegan*, sworn for the defendant.

Direct examination by Mr. Parker.

Q. What is your business?

A. Special land and tax agent of the Erie Railway Company.

Q. Whose office are you in?

A. Mr. von Moschzisker.

Q. How long have you been employed there?

A. About nine years.

Q. Did you have an interview with Mr. Speer in relation to this crossing?

A. Yes, sir.

Q. When?

A. I don't remember just the time, but several months ago.

Q. Where did that interview occur?

A. On the railroad track between Upper Montclair and Park street.

Q. Just tell us what was said and done by each of you?

A. I called upon Mr. Speer—

30

Mr. Barrett—I don't know whether that is competent unless there is some foundation laid for it.

The Witness—I called upon Mr. Speer in order to learn the facts in the case, and he walked with me on the track, I think for a long distance, showing me the improvements in one way and another, and he showed

me where this old crossing used to be, and he said that in order for to settle the matter he would——

Mr. Barrett—I object to any evidence showing any attempt to compromise this matter.

The Court—Well, any evidence tending to show an attempt to settle the controversy would not be evidence in this case, but it may be admissible for another purpose.

Q. Proceed.

A. He said that in order to settle the matter he would  
10 be willing to sell us all his land for \$10,000, but later on, before I left him to come back to the office, he told me he would accept \$7,000.

Q. What for?

A. For the crossing itself, but not the land.

Q. For the land at the crossing?

A. Yes, sir.

Q. Did he say anything about running a street through his property?

A. Yes, sir; he talked to me about that, and I under-  
20 stood him to say that his property was quite valuable, and that by running a street through there he could sell off lots.

Q. Did Mr. Speer say how the street was to run?

A. I do not remember him telling me how the street would run.

Q. Did he speak of the street in connection with the crossing?

A. He spoke with me about an undergrade crossing, yes.

30 Q. Did he say anything about this street connecting with the underground crossing?

[Objected to as leading.]

Q. (By the Court.) Did he say anything more about it?

A. Yes, sir; he said that an undergrade crossing should be built there, and that would give his property an outlet to the Valley road.

Q. Do you say that he pointed out to you where the road was?

A. He pointed out to me where the crossing used to be on the track.

Q. Was there any evidence of an old road being there?

A. I don't remember seeing it.

Further direct examination.

Q. Did you have any further conversation with him on that occasion?

A. We talked in a general way about it, one way and another, and I told him I would report the facts to the office. 10

Q. What office?

A. The real estate department of the railway.

Q. How was the track at the time of your conversation?

A. Elevated.

Q. Elevated?

A. Yes, sir.

Q. And filled in? 20

A. Yes, sir.

Q. Did you give him any envelope or did you write your name on any telegraph blank for him or anything of that sort?

A. Yes, sir.

Q. Is this your name [handing witness a paper]?

A. Yes, sir.

Q. Did you have any other conversation with him at any other time?

A. No, sir. 30

Q. That is the only conversation you ever had with him?

A. Yes, sir.

Q. How did you happen to be up there then?

A. I was instructed by Mr. von Moschzisker, the head of the real estate department, to go there and see Mr.

Speer and learn some of the facts of the case and make a report.

Q. That is all.

Cross-examination by Mr. Barrett.

Q. You are a clerk in the real estate department of the Erie railway?

A. Yes, sir.

Q. What department are you in?

A. I am in the real estate department; I am the special land agent and tax agent.

10 Q. Now, fix the time of this occurrence as near as you can?

A. It was several months ago.

Q. Was it before last summer?

A. I am not positive, but I rather think it was before.

Q. Was the construction of the elevated road—the elevated construction of the track all completed at that time?

A. Yes, sir.

20 Q. That was completed more than a year ago, wasn't it?

A. I should think so.

Q. Wasn't that completed in the fall of 1900?

A. I don't know when it was completed.

Q. Well, you are familiar with the fact, are you not, of the elevation of the track; I think Mr. Moore testified it was done in the spring of 1900; now, with that in your mind, wasn't this conversation about the time when this track was completed, a good deal more than  
30 several months ago?

A. It was a long time, I think, after the work was completed that I had this conversation; I am quite positive it took place within a year.

Q. Within a year from now?

A. Yes, sir.

Q. What makes you think so?

A. Well, it doesn't strike me as being any further back than that.

Q. You have no recollection of the time of the year, whether it was spring or fall, winter or summer?

A. I am not positive in regard to that.

Q. Did you have your overcoat on?

A. I don't remember.

Mr. Parker—I can help you if you like, Mr. Barrett?

Mr. Barrett—I wish you would. That is all I want to get at. 10

Q. (By Mr. Parker.) Refreshing your memory by this report, can you tell us when this conversation was?

A. In the month of September, 1900.

Q. That is all.

*Robert Strauss*, sworn for the defendant.

Direct examination by Mr. Parker.

Q. What is your business?

A. Track layer and supervisor of the Erie railway.

Q. Whereabouts.

A. The Montclair section. 20

Q. How long have you been such?

A. Since the year 1900.

Q. What other work have you done on the railroad besides being section foreman?

A. I am supervisor.

Q. How long have you been supervisor?

A. Eleven months.

Q. And when did you commence?

A. In the year 1900.

Q. When did you go on duty there first? 30

A. I went on duty there the 1st of October, 1899.

Q. When actually did you begin?

A. The 3d day of July, 1900.

Q. Was the elevation of the tracks going on at that time?

A. Yes, sir.

Q. Do you know Abram Speer, the complainant in this case?

A. I only know him, and that is all.

Q. Have you ever had any talk with him about that crossing?

A. Yes, sir; once about May, 1900.

Q. What did he say?

A. He said he had a right of crossing there.

Q. Did you see any indications of a crossing at that  
10 point?

A. No, sir; I never did.

Q. Did you see any indications of a roadway there at all?

A. No, sir.

Cross-examination by Mr. Barrett.

Q. Did you report to the superintendent or any other person above you, in the employ of the Erie Railway Company, the fact that Mr. Speer had told you in May, 1900, that he claimed this crossing?

20 A. I did not.

Q. That is all.

*John Dow*, sworn for the defendant.

Direct examination by Mr. Parker.

Q. What is your business?

A. Track foreman and signalman.

Q. Where are you employed now?

A. On the West Arlington tower.

Q. Have you ever been employed on the tracks of the  
Montclair and Greenwood Lake railroad?

30 A. Yes, sir.

Q. When were you so employed?

A. To the 11th of May, 1875.

Q. For how long?

A. From 1873 to 1875.

Q. What was your duty then?

A. Section foreman.

Q. Under what section?

A. Sections from Montclair to Little Falls.

Q. Does that include the property, or the line of the railroad over the property, of Abram Speer in Upper Montclair?

A. Yes, sir.

Q. What were your duties as section foreman; what did you have to do?

A. Look after the tracks.

Q. Did you have anything to do with the crossings? 10

A. Yes, sir; when they are out of repair I repair them.

Q. Do you know this land of Abram Speer?

A. Yes, sir.

Q. Now, during the time you were there have you ever observed any crossing over the railroad track on his land?

A. No, sir.

Q. Was there any crossing there?

A. Not at the time I was there; no, sir.

Q. Or any plank placed in between the rails at that 20 place?

A. No, sir.

Q. Or any road leading up on each side of the tracks and over the tracks on his land?

A. No, sir; I never saw any.

Q. Have you been familiar with this property since that time?

A. No, sir.

Q. What have you been doing since then?

A. Attending to the drawbridge and the West Arling- 30 ton tower.

Q. How long have you been there?

A. I have been there about six years?

Q. Before that where were you?

A. On the section between Little Falls and Montclair Heights.

Q. Your section didn't cover this land?

A. No, sir.

Cross-examination by Mr. Barrett.

Q. How often did you go over the track on foot, between 1873 and 1875?

A. I cannot say how often.

Q. Why cannot you say?

A. Why I didn't have to go over it every day, and I cannot tell you how many times I did go.

Q. What was your habit?

A. Well, maybe three or four times a week.

10 Q. On foot?

A. Yes, sir; and with a handcart.

Q. Was there any fence along the line of the railroad company and Mr. Speer's land on both sides of the roadway?

A. Yes, sir.

Q. Do you remember that?

A. I think I do.

Q. Do you know whether there were any bars or anything of that nature in the fence?

20 A. No, sir.

Q. You mean you don't know whether there was or was not?

A. I don't remember seeing any.

Q. Did you ever have any occasion to look and see whether there was a crossing at Mr. Speer's land?

A. I never did.

Q. Then your testimony only means that now, after the lapse of twenty-seven years, you don't recall observing it; is that all your testimony is?

30 A. I cannot tell you after 1875 what they done, or whether there was a crossing or not.

Q. After the lapse of twenty-seven years you don't remember observing any crossing there, between 1873 and 1875, while you were in the employ of the company?

A. I don't remember, no.

Q. That is all.

*James Shelton*, sworn for the defendants.

Direct examination by Mr. Parker.

Q. What is your business?

A. Foreman.

Q. Where are you foreman?

A. On the Orange branch.

Q. Have you ever been employed around Speer's place in Montclair?

A. I was employed in 1900 elevating the track.

Q. And how long were you employed there? 10

A. About four months.

Q. When did you commence?

A. In April, 1900.

Q. What was your duty there?

A. Raising the tracks; elevating it above the Valley road.

Q. When did you complete it?

A. 11th of August, 1900.

Q. Did you ever have any talk with Mr. Speer in regard to this property? 20

A. No, sir.

Q. Or about the elevation?

A. No, sir.

Q. Or about the crossing through his land?

A. No, sir.

Q. Did you ever observe any roadway or track through his land?

A. I did not.

Q. That is all.

Not cross-examined. 30

*Frank K. von Moschizker*, sworn for the defendants.

Direct examination by Mr. Parker.

Q. You are an attorney-at-law of this State?

A. Yes, sir.

Q. And you are in the employ of the Erie Railway Company?

- A. Yes, sir.
- Q. In what position ?
- A. Real estate agent.
- Q. You have charge of the land of the company ?
- A. I have.
- Q. Do you know this land of Mr. Speer's ?
- A. I do.
- Q. How long have you known it ?
- A. The last ten years.
- 10 Q. Have you been through the property ?
- A. I have.
- Q. How often ?
- A. Well, at least once, and I have passed over it a number of times on the track.
- Q. When did you go there once ?
- A. The first part of September, 1900.
- Q. For what purpose did you go there ?
- A. For the purpose of looking over the property, with a view of a claim that had been presented for a crossing.
- 20 Q. Was that claim in your hands ?
- A. It had been sent to me at that time; yes, sir.
- Q. Did you see Mr. Speer then ?
- A. I did not.
- Q. Did you observe the land to see if you could find any evidence of any road or crossing ?
- A. I did.
- Q. What was the result of your examination ?
- A. I could find no evidence of any crossing.
- Q. Was there any evidence of a road across there ?
- 30 A. Not that I observed.
- Q. Have you made any arrangement as to offering Mr. Speer a roadway out from his land parallel with the railroad company's track on the west side, between Brookfield avenue and the Valley road ?

[Objected to.]

Mr. Parker—I want to show the railroad company has secured a right for a road out from Mr. Speer's land parallel with the railroad track and the Valley road,

which we have offered Mr. Speer and which we are now willing to build and give him in lieu of any crossing under the railroad, and under such terms as the court may think proper.

[Admitted subject to objection.]

Q. Have you made any arrangement as to securing such an outlet?

Mr. Barrett—I object to the form of the question.

Q. What option have you secured for that purpose?

A. I have acquired option or options on a strip of 10 land leading from the land of Mr. Speer to the Valley road, and parallel with the railroad; it is a strip of land fifty feet in width.

Q. Have you got those options here?

A. Yes, sir.

Q. Let me see them?

A. The options are from Nathan Harrison and William H. Parsons, adjoining property owners.

Q. Have you offered those options to Mr. Speer or that road to Mr. Speer, or his solicitor? 20

A. In the course of the negotiations this was one of the propositions made to the solicitor for Mr. Speer.

Q. What was the proposition?

A. That a street would be opened leading from Mr. Speer's land to the public highway parallel to the railroad.

Q. When was this offer made?

A. I cannot give the exact date of that.

Q. How long ago?

A. Why our negotiations in this matter covered a 30 period from September, 1900, down to a very recent date.

Q. (By Mr. Barrett.) To the filing of the bill?

A. Even after that, I believe.

Further direct examination.

Q. Just describe those negotiations?

The Court—I cannot imagine how negotiations leading to no result can affect this case.

Mr. Parker—It affects Mr. Speer in this way: he appeals to the judgment of this court, and we contend that we are not obliged to make the crossing he demands, but if we are obliged to make it, the cost of the thing is simply out of proportion to any benefit that can be derived by Mr. Speer, so that the court will not compel us to make it as he wants it, and therefore it comes down to a question of damages to Mr. Speer of being deprived of this crossing, and we think that we ought to be allowed  
10 to show that we are willing, and have it in our power to give him an outlet to all his land. We think that this effort on the part of Mr. Speer is not to have us furnish him with a farm crossing, but for the purpose of getting money out of the railroad because of our misfortune in being compelled to elevate our tracks over the Valley road for the safety of the public and for public convenience; therefore, I think we have the right to put the whole facts and circumstances before this court in order that it may be able to judge fairly and equitably whether  
20 this claim, on the part of the complainant, is *bona fide* made for the purpose of a farm crossing or for the purpose of oppressing the railroad company. Therefore, I think, in that view, that the arrangements which were made between the railroad company and Mr. Speer are relevant and pertinent.

The Court—If you proposed to Mr. Speer any other plan of crossing than that already in evidence, you may show that.

Mr. Parker—I think our evidence will go to the extent  
30 that we can show that Mr. Speer was willing to accept a sum of money largely in excess of what we consider to be the proper amount, in consideration of his right of crossing.

The Court—He had a perfect right to say, if you will give me \$10,000 I will give up my right of way; but if the company refused to give it to him, then you have not arrived at any conclusion.

Mr. Parker—We want to go further than that. We

will show that he offered to take less than \$10,000; that he offered to take \$7,000.

The Court—He had a perfect right to put any value he suggested upon any portion of his land. He had a right to say he would sell his right of crossing for so much money.

Mr. Parker—We want to show that it wasn't until after he had received our refusal of what we considered a grossly disproportionate sum, that he commenced any proceedings in this court to obtain this crossing. 10

Mr. Barrett—Do you want to show that we negotiated as long as we could and then brought suit, when we found we could not agree.

Mr. Parker—No, but we propose to show that he was desirous of getting money out of us, and money simply.

Mr. Barrett—That is not so, and never was, and the bill shows it was not so.

The Court—That doesn't make any difference.

Mr. Parker—I would like to make a specific offer for the record. I offer to show that at the time of the commencing of this work, and after it had progressed to some extent, that Mr. Speer was waited upon by the representative of the Erie Railway Company; that he made certain demands for money compensation from the company in view of his right to a crossing which he claimed that he had under the deed from his father to the Montclair Railroad Company; that at present the railroad is operated by the Erie Railroad Company under a lease to the Montclair and Greenwood Lake Railroad Company, and are the owners of the property; that Mr. Speer was offered, on the part of the company, either a grade crossing with approaches parallel with the track or at an angle with the track—right angles with the track—and that he was dissatisfied with it, and that he sought and insisted that the company should either buy his land or else to give him an undergrade crossing, or else, as a substitute for it, to pay him the money compensation for the 20 30

right to cross—a money compensation—and that he stated the sum at \$7,000.

Mr. Barrett—Now you are getting everything in the case by your statement.

Mr. Parker—I have a right to make my offer, and I will now proceed with it. Subsequently Mr. Speer reduced his claim to a smaller amount, and that that amount was grossly in excess of the value of the right to cross; that these negotiations lasted while the work was progressing and continued until about the month of November or December, I think, of 1900, or later, and continued, in fact, down to the filing of the bill; that they resulted in a disagreement between the parties, and that the company offered to Mr. Speer various sums—\$1,000 in consideration of his right to cross, which Mr. Speer refused to accept, and that in the meantime the company had completed their track and had continued to operate their trains and operate the railroad upon its elevated structure.

20 The Court—It is quite proper to show the situation—that is, that the Erie Railroad Company is the lessee of this road, and if you can show, as I said before, that the parties agreed upon the money payment as a substitute for the crossing, I will allow you to show that. You may also show that Mr. Speer offered to take a certain sum of money for the crossing which the company did not accept. You may show that they offered a certain sum of money which he did not accept.

Q. (Further direct examination.) Did you offer Mr. Speer a right of way to the Valley road?

The Court—I might as well say now that what I desire to exclude is the negotiations for a settlement which preceded the filing of the bill, on the ground that such evidence is incompetent.

Q. [Question read.]

A. I did, through his solicitor.

Mr. Barrett—I object to the question and answer, and I would like to have my objection recorded, on the ground

that the question is vague. There is no evidence of any particular roadway put in evidence; they say they had two options from two parties for some land somewhere, but it is altogether too vague.

The Court—I presume the options are in writing and will be put in evidence.

Mr. Parker—Yes, sir.

Q. Now proceed.

A. I offered to Mr. Speer, through his solicitor, a roadway leading from his property line fifty feet wide 10 over the adjoining property to the Valley road.

Q. Bounding on the road?

A. Parallel with the railroad and bounded by the railroad right of way.

Q. To be a public way?

A. To be a public way and to be placed in condition for use by the public and dedicated and turned over to the proper authorities.

Q. And by that roadway Mr. Speer could go between his two pieces of land without crossing the railroad at 20 grade?

A. That would certainly lead him to the undergrade crossing at Valley road, to his land on the other side.

Q. Did you make any other suggestion as to a crossing at grade?

A. You mean during the course of the negotiations?

Q. Yes.

A. My first offer was to construct a grade crossing with an approach thereto on Mr. Speer's land.

Q. What happened to that first offer? 30

A. That was declined; my recollection is that I then offered an amount of money that it would cost us to build that crossing—the estimated cost.

Q. Well, that has been excluded, you understand, by the Vice-Chancellor's ruling?

A. Yes, sir; and that was declined and then my second offer was to build the approaches on the company's right of way running parallel with the railroad and cross-

ing the rails at grade, and then to go down the other side on a roadway running parallel; that is the approach and descent running parallel with the railroad, and that was declined.

Q. What was the next one?

A. I then offered him a \$1,000 compensation for the right to the crossing which he claimed.

Mr. Barrett—The court has excluded that, as I understand it.

10 The Witness—And that was declined, and then my offer was made of the right of way to the Valley road.

Q. Which you first mentioned?

A. Which I first mentioned, and that was declined after being taken into consideration.

Q. That was your last offer?

A. That was the last offer.

Q. Does that offer still hold good?

M. Barret—I object.

A. It does; yes, sir.

20 Mr. Barrett—Why don't you refrain from answering when I object?

Witness—Excuse me, sir.

Mr. Parker—Now I wish to offer these agreements referred to by the witness for the options in evidence.

[Marked *Exhibit Option No. 1, Option No. 2.*]

Q. Did Mr. Speer ever agree to receive a money compensation for this right of crossing?

[Objected to and overruled.]

30 The Court—If you put the question did the Erie Railway Company and Mr. Speer both agree that the right of crossing should be waived and the money consideration paid therefor, it will not be objectionable.

Witness—Well, Mr. Speer, through his solicitor—

Mr. Barrett—One moment; I think you should answer that question yes or no.

Q. Did Mr. Speer and the company agree to receive as a substitute for this right of crossing any sum of money?

A. There was no agreement because a sum was never fixed that he would take; there cannot be an agreement without both agreeing.

Q. Was there an agreement that a money compensation should be accepted without fixing any amount?

[Objected to.]

A. Will you put your question again?

Q. Was there any agreement between Mr. Speer and the Erie Railway Company or its representative that a money compensation—I mean with an amount not fixed 10 in round numbers or exactly, but that a money compensation was to be accepted by Mr. Speer in lieu of his right to cross?

A. Well, that is a hard question for me to answer; there was an offer made that an amount would be accepted in lieu of Mr. Speer's right to cross.

Q. Was there more than one offer?

A. Yes, sir; two offers.

Q. Were those offers accepted by the company?

A. They were not. 20

Q. Now, I would like to ask the reason why they were not accepted?

[Objected to and overruled.]

Q. Your last offer was that made previous to the filing of the bill or afterwards?

A. You mean in regard to the right of way?

Q. Yes?

A. I don't remember, Mr. Parker, and I could not say as to that.

Q. Was there any correspondence which will refresh 30 your memory as to the time when this offer was made?

A. I think possibly there is; if you will allow me, Mr. Barrett and I had an interview at his office, and my recollection is it was after the bill was filed, when this proposition was presented of building this road out to Valley road; the proposition at that time seemed to strike Mr. Barrett favorably, and he said he would present it to his client and endeavor to induce him to accept it, and I

think there is a letter written immediately after that, either to Mr. Parker or myself, which will fix the date, in which he stated the proposition as made would not be accepted.

Q. All the other efforts were made previous to the bill being filed?

A. I think so; yes, sir.

Cross-examination by Mr. Barrett.

Q. Have you with you the drawing which you submitted to me wholly out of the land of the company and running parallel with the track and over the track for a crossing?

A. No, sir; I think I left it in your office.

Q. But didn't I return it to you?

A. I don't remember it; at any rate I haven't it with me now; it is not among my papers.

Mr. Parker—I offer the deed from Mr. Speer to the Montclair Railway Company, dated June 20th, 1870.

Mr. Parker—Do you admit, Mr. Barrett, the New York and Greenwood Lake Railway Company acquired this property from the Montclair Railway Company?

Mr. Barrett—Mr. Cortlandt Parker and I had a discussion about the time of the filing of the bill as to whether the Greenwood Lake Railroad Company should become a party to this suit, and I said I thought it wasn't necessary, but we finally agreed that the bill should go in as it was, and that if it became necessary to make it a party, I would amend the bill, and that was the understanding between us.

Mr. Parker—We only want to show the state of the title.

Mr. Barrett—You have proven that the Erie Railway Company did the work that destroyed this roadway.

Mr. Parker—Will you admit that the fact is correctly stated in the answer in regard to that matter just referred to by me.

Mr. Barrett—In regard to the fact that the New York

and Greenwood Lake Company is the successor to the Montclair Railroad Company, &c., yes, sir.

Mr. Parker—And that the Erie Railway Company is the lessee of the New York and Greenwood Lake Railroad Company?

Mr. Barrett—Yes, sir; I suppose it is a fact that the Erie Railroad Company also owns a majority of the stock of the Greenwood Lake Railroad Company; that although there has been no actual merger, yet the Erie Railroad Company controls it. I will admit that. 10

The Court—And you admit that it is the lessee of the road, and that it is operating it, and that the Erie Railroad Company has itself made this improvement.

Mr. Barrett—Yes, sir.

Mr. Parker—We admit everything except the ownership of the stock.

*Patrick Manning*, sworn for the defendant.

Direct examination by Mr. Parker.

Q. Where do you live?

A. Belleville. 20

Q. What is your business?

A. Keep a saloon.

Q. Were you ever employed in the Greenwood Lake Division of the Erie Railroad Company or the Montclair Railroad Company?

A. Yes.

Q. What railroad were you employed by?

A. Greenwood Lake.

Q. When were you employed by the Greenwood Lake Railroad Company? 30

A. Pretty nearly thirty years.

Q. When did you commence in their employ—how long ago?

A. Shortly after it commenced.

Q. When?

A. Shortly after it was started.

Q. You refer to the old Montclair railway?

A. Yes, sir.

Q. And you commenced in its employment shortly after it was started?

A. Yes, sir.

Q. How long were you employed there and where were you employed?

A. I was section foreman of No. 2.

Q. Where was section No. 2?

A. Just around the other side of the cut to Montclair.

10 Q. This side of what cut?

A. The Arlington cut and Montclair.

Q. That was called section No. 2?

A. Yes, sir; at that time.

Q. How far up did that section go when you were first employed on the road?

A. As far as Mr. Taylor's crossing.

Q. Is that above Mr. Speer?

A. No, I ran over that section for ten years, and I guess I ran the rest of the time after I was moved one  
20 mile further ahead; the meadow section was moved up a mile, and that moved my section another mile up to Upper Montclair.

Q. When was it you worked from Montclair to Upper Montclair?

A. Well, I used to run up from Forest Hill to Upper Montclair.

Q. When was it you ran from Forest Hill to Upper Montclair; what years?

A. I can't tell you.

30 Q. How long ago was it?

A. I guess it is twenty years ago.

Q. Over twenty years ago?

A. I guess so, about that time.

Q. How long were you on that section from Forest Hill to Upper Montclair?

A. About twenty years, I think, but I kept no date of it.

Q. But you were employed there for twenty years as section foreman?

A. Between the other section and the time they moved me up, I mean.

Q. Well, do you know Mr. Speer's place?

A. Yes, sir; I know it.

Q. Now, what have you to do as section foreman on the railroad?

A. I have to do all the repairings to the railway and do all the repairs.

Q. Have you charge of the private and public crossings of the road? 10

A. Yes, sir; any part of the track that has to be repaired I have to attend to it.

Q. Did you ever have anything to do with the construction of the crossings or the keeping of the crossings in repair?

A. Yes, sir.

Q. What did you have to do with them?

A. I had to plank them and fix them up and do everything that ought to be done to them.

Q. Can you tell us while you are on this section whether there was any crossing at Speer's land over the railroad? 20

A. There was no crossing that was planked.

Q. Did you ever see any planking laid across the tracks there?

A. No, sir.

Q. Did you ever see any use made of that crossing?

A. Yes, sir; I saw him drive his cows back and forth.

Q. Did you ever see any wagons go across there?

A. No, sir. 30

Q. How often did you use to pass this place?

A. Sometimes every day for a week and then for two or three days again I would not be there.

Q. How did you go there, on foot?

A. Yes, sir; I used a hand car part of the time and part of the time I went on foot.

Q. Did you have any other men working for you or under you?

A. I had seven or eight men at times; there was six generally to a gang.

Q. Did you know John Dodd who was employed there?

A. Yes, he had the section above me, the next section above me.

Q. I wish you would explain, if you can to us, when you first went on the road how far your section ran?

A. From Arlington to Montclair, at Mr. Taylor's  
10 crossing.

Q. That was the first section you had?

A. Yes, sir; and I was a good many years on that; then I was moved up from there one mile; there was a mile taken off of my lower end and put on the upper end, so that I went up as far as Upper Montclair.

Q. Is Taylor's crossing above or below Speer's place?

A. Taylor's crossing is in Montclair.

Q. Montclair itself?

A. Yes, sir.

20 Q. How long did you work on that section which extended up to Montclair?

A. I guess about ten years; somewhere about that time.

Q. And then you commenced to work on the section which extended up to Upper Montclair?

A. Then I went from Forest Hill to Upper Montclair.

Q. How long did you work on that section?

A. I guess about twenty years.

Q. When did you cease working for the railroad?

30 A. I guess about four years ago.

Not cross-examined.

*I. Seymour Crane*, sworn for the defendants.

Direct examination by Mr. Parker.

Q. Where do you live?

A. Montclair.

Q. How long have you lived there?

A. Forty years.

Q. What is your business?

A. Hardware.

Q. Do you have any connection with any financial institution in Montclair?

A. Yes, sir.

Q. What?

A. I am on the building and loan committee of the Bank of Montclair and on the same committee of the savings bank and trust company. 10

Q. What are your positions in those institutions?

A. Well, the savings bank I am one of the managers and directors, and the same in the trust company and in the building loan.

Q. How long have you been so employed?

A. The building loan, about fourteen years, I think, and I am chairman of the securities committee of the savings bank, and I have been in the trust company since its organization.

Q. How long has it been organized? 20

A. I think the savings bank has been there about ten years.

Q. Did you ever deal in real estate in that vicinity?

A. Yes, sir; I have.

Q. How long have you done that?

A. More or less of it for ten or fifteen years past.

Q. In your business connected with these various institutions, did you make loans on real estate?

A. Yes, sir.

Q. Is that part of your business? 30

A. I don't know whether you would call it part of my business; I have done a great deal of it.

Q. Is it part of your duty as such officer?

A. Yes, sir.

Q. Then your duties require you to become informed as to the values of property and as to sales of property up around Montclair and that vicinity?

A. Yes, sir; I think so.

Q. Have you kept yourself informed as to such sales and valuations?

A. Most of them; yes, sir.

Q. Do you know the property of Abram Speer in Upper Montclair?

Mr. Barrett—I object to that. I don't think this inquiry is proper, because this witness has not been sworn to be an expert as to the value of complainant's land.

[Admitted.]

10 A. Yes, sir; I do.

Q. How long have you known it?

A. About four years.

Q. Do you know the property surrounding it?

A. Yes, sir.

Q. Have you lately gone and looked at it?

A. Yes, sir.

Q. When?

A. Within a week.

Q. Just describe the character of the land?

20 A. Well, it has been considered farming land; the property facing on Valley road, for a distance, I should think, back one hundred and fifty or two hundred feet, and about the same distance back from Cliffside avenue, is what I would call upland property, and the property in between is low, swampy land.

Q. Will you state what it is adapted for; I mean the property in between there; is it adapted for anything?

[Objected to.]

Mr. Parker—I want to show whether there was any 30 damage to his property by reason of his not having a crossing over the railroad track as demanded by him. We expect to show also the pecuniary interest at stake by reason of the denial of this crossing.

The Court—The evidence may go in subject to your objection.

Mr. Barrett—Then I also object to this witness on the ground that he has not qualified himself to speak as an expert.

The Court—You may cross-examine him if you choose, as to his knowledge.

Cross-examination by Mr. Barrett.

Q. Are you familiar with the value of land in the vicinity of Mr. Speer's land?

A. Yes, sir.

Q. Where did you get that familiarity?

A. I own some property right near it.

Q. How near?

A. On Watchung avenue.

10

Q. That is a half mile, pretty nearly, is it not?

A. No, sir; it is right down on the same line of the road adjoining the water company's place.

Q. Are you familiar with the value of land, except your own, in that neighborhood?

A. Not from any sales that have taken place there.

Q. Have you any more information than what you consider your own property worth, and by that, judging relatively, the value of other property?

A. My opinion is based on sales of other property in that township.

Q. Well, in the immediate vicinity of this land?

A. There have been no sales of any land in the immediate vicinity of this land.

Q. Then your information is based wholly on the sales in the township, not in the vicinity of this land, and on the fact that you own a piece of property in that vicinity yourself?

A. Yes, sir.

Mr. Barrett—Then I object to this testimony.

30

Q. (By the Court.) Do you know of the value of property within a mile of this place?

A. Yes, sir; I know the value of a number of them.

Q. Have you ever passed upon the question of mortgaging properties in that vicinity?

A. Yes, sir.

Q. And upon the question of the land as security for mortgages?

A. Yes, sir.

The Court—I think the witness is competent.

Q. (Further direct.) Are you familiar with and did you examine this ground between the railroad company and this fence [indicating upon the map] across the track?

A. Yes, sir.

10 Q. There is about six acres there; now, can you tell  
01 us what the value of that land is, without connection through to this piece of land on the east side of the railroad track, in its present condition?

Mr. Barrett—What do you mean by value?

Q. I mean its fair market value?

A. I should say \$200 an acre.

Q. Now, suppose it had connection across the railroad by a crossing which goes up here [indicating] and crosses over the railroad at a level and then down again on this  
20 side to the other piece of land on the east side of the railroad—

[Objected to. Question withdrawn.]

Q. Suppose it had a crossing suitable and convenient across the railroad track or through the bank to the other piece of land on the east side of the railroad, which would be available for the owner of the two pieces of property, would there be any additional value to the property?

Mr. Barrett—I object to the question in that form.

Q. What would the land be worth, first without any  
30 access to it?

[Objected to.]

The Court—Let the question be, first, what is the value of the land without the crossing—that is, without any connection between the two pieces, and then what is the value of it with a connection.

Q. Has the question suggested by the court presented itself to your mind before this time?

A. Yes, sir; it has, and it seems to me that if it makes

any difference in the price of the property on either side of the railroad before or after the connection is made, it would depend entirely upon the character of the crossing; if the crossing is made on the railroad company's property up and over the track and down on the other side, I think the property is worth no more with it than it would be without it, or if a tunnel were cut through the bank it would make no difference as to the value of the property; if a tunnel were put through there similar to the one on Valley road it would make some difference in the value of 10 the property.

Q. That is, you mean a public tunnel?

A. Yes, sir; clear of the entire street and the sidewalk as well.

Cross-examination by Mr. Barrett.

Q. Do I understand you that Mr. Speer's property was worth \$200 an acre in your judgment?

A. The lowland on the west side of the track I was asked about.

Q. Well, you own some land, similar land, don't you, 20 above there?

A. No, sir; below that.

Q. Below it?

A. Yes, sir; and it is not lowland; it is higher than this.

Q. What is your piece of land worth per acre?

A. I should say my piece of land, per acre, was worth about \$700.

Q. \$700 an acre?

A. Yes, sir.

30

Q. How many acres do you own there?

A. A little over an acre.

Q. Has it any frontage?

A. Yes, sir; two hundred feet frontage on Watchung avenue.

Q. When did you buy it?

A. I took it for a debt about five or six years ago.

Q. How big was the debt?

A. The debt was \$1,200.

Q. Did you take it in full satisfaction for the debt?

A. Yes, sir; it was all I could get.

Redirect examination.

Q. How big do you say that piece of land was?

A. Two hundred and seventy-five feet deep by two hundred feet front.

Q. And how much land do you say there was—about  
10 an acre?

A. A little over an acre.

Q. You didn't express any opinion as to the higher land fronting on Cliffside avenue and Valley road?

A. No, sir; I have not.

Q. Your opinion was only as to the pasture land?

A. That was all.

Q. That is all.

*Robert C. Ryerson*, sworn for the defendant.

Direct examination by Mr. Parker.

20 Q. What is your business?

A. Real estate agent and insurance, mortgage and loans.

Q. How long have you been in that business?

A. About twelve years.

Q. Where?

A. Montclair.

Q. Continuously?

A. Yes, sir.

Q. Does your business require you to keep yourself in-  
30 formed on sales and of the value of real estate in that vicinity?

A. Yes, sir.

Q. Have you kept yourself so informed?

A. I have endeavored to do so.

Q. Have you made sales in the vicinity of Speer's land?

A. I have sold lots on Cliffside avenue.

Q. Do you know the property owned by Mr. Speer?

A. Yes, sir; I do.

Q. How long have you known that?

A. Twenty years.

Q. Are you familiar with the sales of property of similar character to Speer's land?

A. I am.

Q. Have you made such sales?

A. I cannot recollect any of just similar character of 10 land in that vicinity.

Q. Have you made appraisements and put values on property of that description in that vicinity?

A. I don't know that I have; I think I have made appraisements of lands.

Q. Well, are you familiar with the value of the property?

A. Yes, sir.

Q. Did you go on Mr. Speer's land for the purpose of making an appraisal of that property? 20

A. I did.

Q. When?

A. Last Saturday.

Q. And did you go over the property?

A. Yes, sir; as far as I could.

Mr. Barrett—I object to his evidence, because he has not testified that he has bought or sold any land in this vicinity.

The Witness—I stated that I sold some lands on the west side of Cliffside avenue; I have made no sales of 30 land down in this lowland.

Q. There has been no such land sold around there, has there?

A. Yes, sir; I think there was some sold adjoining this property; I have been told so, but I don't know of my own knowledge.

Mr. Barrett—I object to this witness testifying as to the value of the land.

[Objection overruled.]

Q. What was the value of Mr. Speer's land, with or without the crossing over it or under the railroad so as to connect the two tracts of land together?

Mr. Barrett—I object; that calls for a judgment which is entirely outside of an expert opinion.

[Question withdrawn.]

Q. Can you give an opinion of the value of Mr. Speer's land at Montclair, New Jersey, without a connection from one side of the railroad track to the other side by a  
10 tunnel or overhead crossing suitable and convenient and giving free access to the owners of the property on each side to go from one piece of land to the other; give us an opinion of the value of the property without such tunnel or access first, the property being entirely separated by this solid embankment?

A. I think part of the property is of a very moderate value, and that some of the land near Cliffside avenue is of increased value.

Q. Well state the value, please?

20 A. I think the value of the tract on the west side—

Q. Take the whole piece; take this case: here is a farm with land partly on one side of the track and partly on the other; now, the question is as to the value of the land as a whole without any means of access through the embankment; then I want you to tell us what it is worth with such access; that is the problem for you to answer?

A. Do you wish me to give you the value as I consider it worth, east and west of the railroad?

30 Q. I want you to give us your opinion of the value of the whole farm west and east of the railroad, assuming there is no access between the two properties?

A. I think about \$300 an acre.

Q. Now, assuming that there is free access from one part of the land to the other, over across the track or underneath the railroad by a private right of way?

A. In my judgment it doesn't increase the value of the property at all.

Q. Would that property be worth any more, and if so, how much?

A. I don't think it would be worth any more.

Cross-examination by Mr. Barrett.

Q. How would that land adjacent to the railroad here be accessible for any purpose, if there was no railroad crossing?

A. It could be reached from Cliffside avenue.

Q. How far is it from Cliffside avenue to there?

A. Do you mean straight across the land? 10

Q. Yes.

A. I should think several hundred feet.

Q. What do you mean by several?

A. Between six hundred and eight hundred feet.

Q. For what purpose could that land be used if the access was limited to Cliffside avenue?

A. Do you mean without any outlet to the east side?

Q. Yes, that is the theory we are going on?

A. Nothing except farming and pasturing.

Q. Has it any value for that purpose, or much value 20 if it has to be used with access only from Cliffside avenue?

A. Well, if that land on Cliffside avenue were sold there would have to be a right of way reserved for it.

Q. It would take off part of the Cliffside avenue front for access?

A. Yes, sir.

Q. How far is this piece of land where Tony's brook crosses it, from Valley road?

A. I don't know. 30

Q. Have you ever considered whether this rear land could be used, or could be utilized more if there was access to it from Valley road, than it could be with access from Cliffside avenue?

A. It could be better used for any purpose if there was a right of way out of it alongside of the railroad.

Q. Just please answer my question; the stenographer will read it to you?

[The stenographer read the same.]

A. It could not be used any more—you could get at it better.

Q. Would it not be more accessible?

A. It would be easier to get to.

Q. Do I understand you to say you don't consider that a right of way under or over the railroad connecting  
10 those two pieces of property of any value to the land on either side of the railroad?

A. Not in the condition in which I found it the other day.

Q. If you owned farm pasture land similar to this and a railroad company wanted to buy the exclusive right to a strip of land one hundred feet wide through it, which would make one piece as accessible from your home as this piece is from Mr. Speer's, would you consider that a right of way was of no value and that it would be no  
20 object to retain it?

[Objected to.]

A. Yes, I should ask them to provide me with some way of reaching it.

Q. That is all.

Redirect examination.

Q. Have you formed any opinion of what would be the value of the right to cross from one side of that farm to the other if the land was only good for farm purposes, considering the means of access from the public streets?

30 A. I think the property would be enhanced in value if access were had from the public streets.

Q. You don't understand me; I will withdraw the question; that is all.

*I. Seymour Crane*, recalled.

Q. (Further cross-examination.) Are you now asking \$20 a foot front for the land which you mentioned before—two hundred and seventy-five feet front?

A. I would like to get it; I don't know that I ever asked that for it.

Q. But you would like to get it?

A. Yes, sir.

Q. Have you ever fixed a price upon it at all to anybody?

A. No, sir.

Q. Never have?

A. No, sir.

Q. If the land is only worth \$700, which I understood you to say was the cost, valuing it by the acre—you said it was two hundred and seventy-five feet by two hundred, didn't you?

A. Yes, sir.

Q. Well, that is about an acre and a third in round numbers?

A. Yes, sir.

Q. Then why do you say you would like to get \$5,500 for it; do you mean that seriously that you are contemplating getting that price for it, or do you mean that you would only be too glad to swindle somebody out of \$4,500?

A. No, sir; I would be glad to get that amount of money out of it, if I could.

Q. If you could sell it to somebody who didn't know its value?

A. Oh, I don't know about that.

Q. Have you ever offered to sell it for \$10,000?

A. No, sir; I never offered to sell it at any price; I never had an application for it. 30

Q. Are you not now holding, and haven't you said that you expected to hold that land at \$20 a foot front?

A. No, sir; I never said any such thing.

Redirect.

Q. Where is it?

A. On Watchung avenue, the next street south of Brookfield avenue.

Mr. Parker—We have two more witnesses to the same effect as the last witness, and we also expect to put in the Chancery proceedings between the North Jersey Street Railway Company and this steam railway company for the raising of the tracks.

The Court—I do not think you need put in any more evidence on the question of value at this time. I will reserve the right to you to put in any further evidence on that question, if it becomes necessary hereafter.

10 Mr. Parker—Then I will now put in evidence the Chancery proceedings compelling us to elevate our tracks. Is it admitted by the complainant that the allegation in the answer in reference to the Chancery proceedings for the elevation of the tracks are offered?

Mr. Barrett—I cannot answer that general question, but I am willing that the record shall go in evidence.

Mr. Parker—I will offer in evidence the proceedings in Chancery in the matter of the application of the North Jersey Street Railway Company to define and regulate  
20 the mode of crossing of the line of the New York and Greenwood Lake railroad at Valley road, in the town of Montclair—first, the petition, verified December 5th, 1895, filed December 6th; second, the order for the hearing, filed December 6th, 1895; third, the decree, with the copy of the resolution of the town council and consent of the town council to the railroad company's attorneys, filed November 1st, 1899; fourth, the maps accompanying the decree, filed November 1st, 1899; we also want to prove that Mr. Barrett claimed, previous to the filing of this  
30 bill, that Mr. Speer was entitled to a crossing which would be available practically as a public way.

Mr. Barrett—I don't think that would be competent.

Mr. Parker—We have a letter here which we propose to offer in which Mr. Barrett speaks on that subject.

Mr. Barrett—That letter was written in reply to the letter of January 19th, from Mr. von Mochzisker, and if that goes in, I think the letter of the 19th ought to go in too, because the one explains the other.

The Court—If one letter goes in, they both should go in.

Mr. Barrett—Here is the letter of the 18th to Mr. von Mochzisker, the representative of the railroad company, with whom I was negotiating, and I said to him that I would rather have the crossing than \$4,500, which he had then offered to accept, and his company was unwilling to pay; then I go on to say—[counsel reads same].

Mr. Barrett—I have found four witnesses here whom I expect to call to show the physical condition of the road and the physical condition of the crossing, but in view of what the Vice Chancellor said, that as the case stands he thinks the complainant is entitled to have a crossing, I don't think it worth while to take up any further time of the court now. One of the witnesses is Mr. Halstead, who had his cows pastured there; another is a neighbor. It is all of the same character of testimony as I have previously put in, and is simply cumulative and corroborative. 10

The Court—As I understand the evidence of the surveyor of the railroad he found evidences of a crossing at the point at which it is claimed there were marks of wagon tracks on one side of the railroad, and it seems to me, as the evidence stands, there would be no doubt as to there having been a crossing there. How far it has been used, I cannot say. One of the witnesses for the railroad company says that he saw cows crossing at that place but no wagons driven over it. Some of the witnesses say that planks were laid there between the rails and wagons driven over. Since the deed was made there has been a crossing there for some purpose, and that that crossing has never been abandoned I think is the evidence as it stands now. There is another fact that has not been adverted to. I understood one of the surveyors, on the part of the railroad company, stated that there were posts in the fence separating the tracks on the easterly side of Mr. Speer's property in which rails had been placed, but on the other side there was a wire fence. He 30

didn't state whether there was any opening through that wire fence, nor has it been stated how long that wire fence has been there. You may put in any evidence you desire upon that subject.

Recess.

*Richard T. Dana*, recalled.

Further direct examination by Mr. Parker.

Q. You were up at Mr. Speer's land for the purpose of taking observations of the approach of trains on the track and give us the result of your observations?

10 A. I stood on the right of way on the east side of the railroad track and observed how far down the track you could observe the approach of trains in either direction; a train approaching from the west can be seen at a distance of about eighteen hundred feet; a train approaching from the east can be seen at a distance of about nineteen hundred feet from the point where the old roadway crosses the track; on the other side of the right of way you could see, if anything, a little bit further in each case.

20 Q. Can you tell us whether it was practical to make a level overhead crossing at Valley road without raising the railroad track over Mr. Speer's land to the degree to which it was raised?

A. Not in my judgment; Valley road was depressed—the highway of the Valley road was depressed somewhat to avoid the necessity of increasing the elevation.

Q. To what extent was that depression?

30 A. It looks to be from six to eight feet; I didn't have charge of that work and I haven't got the figures.

[The letter of Mr. von Mochzisker of January 18th and the reply to that letter of January 19th, and the reply of January 21st were offered in evidence.]

*Abram Speer*, recalled.

Further direct examination by Mr. Barrett.

Q. Mr. Dana testified yesterday afternoon that west

of the railroad embankment there was a wire fence across your property running parallel with the railroad; is there any such wire fence there now?

A. Yes, sir; what there is left of it.

Q. When was that put there?

A. Probably ten or eleven years ago.

Q. Were there any openings in it?

A. Yes, sir.

Q. Where?

A. There were bars and they were taken away within 10 the last six months; this gentleman over here [indicating] called on me, and I went down with him, and when I got over the railroad I saw they were gone; on the side next my house they were there yet.

Q. When the wire fence was put there there were posts and bars for the purpose of a crossing through it?

A. Yes, sir.

Q. And when were those bars removed?

A. Well, I don't know when they were removed, but I say when I went over there with this engineer that they were gone, and I spoke of it, and I said those two bars had been taken away, but I said next my house they were there until a day or two ago; there is a wire fence along the side of the railroad.

Q. Who does it belong to?

A. The railroad company; in the first place they put up a board fence, and that burned down, and I notified Mr. Smith, the superintendent at that time, that his fence was down and out of order, and I asked him to repair it, but I didn't get much satisfaction, and finally I met him 30 up at Upper Montclair, and he said: "If you can show me any good reason why we should build that fence, I don't know but what we will do it;" I said: "Well, I will show you a copy of my deed."

Q. Never mind that; what did Mr. Smith do afterwards; what was—

A. Mr. Smith said that if I could show him any good reason he would repair it.

Q. What was done?

A. The wire fence was sent up there and I nailed it on for them.

Q. Were the posts already there?

A. The old posts were there.

Q. You say there was an opening left where this farm crossing was made?

A. Yes, sir; there was a farm crossing there of about fourteen feet.

10 Q. With bars?

A. Yes, sir.

Q. And the opening is there still, is it not?

A. The opening is there still and the bars are still on the east side, or they were there within a day or two when I went up there with this young man, and when I was there three weeks ago I saw them, but they were removed on the other side, and when that was done I cannot say.

Q. What is there on the west side?

20 A. There is a fence.

Q. On the west side?

A. I don't quite catch your meaning exactly.

Q. What is there on the west side?

A. There is a fence on the west side.

Q. Is the fence there yet?

A. Yes, sir; but the bars, where the crossing was, are gone.

Q. What is there in place of it?

A. Nothing, just an opening.

30 Q. How long has that fence been there?

A. That fence was started in there when the road was built.

Q. I mean the wire fence?

A. Well, I could not tell you just the number of years; I have no date for it.

Q. A long while ago?

A. Well, I suppose ten or fifteen years ago, in that

neighborhood, while Mr. Smith was superintendent of the road.

Q. That is all.

Complainant rests.

*Richard F. Dana*, recalled.

Further examined by Mr. Parker.

Q. You testified you were at this land to-day and you were there about three weeks ago?

A. Yes, sir.

Q. And last September?

10

A. Yes, sir.

Q. Did you notice any opening in the wire fence on the west side of the track?

A. I did not notice it.

Q. Mr. Speer testifies that there was an opening there on the west side of the track, is that so?

A. I will not swear there was not an opening, but I didn't see the opening.

Q. That is all.

Case closed.

20

Before his Honor Vice Chancellor Stevens.

*Mr. Halsey Barrett*, for the complainant.

*Messrs. Cortlandt & R. Wayne Parker* and *Mr. Chauncey G. Parker*, for the defendants.

Transcript of shorthand report of the decision of the Vice Chancellor, of the above-stated cause, on Tuesday, the 3d day of June, A. D. 1902, at the Chancery Chambers, Newark, N. J.

The Court—I find, on looking at the English cases and other cases which are referred to in the Pipe Line case, that there is a distinction between an easement 30

which is created for the benefit of the land only and a stipulation giving the right of way in general terms. The English cases hold very clearly, and I understand they are approved in the Pipe Line case—they hold very clearly that where a railroad gives a right of passage, that that is a right of passage for all purposes, and that it is a right which enures not merely to the grantee of the easement for the purposes for which he is then using the land, but it enures to every tenant of the grantee and to every grantee of that grantee however much he may sub-  
10 divide the land.

The English cases are entirely clear that the land may be subdivided indefinitely, and that every subdivision will be entitled to the enjoyment of the easement. Those cases seem to me to be founded on good sense, and besides that, as I understand it, they are referred to in the opinion in the Pipe Line case as being law.

Now, it seems to me to follow from these decisions that the complainant's right is broader than I had at first sup-  
20 posed it was. The situation is this—the language of the deed is: "The party of the second part doth for itself and its successors agree to make and maintain necessary fences on both sides of said tract of land, which shall be built before the work of grading the said track is commenced, and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway, where the party of the first part may direct."

Now, the party of the first part did direct that the ease-  
30 ment should be where the old road had been, and the company assented to that direction, and constructed a passageway in accordance with that direction. I find a very significant passage in a decision by Chief Justice Beasley in the Morris and Essex Railroad Company's case, 2 Vroom 209: "If A grant to B a right of way over his farm, such way to be laid out by B, it could not be plausibly pretended that after such way had once been located and ascertained by B it could afterwards be re-

located or altered or added to by him." That was in a case in which it was held that the Central railroad, having once located their tracks in a certain way, could not afterwards relocate them; that the power that their charter gave them was exhausted, and that the location must remain forever as it was.

Now, I take it that as soon as the grantor gave that direction, and the railroad company assented to that direction, the right of way became fixed; it would not afterwards be changed by either party without the consent of 10 the other. The effect was the same as if the exact location of the crossing had been defined by the deed itself. That being so, what is the consequence? The consequence is that neither party could change that location without the consent of the other. That is the inevitable consequence of this view of the construction of the clause.

Now, that being so, I take it, that inasmuch as the location cannot be changed laterally, it cannot be changed vertically; a vertical change would be more inconvenient and more destructive of the right, as it was created by the stipulation, than a lateral change; and so I take it that 20 what Mr. Speer was entitled to was a crossing practically at grade—a crossing in which the approach was not raised more than eighteen inches above the general level of the land, because, that, according to the evidence, was the grade established by the railroad company. Now, what the company did was to put up and construct this embankment, sixteen feet high, and destroy the crossing. There is absolutely no crossing there. In other words, they have deprived the complainant of that easement 30 which by his deed he was entitled to, and they did it after notice by the deed itself, which was placed upon record, and by actual notice of the complainant's right.

The evidence seems to be that this notice was given either just before the actual work of grading commenced, or just afterwards. If I believe the testimony of the company's witnesses it must have been given before the work was commenced, because the latter shows that the notice

was given in March—I think, on the 23d of March, 1890—and two witnesses on the part of the company said that the work was commenced about the 1st of April. Mr. Speer's evidence seems to indicate that the work of grading had been commenced, but in that he may be mistaken, and he is, if the company's witnesses are right. But whether Mr. Speer is right in that matter or whether the company's witnesses are right in that matter, in either case the notice was given at the earliest possible opportunity, and therefore Mr. Speer has lost none of his rights.

Now, this I take it to be the situation of the parties. The agreement having provided that the crossing should be at that identical point, of course the company was not at liberty to give Mr. Speer another crossing at any other point, and certainly they are not at liberty to say that a crossing over the lands of somebody else, in a more indirect way, is equivalent for the right which he has by his deed.

20 Under those circumstances the question is, what to do with this case? I have come to the conclusion that in order to meet the equities of the case the company must do one of two things. They must either give an under-grade or tunnel crossing, or they must proceed to condemn the right. They must proceed to condemn the right of which they have now deprived Mr. Speer altogether. I think that I ought to put the decree in the alternative. The reason why I desired the presence of counsel here this morning was that, after explaining the case as it strikes me, I might say that if there is any question as to whether or not the company can condemn such a right, I would be glad to hear argument on that subject. It wasn't referred to in any way, and has never been discussed. The point is this: whether the company, having agreed to give this crossing, can now ask to come in and condemn the very thing which they have given by deed.

Now, my own impression about it—and in that im-

pression I may be entirely wrong, because I haven't examined the case, and did not examine it, because I desired to give counsel an opportunity to discuss it, if they desired to, before I examined it—my own impression about it would be that, inasmuch as the railroad company could condemn any other right they would also be at liberty to condemn such a right as this. For instance, suppose the railroad company having a piece of land it didn't want for the time being, should convey that land by a general warranty deed to a guarantee. I don't suppose 10 that if they afterwards desired this land, and had the right under their charter to condemn that they would be prevented by their warranty deed from condemning, and if they could condemn the whole interest, I don't see why they cannot condemn a partial interest, even though they themselves had created that interest. It would seem that to compel the company to construct this tunnel without any other alternative, would not be equitable under the circumstances of this case. The right which they would then be obliged, by the judgment of this court, to give 20 Mr. Speer would be a more advantageous right than that which he got by his contract. What he got by his contract was a right to cross the tracks at grade. That right was of course attended with some risk, and it was much less convenient, and of course much less beneficial than a right to cross at grade under the raised tracks, and so if I merely compel the company to give this underground crossing, I would be compelling the company to give something for which they never stipulated, and something which would be more beneficial to the complainant 30 than he was entitled to by the terms of his original deed. And then perhaps I may advert to one other consideration which at present doesn't strike me as forcibly as the one I have just mentioned. Counsel will find in the May 15th number of the Supreme Court Reporter, that the Supreme Court of the United States has just decided a case of Pine against the City of New York. In that case an owner of land fronting on a stream of water

sought to enjoin the city of New York from building a dam, under these circumstances: the stream was partly in the State of Connecticut and partly in the State of New York. The land of this landowner was below the dam. The stream flowed for a certain distance in New York and then went into the State of Connecticut, and the dam was erected at a point within the State of New York. Now, the city of New York was endeavoring to secure the waters of this river for a water-supply and was

10 proceeding to build its aqueduct, with the result that the water would be entirely diverted from the land of this landowner, and would be used by the city of New York. There could be no condemnation in that case, because the city of New York could not condemn in Connecticut. There was, however, some negotiation between the parties before the dam was begun and while the construction of the dam was in progress; and the Supreme Court thought that inasmuch as both parties contemplated a money equivalent for the loss of this

20 water and had been negotiating on that basis for a considerable time, and there had been no absolute assertion on the part of the landowner of his right to the flow of water, that for that reason it would be inequitable to give him anything more than a money equivalent, and so they held in that case that they would enjoin unless the city of New York would pay him such damages as should be assessed by the Court of Chancery. They reversed the decision below which made the injunction absolute. This case perhaps resembles that in some respects. Here, too,

30 there was considerable negotiation for a money equivalent, and while the complainant never gave up his right yet he did negotiate with this company, on a money basis, to a certain extent. There were negotiations extending, as I understand the evidence, through several months, and they could not come to terms just as they could not come to terms in the New York case, to which I have just alluded. That may be an additional reason for making the order in the alternative as I have suggested.

If counsel desire to be heard on the question of whether or not there can be a condemnation of this right, under the charter of the railroad company, I will hear them on that point, but otherwise the inclination of my mind is to give a decree that the company shall either construct this tunnel or shall condemn. I don't think that a road constructed in the way that the railroad company proposes would be the right of way which was given by the contract. That would, in the first place, not be as convenient; it might be sufficient for the present purposes of the owner, but inasmuch as under the terms of this stipulation, the owner is entitled to have a suitable and convenient crossing, which shall be suitable and convenient in the future as well as in the past, why evidently such a crossing as that would not be either convenient or suitable for such uses as the evidence would indicate the land will be needed for in the near future or may be devoted to. I think that such a crossing would be very much less convenient and suitable than the crossing which Mr. Speer and his father have enjoyed for thirty years. 10

So far as the crossing, with approaches on Mr. Speer's land is concerned, the evidence shows that in order to make such a crossing, considerable land of his own would be taken. There was no such contract as that. Mr. Speer is not obliged to give more of his land than he has already given for the consideration which he received. The evidence, I may say, appears to indicate that this land is rapidly becoming something other than farm land. The price in itself indicates that. All the witnesses, on both sides, say the very worst of this land is worth \$200 an acre, and the evidence of the company, as well as the evidence on the part of the complainant, indicates that streets are being run through in the immediate neighborhood, which indicates that this is going to be a suburban residential neighborhood, and not merely a farming neighborhood in the near future. Under the English cases we have got to take that into consideration; we have got to give a crossing which could be used by the grantees 20 30

of Mr. Speer for such purposes as they may then desire to use the land, as well as a crossing for a mere farming purpose, for which Mr. Speer now uses it.

If there is an appeal to be taken in this case, I think I had better announce my decision now, so that it can be taken to the next Court of Errors.

Mr. Parker—Has your Honor considered this case against the town of Newton—this question of alternative relief, where, instead of sending the plaintiff to law  
10 in condemnation proceedings, it was referred to a master to ascertain the amount to be paid. There are a list of cases that I submitted to your Honor at the time of the argument, and I think not only that case, but a number of other cases previous to that time say that it wasn't necessary to go to law to have the appointment of commissioners and all that; that the Court of Chancery would take care of the whole affair and carry it through to the conclusion; it seems to be much simpler and a less roundabout matter. I don't know what counsel desires,  
20 but that would eliminate the question as to whether there should be any argument in the matter of condemnation. I will say that that question was considered at the time this claim was first made, and it was considered not only by the counsel of the road in this county, but also considered by Messrs. Corbin in Jersey City, who acts for the railroad company; they all seemed to be quite clear that the statutes didn't seem to provide for the situation; therefore, they didn't pursue that method, they thought it was practically useless—taking the view that it was  
30 an attempt to use condemnation proceedings for the purpose of defeating every right which the company had agreed to give. That was the view counsel took in the case, and it seems to me there is a great deal of force in that position. I must say that I am a little surprised at the view the court has taken on the right of complainant; the complainant himself put his right upon the covenant, not by a right of way or reservation at all; his whole bill is framed on that view, and we take very much a similar

view, and it makes considerable difference in deciding the question as to the right of condemnation whether it is a covenant or reservation, and I must say the case may be fraught with difficulties if we go to the Court of Errors and contest there as to what this right is. It seems to me that both the railroad and the complainant are desirous of reaching some sort of an adjustment of this affair, and that it would be wiser for the court, if it was within the jurisdiction of the court, as the court holds, to direct that this amount of money should be ascertained 10  
by reference rather than insisting upon the condemnation. I think that not only in the Newton case, but in four and five previous cases this court has taken that course, even though it appeared that there was a right of condemnation at law. It says: "Well, the plaintiff is here asking for relief, and if he comes into a court of equity he must do equity, and it is just as competent for us to find out what sum of money would compensate him as it would be for a commissioner, and he must take such sum as that court awards, upon a reference to the 20  
master." I must say that this seems to be a very strange position for the court to take, and I would suggest to counsel—counsel practically submitted to that course at the argument—it seems to me that would be a better way to have the decree framed, than to order us to condemnation.

The Court—I remember Mr. Parker alluded to the subject on the argument, but I don't think it was discussed at all, certainly not by Mr. Barrett, and I will hear any argument on that question which counsel may 30  
desire to present. It is a question, to my mind, that is not entirely free from difficulty. The peculiarity of this case lies in this circumstance, that I cannot find that Mr. Speer has been guilty of any laches whatever. He is standing on his rights, and he has not lost them by any lack of diligence. Now, this case must be argued on that basis, so far as I am concerned. I know counsel did make the argument that there was some laches, but I

have carefully reread the evidence, and I cannot find any laches at all, and so Mr. Speer is not put upon any terms growing out of the fact that he has been in laches. The point to which I allude with regard to the decision of the Supreme Court of the United States is a different point. There may be an argument that Mr. Speer did indicate by his conduct that he was willing to take a money equivalent for his right, but I don't consider that that is any indication of laches on his part. He insisted on his right  
10 from the beginning, although he likewise, to a certain extent, signified his willingness to take a money equivalent for that right, if the company was willing to pay him what he thought it was worth.

Mr. Barrett—The evidence shows and the correspondence shows that this suggestion of a money equivalent came wholly from the railroad. Now, the mere fact that Mr. Speer did not refuse to consider that—that he didn't push it all aside and say, "I won't consider any settlement other than giving me such a crossing as I may be  
20 entitled to under the agreement"—I don't think that that binds him or changes the situation in any respect, or really gives the court any jurisdiction to assume that that matter should be adjusted by a money equivalent. I think the fact that we did allow the railroad company to present offers to us, which we consented to consider, cannot change the situation at all.

The Court—It is very much like the Supreme Court cases in this: that Mr. Speer allowed the embankment to be constructed while he was negotiating for a money  
30 equivalent; he didn't file his bill before they commenced to construct the embankment, or as soon as he saw they were constructing the embankment. On the contrary, he allowed matters, under this negotiation for a settlement, to drift on for over a year. Now, that was the case in the Supreme Court of the United States. The complainant in that case never gave up his right—in-  
sisted upon his right—but at the same time, while the dam was being built, he negotiated with the company,

and didn't file his bill to enjoin the construction at the beginning. So, I say, there may be some similarity between these two cases in that respect.

But there is another thing which I tried to make clear, and that is this: that by no action of the court can the complainant be restored to his original right. The court must give him either something less than his original right or something more. If the court gives him merely a way, such as the company proposes to make over the property, it will give him something less than his original right. If, on the other hand, the company gives him a tunnel, they will give him something more than his original right. That, I think, is a circumstance which ought to be taken into consideration when the court deals with this subject. 10

Of course I don't ask counsel to discuss this matter to-day, but I will be glad to hear any discussion either with respect to the question of whether the company can condemn this right, or with respect to the question of whether the Court of Chancery should, itself, assess the damages. I don't know what the charter of this company provides, whether it provides for a trial by jury or not, but I will hear discussions on that question, and I will fix some early day for the hearing, if counsel desire to argue it. 20

Mr. Barrett—Just one moment. Inasmuch as the right of way or the crossing was destroyed by the railroad company wholly, the mere fact that the physical situation is such that the court cannot absolutely restore it in the same manner as it was, but either, more or less, it seems to me that as we are innocent and have not committed laches, that you cannot give us as much, you must necessarily give us more; that that would be the alternative. 30

With respect to the alternative of a condemnation, as provided in the decree, it seems to me that that is not to be placed in the decree—the right of this company to condemn, if such a right existed, nor be based or depend

in any respect upon the decree of this court; it depends on a present right, and that present right now cannot go by reason of this decree, and consequently it seems to me that the decree ought to be made for a specific performance, or in the nature of specific performance as your Honor has indicated, and that there is no basis for an alternative decree there. If the company has that right to compel us to take money or if our negotiations have created such a condition that we ought to take  
10 money, then it seems to me it doesn't need to be in the decree at all. That is the only suggestion that I make.

The Court—I don't know what the form of the decree will be; it might be in this form: that the company should be required to construct this tunnel, putting it of course in the negative form that they should be enjoined from continuing the present construction unless within a certain time it applied to condemn, I don't know what the form ought to be. That would have to be considered by counsel.

20 Mr. Parker—I should like to say a word. I do it with much hesitancy, because I fear I am simply repeating what had been uttered, but has not reached me. I understand your Honor to meditate upon making a decree for the complainant in this case, and at the same time to realize that a decree, such as he asks for, is unjust in its consequences, that to build a tunnel would be pressing into the contract as you hold, exceeding something far greater than was ever contemplated or thought of, and the payment of which is hardship and unjust, and your  
30 Honor suggested that under such circumstances if there would be a condemnation under the charter and powers of the company, that that course would be taken. So that there is doubt, certainly there is grave doubt, it seems to me, as to whether a company can condemn back again the very thing that they have themselves created. That difficulty stares me in the face at once, and I think there are others, in the absence, I think there is an absence probably of a direct law upon the subject; there

must be a general law I think, at any rate I am quite sure it cannot be any charter itself. Now, that being so, is not that very difficulty a reason—a controlling reason why your Honor should take this matter of the adjustment between these parties according to right, in your own hands. That is the practice of Chancery in many cases. I can refer to the books in such matter as that, that where the court finds that justice calls for a certain result and no absolute law gives the power of reaching that result, then the court, and it should be so, as a court of equity it is the very object of its jurisdiction, should come in, and, by its action, referring it to a jury perhaps, but with no duty to do that, and still a duty existing in the court to do the exact right between the parties which your Honor can do by your own action, the evidence given and taken for that purpose or through the use of the ordinary means of arriving at a money compensation. 10

The Court—Well, if Mr. Barrett will consent that the damages should be assessed in the Court of Chancery, provided the railroad elect that alternative, there may be no further difficulty; if he will not then I wish your argument on that subject. 20

Mr. Barrett—Of course I don't wish to consent now.

The Court—I suppose Mr. Barrett would desire to consider that question, and you can let Mr. Parker know.

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OPINION.

[Filed March 26, 1903.]

*Mr. Halsey M. Barrett*, for the complainant.

*Mr. Chauncey G. Parker, Mr. Cortlandt Parker, Jr., 30*  
and *Mr. Cortlandt Parker*, for the defendant.

STEVENS, V. C.

The bill is filed to compel the defendant company to restore a farm crossing over its tracks in Upper Montclair. By deed dated June 20th, 1870, John A. Speer conveyed in fee to the predecessor of the defendant company, for the consideration of \$487.50, a strip of land one hundred feet in width running through the middle of his farm. The farm contained about forty acres. In this deed the grantee company stipulated as follows: "The  
10 said party of the second part doth for itself and its successors agree to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the work of grading on said track is commenced, and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct."

In conformity with this stipulation the grantee directed that the crossing should be where an old road ran through to the middle of the farm. To this direction the  
20 company assented and provided a crossing accordingly. Its single track ran through the farm nearly at grade, the rails being laid about eighteen inches above the natural surface. On both sides of the track planking was laid, and the crossing so constructed that the grantor could cross with his farm wagons, horses and cattle. The way was used by the grantor, and after his death, by the complainant, his sole heir-at-law, up to the month of April, 1900. During the latter part of this period, however, the complainant seems to have utilized it only as  
30 a driveway for cows, so much of the farm as lay west of the track having been devoted to pasturage.

In the year 1897 the company constructed an additional track, and in April, 1900, raised both tracks so as to run over the Valley road at an elevation of thirteen feet (clear head room), pursuant to a decree of this court, regulating the use of that highway as between the North Jersey Street Railway Company and the defendant company. In thus raising them, the latter company was

obliged to raise them at the farm crossing, and it constructed across complainant's land a solid earthen embankment about fifteen and a half feet high. It did not bridge the crossing, but completely destroyed it. Complainant can only now go from the easterly to the westerly part of his farm by making a considerable circuit on land not his own.

Just before or very shortly after the work of grading had begun, the complainant notified the agents of the company of his right. The notice of claim is dated 10 March 23d, 1900. The company's first reply is dated March 29th, 1900. Mr. Moore, the company's engineer, says the work of elevating began about the 1st of April of that year. The company, notwithstanding the notice, went on and constructed the embankment across the way.

The stipulation in the deed is only that the company and its successors shall provide the *party of the first part* with a suitable and convenient road crossing. It does not in terms extend to his heirs and assigns, but it has been settled that those terms are not, in a case like the 20 present, necessary to attach the covenant perpetually to the land. In *Pipe Line Co. v. D., L. & W. R. R. Co.*, 33 Vr. 254, 274, the stipulation was that the company should erect and forever maintain under the rails of its railroad a suitable wagon road or crossing, &c. Mr. Justice Depue, speaking for the Court of Errors, said: "The grant in terms is to Stewart without the word 'heirs' or words of perpetuity. Such a grant at common law would create only a personal right for the life of Stewart. Where the right is granted in a deed, in 30 the nature of a reservation, and it is manifest from all the recitals in the deed on the subject that the plain purpose of the parties was to create a right for the benefit of the part of the whole tract which had been severed by the conveyance, the grant will be construed as creating an easement appurtenant to the premises and will pass as such without the word 'heirs,' at least in equity." The covenant in the case in hand does not differ essentially

from that which was the subject of consideration in the Pipe Line case, so far as it is in the nature of a reservation. Here, as there, the plain purpose was to create or rather to preserve and perpetuate a right for the benefit of the severed parts of the whole tract. It therefore follows that the complainant, who is the sole heir of the grantor of the land, is entitled to the benefit of it.

In view of the decision in the Pipe Line case, the company does not seriously contest its liability in some  
10 form. It says that it is willing to give a crossing in one of three ways: (1) it will undertake to give an outlet to the Valley road over a right of way *to be* acquired by it. This will compel the defendant to make a circuit off his own land, in order to go from his house and barn and from the Valley road to his land west of the raised tracks; (2) it will provide approaches on its own land parallel to its tracks, which will carry the crossing over the road at grade, or (3) it will construct approaches on  
20 the complainant's land so as to carry the crossing over the road at right angles to the direction of the tracks. The company suggests further that in case the court shall be of opinion that the complainant is not obliged to accept either of these three modes of crossing, then it shall itself ascertain the damages which the complainant will suffer from the severance and compel him to accept them, in lieu of the specific relief which he asks.

The complainant refuses to accept any of these propositions, and insists upon his right to a crossing at the level at which it existed for the thirty years prior to the  
30 raising of the tracks. In reply to this insistent the company says that such a crossing would cost over \$5,000, while any of the other modes of crossing would not cost more than five or six hundred.

It would seem, at first blush, as if a crossing, such as the company offers, would answer complainant's requirements and that the rule should be applied that if subsequent events have made literal performance by defendant so onerous that it would impose great hardship upon

the company and be productive of little or no benefit to complainant, then it will not be decreed. Trustees of Columbia College *v.* Thatcher, 87 N. Y. 311. But a little consideration will show, I think, that this case does not fall within the reason of the rule. In the first place, if the company will now be obliged to spend \$5,000 upon what I shall call a tunnel crossing, it is only because, in the face of not only constructive but *actual* notice of the complainant's rights, it chose to go on and disregard them. The company's engineers do not tell 10 us what such a crossing would have cost had it been made while the work was progressing. It is obvious that it would have cost very much less than it will now. The company was under no compulsion to construct the embankment as it has constructed it. If the company deliberately disregarded complainant's rights it should not be permitted to stand in any more favorable position for having done so. In the second place, the evidence shows very clearly that the right, as it has heretofore been enjoyed, is gradually becoming more valuable. There is 20 evidence on both sides that the land in the vicinity is coming into the market for residence purposes and that it now possesses a value much above its value as farm land. An outlet to the Valley road, such as the tunnel crossing would afford, would give added value to the complainant's land west of the embankment.

If then the complainant has a legal right to a tunnel crossing, there is nothing in the present situation, created by the defendant itself, after full notice, that would warrant the application of the above rule. I will first con- 30 sider the nature and extent of the right, and then whether equity should deprive him of it in the form in which it is given.

The covenant is, that the predecessor of the defendant company will "provide the party of the first part with a suitable and convenient road crossing, across the track of said railway." This right is not, as it was in the Pipe Line case (*supra*) limited "so as to enable said S.

to travel and cross freely between his land on each side of said granted premises." It is an unlimited right, a right of passage for all purposes; and the case in hand, as it seems to me, comes within the principle of the cases, cited with approval in the Pipe Line case, which hold that a crossing has been given for all the purposes to which, at the time, or at any future time, the owner or any grantee of the whole or any part of his land may think fit to appropriate it. One of the passages  
10 quoted with approval in the Pipe Line case is taken from judgment of Lord Justice Mellish in *United Land Co. v. Great Eastern R. R. Co.*, L. R., 10 Ch. App. 587, and is as follows: "When a right of way is created by grant or act of parliament, it must depend on the proper construction of the grant or act of parliament whether the right of way is to be used for all purposes or for only limited purposes. No doubt there are authorities, that from the description of the land to which the right of way is annexed and of the purpose for which it is  
20 granted, the court may infer that the way was intended to be limited to those purposes. But if there is no limit in the grant, the way may be used for all purposes." See, also, *Newcomen v. Coulson*, 5 Chan. Div. 133. A glance at the map makes it apparent that on a subdivision of the land into lots the tunnel crossing would be far preferable as a means of reaching either on foot or by vehicle what is the principal highway in that locality, viz., Valley road. Speer had, by the above-quoted reservation, the right to go from the westerly  
30 part of his farm to that road, and the above cases show that his grantees, however numerous, would have the same right.

This brings me to the question, whether the complainant has the right to the tunnel crossing which he now claims.

The deed provided that the crossing was to be "where the party of the first part may direct." It is admitted that the direction was both given and complied with.

That irrevocably fixed the place of crossing. The case is identical with that suggested by Chief Justice Beasley in *M. & E. R. R. Co. v. Central R. R. Co.*, 2 Vr. 209. He says: "If A grant to B a right of way over his farm, such way to be laid out by B, it could not be plausibly pretended that after such way had been once located and ascertained by B it could afterwards be relocated or altered, or added to by him." The precise location having been once for all settled, it is as binding upon the parties as if it had been fixed by an actual description 10 in the deed itself. But it is obvious that if its location could not be changed laterally, it could be changed vertically. The vertical change here proposed would be much more inconvenient than any lateral change. The way, if changed vertically, would not be the way located and agreed upon by the parties. It has been suggested, however, that while a crossing with raised approaches would not be as convenient as the old crossing, a tunnel crossing would be more convenient because the tracks, not being crossed at grade, the element of danger would 20 be eliminated; and that if complainant ought not to be compelled to accept an inferior crossing, he is not entitled to a better. But certainly this ought not to be urged as an argument why the company should not perform its contract. The crossing would only be better in the sense that it would be less dangerous. In all other respects it would be the same. It would hardly be permitted to defendant to say, "I ought not to be compelled to give you the very way which I have stipulated to give you because I will now be obliged to so construct it as 30 to obviate all danger of collision."

It being clear that complainant has the legal right to the very crossing which his father designated and the company gave, the question then is whether equity ought to compel him to take something else. I do not see any reason for compelling him to take a roundabout crossing off his own land, nor do I see any reason for compelling him to accept as a substitute a more dangerous and in-

convenient one over the tracks of the company, whether that crossing be constructed on the company's land with approaches parallel to the tracks, a very awkward way of getting over them, or a crossing with approaches constructed on complainant's land—land which he never gave for the purpose—at right angles to these tracks, it being remembered that the only ground on which this is asked is that of expense; and the expense having been, to a considerable extent at least, incurred only as a result of the  
10 violation of the complainant's right after notice.

It is urged, however, that if complainant cannot be compelled to take a less advantageous mode of crossing, he should at least be compelled to take damages in lieu of performance. If complainant could condemn, there would be much force in the contention; for it has been repeatedly decided, both here and in the Court of Errors, with reference to analogous cases that this court has power to award damages. But it is conceded by counsel on both sides that this right of way cannot be condemned.  
20 And the reason is obvious. The charter of the original company preserved the old road to the landowner (Laws of 1867, chapter 160, section 9) and the General Railroad act, under which the present company is formed, requires that suitable wagon ways shall be constructed over, under or across the railroad where it intersects any farm. Gen. Stat., p. 2661, § 84. The company could not condemn that which, in every condemnation proceeding, is expressly reserved or given to the owner. If then  
30 the law gives the right to the crossing and if the crossing has been actually located, constructed and maintained under an agreement or covenant which neither party may vary from without the consent of the other, it would seem plain that the court should enforce the agreement as it finds it and not give something as a substitute unless the company can show that under the particular circumstances of the case, to enforce the legal right would be inequitable.

It is very clear that the mere expense will not, under the circumstances, give rise to an equity.

Long and undisturbed possession may create an equity, but here the possession was with the complainant and not with the company.

Laches might, if present, give rise to an equity, but here there was diligence. It is indeed contended that complainant, anyway, should have acted while the proceedings between the railroad and trolley companies were in progress. But how could he have acted? Even if it were shown that complainant had other than constructive notice of these proceedings he could hardly have anticipated that the company, without necessity, would obstruct his way with an embankment when they might have easily bridged. 10

There is one other conceivable ground on which it can be claimed that complainant is estopped from claiming the very right which the law and the contract both gave him, and that is the ground suggested by the case of *New York City v. Pine*, 185 U. S. 93. In that case it appears that the Bryam river flowed partly in the State of New York and partly in the State of Connecticut. It had two branches, the east branch being in Connecticut and the west branch being chiefly in New York. The city of New York was constructing a dam near the Connecticut line with the intention of appropriating the waters of the west branch to increase its water-supply. The bill was filed by a riparian owner in Connecticut, lower down the stream, to enjoin the city from making this appropriation. The Circuit Court of Appeals affirmed the decree of the Circuit Court granting an injunction, but the Supreme Court reversed, and held that the complainant should have damages, and not an injunction unless the damages were not paid. 20 30

It is, of course, apparent that the city of New York could not condemn land in Connecticut. The grounds upon which the Supreme Court refused to sanction the injunction, in the first instance, were these: that it was not a case between two individuals, one of whom asserted that his property rights were being infringed by the

other; that it was rather a case between an individual having a right that was of small value to him, and a public corporation which was undertaking to supply its citizens with a necessary of life; that the city had been engaged in this work of public utility, to the knowledge of complainant, for two years prior to the commencement of his suit; that during all that time the plaintiffs and the city had been trying to agree upon the amount of compensation, thus showing, as Mr. Justice Brewer says, 10 "that the plaintiffs were seeking *compensation* for the injuries they would sustain and were not insisting upon their alleged right to an abandonment of the work;" and that had the injunction been continued a costly public work would have been rendered useless. In view of these facts, Mr. Justice Brewer says: "If one aware of the situation believes he has certain legal rights and desires to insist upon them he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such 20 rights, but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waived, especially if it is in respect to a matter which will largely affect the public convenience and welfare, a court of equity may properly refuse to enforce these rights, and in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal." *Simmons v. Paterson*, 15 Dick. Ch. Rep. 393, 30 is, in our own State, decided upon the same principle.

The case in hand differs from the case cited in the very particulars which justified the court in giving compensation rather than an injunction. In the first place, no public interest is involved. It is perfectly immaterial to the public whether the defendant's trains be carried over a bridge or arch twelve or thirteen feet wide or over an embankment. The plaintiff does not ask that the company be ejected from the lands or restrained from

running its trains. In the second place, the lapse of time intervening is considerably less. The parties were in negotiation for a few months and not for two years; and the negotiations related not only to a money equivalent, but also to the alternative rights of way proposed and proposed only by the company. In the third place, the parties appear from the start to have been hopelessly at variance because of the opposite views taken of the nature and value of complainant's right, and Mr. von Moschzisker, the company's agent, admits that Mr. Speer 10 did not go so far as to agree to accept a money equivalent. It is not a fair inference from the evidence that complainant waived his right to an injunction. From the outset he insisted upon it. The situation was this: The company, in the face of notice, obstructed the crossing, and having obstructed it, began to propose substitutes for it. Unless it was improper for the complainant to have merely listened to these proposals he was not lacking in diligence. It would seem plain that he has done nothing which the company is in a position to in- 20 sist upon as being a waiver of the right which the deed and long-continued enjoyment under the deed gave him.

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#### FINAL DECREE.

This cause coming on to be heard at the October, nineteen hundred and two, Term of the Court of Chancery, held at the State House in the city of Trenton, in the presence of Halsey M. Barrett, of counsel with the complainant, and Messrs. Cortlandt & Wayne Parker, of counsel with the defendant, and the pleadings and proofs having been read and the argument of counsel having 30 been heard and considered, and the court having duly considered the pleadings, proofs and arguments, and it satisfactorily appearing to the court that by a certain

indenture, made the twentieth day of June, eighteen hundred and seventy, duly acknowledged and recorded in the office of the Register of Essex county July fifth, eighteen hundred and seventy, in Book D 15 of Deeds, for said county, pages 267 and 268, John A. Speer, the father of the complainant, did convey unto the Montclair Railway Company, its successors and assigns, in fee-simple, all that parcel of land in the township of Montclair, county of Essex and State of New Jersey, bounded

10 on the north by land of Clemens Sigler, on the south by land of Bessie L. Rodman, on the east by a line parallel with and fifty feet distant from the located center line of the railway of said company, and on the west by a line parallel with and fifty feet distant from said located center line and the line of I. D. Sigler, containing one acre and eleven-hundredths of an acre; and that in said indenture, the party of the second part did, for itself and successors, agree to make and maintain the necessary fences on both sides of said tract of land, which fences

20 were to be built before the work of grading on said tract should be commenced, and should provide the party of the first part with a suitable and convenient road crossing across the track of said railway, where the party of the first part should direct; and it further appearing that the said John A. Speer did direct that said suitable and convenient road crossing should be located and provided by the said Montclair Railway Company, across the track of said railway, at the place where a former farm road had been located, and used by said John A. Speer, and

30 that said crossing was thereupon located by said Montclair Railway Company across its said track where said farm road had formerly been, which crossing was at or about grade and was maintained by said Montclair Railway Company and its successors, as located by the direction of said John A. Speer, continuously until about January, nineteen hundred.

And it further appearing that in the year eighteen hundred and ninety-six, the said land and the railroad route,

rights, franchises and privileges, originally of said Montclair Railway Company, were leased to the defendant, the Erie Railroad Company, for a long term of years and that the said Erie Railroad Company thereupon entered into possession and occupation of said tract of land formerly of John A. Speer, and of the right of way and property formerly of the Montclair Railway Company, and are operating said railroad under and by virtue of the franchise and the rights originally of the Montclair Railway Company, in accordance with the terms of said lease; 10  
and it further appearing that in the said month of January, nineteen hundred, the said Erie Railroad Company determined to elevate its railroad tracks upon the land conveyed to it by the said John A. Speer, and in pursuance of its said plan of elevating its said railway tracks, constructed an embankment for the support of its road-bed or tracks upon the right of way across the premises described in said deed of conveyance, which embankment is about sixteen feet high and is filled in solidly, whereby the said crossing hereinbefore referred to was completely 20  
and wholly destroyed; and it satisfactorily appearing that the complainant, Abram Speer, is the only son and heir-at-law of said John A. Speer, and that said complainant is at the present time, and was at the time of the destruction of said farm crossing, the owner of the land formerly belonging to his father, said John A. Speer, located on both sides of said line of said railroad, and that said complainant has been deprived of all use of said crossing by reason of the said embankment constructed by the defendant and of that easement which, by the deed 30  
of said John A. Speer, the said John A. Speer, his heirs and assigns were entitled to enjoy, with respect to said crossing; and it further appearing that the complainant is entitled to a crossing of the tract conveyed to said railway at the point where the same was formerly located and maintained by said railway company, which crossing shall be substantially and practically at grade, and that the only means whereby such grade crossing, practically

at grade, can be secured to the said complainant, his heirs, assigns and subsequent grantees, is by the means of a tunnel or opening through the said embankment constructed by the defendant upon its said tract of land, which tunnel or opening should be of sufficient width and height to provide said complainant, his heirs and assigns and subsequent grantees, with a suitable and convenient road crossing across the track of said railway, and that the complainant is entitled to the relief prayed for in  
10 this bill of complaint, and is entitled to have a suitable and convenient tunnel or opening constructed and maintained by the defendant at its expense, through its said embankment at the place where said crossing was formerly located:

It is, on this thirteenth day of April, nineteen hundred and three, by William J. Magie, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor, by virtue of the power and authority of this court, doth hereby order, adjudge and decree that  
20 the defendant, said Erie Railroad Company, shall be enjoined from continuing its said embankment at the place where said road crossing has been heretofore provided and maintained; and the court doth further order, adjudge and decree that the defendant, said Erie Railroad Company, shall and do forthwith, and without unnecessary delay, construct a tunnel or opening through its said embankment and across its said right of way, at the place where said road crossing across the track of said railway has been heretofore provided and main-  
30 tained, which tunnel or opening shall be constructed substantially at grade, and not more than eighteen inches above the grade or level of the lands on both sides of said crossing belonging to complainant, which tunnel or opening shall not be less than twelve feet in width between its sides at the base and of uniform width, and not less than twelve feet in height, the work of such construction of said tunnel or opening to be completed not later than the first day of September, in the year nineteen hundred and three, and that an injunction issue accordingly.

And the court doth further order, adjudge and decree, that the defendant, said Erie Railroad Company, its successors and assigns, shall hereafter at all times maintain said tunnel or opening and said crossing, by way of said tunnel or opening, for the use of the complainant, his heirs and assigns, owners of said tract of land, a portion of which tract of land and premises was conveyed by the said John A. Speer to the said Montclair Railway Company, by the deed hereinbefore referred to, dated June twentieth, eighteen hundred and seventy, recorded in 10 Book D 15 of Deeds for Essex county, pages 267 and 268.

And it is further ordered that the said defendant shall pay the complainant his costs of this suit.

Respectfully advised,

FREDERIC W. STEVENS,  
V. C.

Service acknowledged April twenty-first, nineteen hundred and three.

HALSEY M. BARRETT,  
*Solicitor of Complainant.* 20

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**NOTICE OF APPEAL.**

The defendant hereby appeals from the final decree made in this cause on the thirteenth day of April, nineteen hundred and three, and from the whole and any part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 18th, 1903.

CORTLANDT & WAYNE PARKER,  
*Solicitors of Defendants.* 30  
CORTLANDT PARKER,  
*Of Counsel.*

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

CORTLANDT PARKER,  
*Of Counsel with Defendant.*

Served April 21st, 1903.

HALSEY M. BARRETT,  
*Solicitor of Complainant.*

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**PETITION OF APPEAL.**

*To the Honorable the Court of Errors and Appeals in the  
10 Last Resort in all Causes:*

The petition of the Erie Railroad Company, the appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by the final decree made in the Court of Chancery by his Honor William J. Magie, Chancellor of New Jersey, bearing date the thirteenth day of April, nineteen hundred and three, wherein the said Abram Speer was complainant and the said Erie Railroad Company was defendant, in this respect, to wit:

20 That the said decree adjudges that the defendant, the said Erie Railroad Company, shall be enjoined from continuing a certain embankment at a place where an alleged road crossing, in said decree above mentioned, was claimed by said complainant to have been theretofore provided and maintained; and in that the said decree adjudges that the said Erie Railroad Company shall and do forthwith, and without unnecessary delay, construct a tunnel or opening through its said embankment and across  
30 across the track of said railway is in said decree alleged to have been theretofore provided and maintained, which

tunnel opening shall be constructed substantially at grade, and not more than eighteen inches above the grade or level of the lands on both sides of the crossing belonging to said complainant, which tunnel or opening shall not be less than twelve feet in width between its sides at the base, and of uniform width of not less than twelve feet in height, the work of such construction of said tunnel or opening to be completed not later than the first day of September in the year nineteen hundred and three; and that an injunction issue accordingly. 10

And for that said decree adjudges that the said defendant, said Erie Railroad Company, its successors and assigns, shall thereafter, at all times, maintain said tunnel or opening and said crossing by way of said tunnel or opening for use of the complainant, his heirs and assigns, owners of the tract of land in said decree mentioned, a portion of which said tract of land and premises was conveyed by said John A. Speer to the said Montclair Railway Company by deed in said decree referred to, and dated the twentieth day of June, eighteen hundred and seventy, recorded in Book D 15 of Deeds for Essex county, pages 267 and 268. 20

And for that said decree further adjudges that the defendant shall pay the complainant the costs of the said suit.

Your petitioner humbly appeals from that portion of the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that no decree or order for an injunction should have been made in said cause, and said Erie Railroad Company should not have been ordered or decreed to be enjoined from continuing its embankment at the place in said decree mentioned, or at any other place upon the lands and premises described in said deed from John A. Speer to the Montclair Railway Company above mentioned, or elsewhere. And for that the said railroad company should not have been decreed to construct any tunnel or opening through its said embankment and across its said 30

right of way at the place in said decree mentioned, or at any other place on said land and premises, in the manner and of the character specified in said decree or in any other manner or character whatsoever. And it should not have been decreed that said tunnel or opening should be completed not later than September first, nineteen hundred and three, or at any other day. And that said Erie Railroad Company should not have been decreed to maintain said tunnel or opening, at said crossing by  
10 way of said tunnel or opening, for the use of the complainant, his heirs and assigns, owners of said tract of land, the portion of which said tract of land was conveyed by the said John A. Speer to the said Montclair Railway Company as aforesaid, or for any other persons or corporations, in the manner specified in said decree or in any other manner, and should not have been decreed to pay the complainant his costs of suit.

And further that it should have by such decree been adjudged and decreed that the said complainant was  
20 not entitled to any relief in said cause and that his bill of complaint should have been dismissed, with costs, or in case said court should have held that the said complainant was entitled to any relief as against said defendants, by reason of anything contained in said deed from John A. Speer to said Montclair Railway Company or otherwise, then that the said defendant might perform any duty or obligation which they might owe to complainant, or his heirs and assigns, either (1) by constructing and maintaining a practicable level crossing or means of passage  
30 across the railroad tracks on the land described in said deed, with raised approaches partly on the land of the complainant and partly on the land of said defendant, outside of defendant's right of way, or (2) by constructing such level crossing and approaches thereto wholly on the right of way of said defendant, such approaches ascending the embankment of defendant parallel with the tracks of defendant to such level crossing, and then descending again on the further side of such level crossing

and of said tracks in like parallel manner to the level of adjoining land, or (3) by providing a street or right of way over the lands adjoining the right of way of said defendant on the west, southerly from said Speer's land on the west side of said railroad, along such right of way to the Valley road or a street connecting therewith, so as to enable said defendant and his heirs and assigns to pass and repass along the land on the east and west side of said tracks by said streets and said Valley road; and in case it should have been held that either of said modes of crossing or means of communication between complainant's tracts of land so determined upon was not so valuable as any right to a crossing or means of communication between complainant's tracts of land provided for by said deed and formerly existing, then decree should have been made that the difference in value between such new crossing or means of communication and the crossing or means of communication provided for by said deed or formerly existing, and any damages for the deprivation thereof should have been ascertained under the direction of said court or other legal manner, and paid said Speer, in place and substitution of any further relief to which he might be entitled to by reason of anything set forth in said bill. And further, in case said court should have determined that said complainant was possessed of a right to a crossing or means of communication between the said parcels of land, and that said various modes of providing such crossing or means of communication in substitution for any crossing or means of communication formerly possessed by said complainant, either alone or in connection with the payment of the difference in value aforesaid, did not or could not afford complainant full or adequate relief, then that the value of said right to such crossing and any damages which said complainant might have suffered, or he, his heirs or assigns might thereafter suffer by reason of destruction of said crossing or deprivation of the use thereof, should be ascertained and determined under the direction of said Court

of Chancery, and said complainant should have been ordered and decreed to receive the same in full satisfaction and discharge of any right to crossing or damages by reason of the destruction or deprivation to said complainant of said crossing.

Or such other decree should have been made, not involving the construction of a tunnel or opening, as should have been equitable and just.

Your petitioner therefore prays that the said decree of  
10 the Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

CORTLANDT & WAYNE PARKER,  
*Solicitors for Appellant.*

CORTLANDT PARKER,  
*Of Counsel.*

Service acknowledged May 8th, 1903.

HALSEY M. BARRETT,  
*Solicitor for Respondent.*

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**ANSWER TO PETITION OF APPEAL.**

The answer of the above-named respondent to the petition of appeal of the above-named appellant.

This respondent, not acknowledging all or any of the matters which, in the said petition are contained, to be true, for answer thereto nevertheless says and admits that a final decree was, on the thirteenth day of April, nineteen hundred and three last past, made and entered in the Court of Chancery by his Honor William J. Magie,  
30 Chancellor of New Jersey, in the cause for that purpose mentioned in the said petition, as therein stated, that

as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said final decree is in all respects agreeable to equity, and prays that the same may be affirmed, with costs to be adjudged to this respondent.

HALSEY M. BARRETT,  
*Solicitor for and of Counsel with Respondent.*

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### Complainant's Exhibits.

COMPLAINANT'S EXHIBIT No. 2.

10

UPPER MONTCLAIR, March 23—1900

*Mr T H Pindle Sup G. L. Division of Erie R. R.*

DEAR SIR—Won't you please repair your fence on the line of my property along Railroad just north of Valley Road crossing and also make me a suitable crossing as I want to turn my cattle into pasture as it now is it is not safe

Signed ABRAM SPEER.

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COMPLAINANT'S EXHIBIT No. 3.

ERIE RAILROAD COMPANY.

20

P JERSEY CITY, N. J., March 29th, 1900

*Mr. A. Speer,*  
*Upper Montclair.*

DEAR SIR:—

Your favor of March 23rd. with reference to fence and also to a crossing. I am unable to locate your ground

on our maps between Valley Road and Upper Montclair. Kindly advise me who owned this ground when the R. R. acquired this right of way in 1870. Upon receipt of this information, I will write you promptly.

Yours truly,

WM. PINDELL

*Supt.*

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COMPLAINANT'S EXHIBIT No. 4.

ERIE RAILROAD COMPANY.

10 P

JERSEY CITY, N. J., April 13th, 1900

*Mr. A. Speer,*

*Upper Montclair, N. J.*

DEAR SIR:—

Your favor of March 23rd. with reference to fences and crossing between Valley Road and Upper Montclair. I expect to be in that vicinity in a few days, and shall be glad to go over the matter with you.

Yours truly,

WM. PINDELL

20

*Supt.*

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COMPLAINANT'S EXHIBIT No. 5.

HALSEY M. BARRETT,  
Counsellor at Law,  
Prudential Building.

NEWARK, N. J., Jan. 18th 1901.

*Mr. F. A. von Moschzisker,*  
*26 Cortlandt St., N. Y. City.*

DEAR SIR:

In reply to yours of the 17th Mr. Speer says that he  
30 would rather have the crossing than \$4500. and as the  
Company is not willing to pay this sum, there is no

course left for me except to apply to the Court for the crossing, and this I shall do at the earliest opportunity.

I regret that our negotiations in this matter have not brought us to an agreement, but our differences seem to be hopeless of settlement otherwise than as above indicated.

Yours truly,  
(Copy signed) HALSEY M. BARRETT.

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COMPLAINANT'S EXHIBIT No. 6.

ERIE RAILROAD COMPANY, 10  
Office of the Real Estate Agent.  
26 Cortlandt Street,  
New York.

V.-M. January 19th, 1901.

In re claim of Abram Speer.

Mr. Halsey M. Barrett,  
Counsellor-at-Law,  
Newark, N. J.

DEAR SIR;—

Allow me to acknowledge receipt of your favor of the 20 18th. inst. Will you kindly advise me upon what theory Mr. Speer considers this crossing of the value at which he places the same,—this in order that I may, before finally declining adjustment, present the whole matter to our General Manager for his determination.

Awaiting your reply, I remain

Respectfully,  
F. A. VON MOSCHZISKER  
Real Estate Agent.

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COMPLAINANT'S EXHIBIT No. 7. 30

HALSEY M. BARRETT,  
Counsellor at Law,  
Prudential Building.

NEWARK, N. J., Jan. 21st 1901.

*Mr. F. A. von Moschzisker,*  
*26 Cortlandt St., N. Y. City.*

DEAR SIR:

In reply to yours of the 19th asking me to advise you upon what theory Mr. Speer considers the railway crossing of the value at which he places it, I beg to say there are two theories as to the value of this property in connection with the crossing, by either of which Mr. Speer  
10 estimates the injury to his property by the destruction of the former crossing.

The tract which Mr. Speer owns, which lies west of the railroad, contains about eleven acres of land. Without any crossing, Mr. Speer could utilize the frontage on Clifside Ave. which would contain about four acres; but the remaining seven acres lying east of the Clifside Ave. lots and west of the railroad, would then be absolutely inaccessible and its value almost wholly destroyed. If this seven-acre tract could be made accessible from the  
20 Valley Road by means of this crossing, Mr. Speer estimates that it would be worth at least a thousand dollars an acre, or at least \$7000.; and that when he offers to accept \$4500. as the consideration for surrendering his right to a crossing, he has offered to accept a sum which is less than the difference in the value of these seven acres with or without such crossing.

The second theory of value of the crossing relates to the development and use of his property. If a suitable and convenient crossing were provided to Mr. Speer, as  
30 called for by the conveyance made to the Railroad Company, for its right of way, Mr. Speer could open a street through the centre of his property from Valley Road westerly to Clifside Ave. The eleven acre tract is about 1200 ft. deep on Clifside Ave. to the railroad. Allowing that lots could be sold fronting on Clifside Ave 300 ft. deep, there would be 900 ft. of frontage on each side of such new street, or 1800 ft. of such frontage. If this street had a suitable and convenient crossing for access

to Valley Road, Mr. Speer considers that these lots could be sold for \$10. a foot front, or \$18000., but if the crossing be destroyed so that access to this street and the lots fronting on it can only be had by way of Cliffside Ave., he believes that these lots fronting as they would upon a blind street, could not be sold for more than \$5. a foot or \$9000., so that the depreciation for the use of the land in the manner proposed, would be \$9000.

In estimating such depreciation it must be borne in mind that Valley Road is an important public thoroughfare on which the trolley road runs, and that nearly all of the persons who would purchase lots west of the railroad would use Valley Road as the means of reaching their property. Mr. Speer has at all times felt that he would greatly prefer a suitable and convenient crossing than to accept any sum from the Railroad Company for the release of his rights to such crossing; and it was only at your request that I asked him to consider the acceptance of a lump sum. The amount which he wanted and which he felt justified in naming, was \$7000., and it was only in deference to my urging him to reduce that figure, that I finally prevailed upon him to say that he would accept \$4500., and even this offer on his part is made by way of compromise and is not to be considered binding unless accepted within a short time and before I commence a suit. 10 20

You suggest in your letter to me that tenants of Mr. Speer or persons purchasing lots from him would not be allowed to use such crossing if it were furnished by the railroad. I think you are in error there. An agreement of this character has been uniformly held not to be a personal privilege but to be an agreement which runs with the land, and is for the benefit of the property and of enhancing the value of the property, if such crossing shall prove to enhance the value of the property. It is a consideration in lieu of the damage or depreciation which the property would sustain for all time if no crossing were reserved. Courts have held in the consideration of such cases that the future possible use and 30

value of the property was a condition contemplated in securing such crossings, particularly where such crossings were reserved and secured by agreement between the land owner and the railway, and this seems a reasonable interpretation of the intention of the parties. It cannot have been supposed in 1870, when the conveyance of a right of way was made to the Railway Company, that this land would necessarily be useful only for pasturage for all time; and to insist that Mr. Speer shall now, when that  
 10 portion of Montclair is becoming largely built up and thickly settled and available for building purposes, be required to estimate the value of this crossing on the theory that his property can only be used for purposes of pasturage, is unreasonable and I think indefensible.

In advising Mr. Speer to accept \$4500. for the damage to his property by the destruction of this crossing, I have gone as far as I feel justified in going, for the purpose of effecting a compromise and settlement of his claim, for I think a crossing would be worth much more than that sum  
 20 to his property, and unless we can settle on this basis Mr. Speer prefers to have the Courts determine his legal rights.

It is now more than four months since I first communicated with the officers of the Railway Company respecting this matter, and as the only question is whether the Railway Company will give Mr. Speer \$4500. or will give him a suitable and convenient crossing, it ought to be possible to reach a conclusion in a very few days. I might add that in case I begin suit I shall insist and  
 30 I think that the Court will hold, that Mr. Speer is entitled to an underground crossing by means of a tunnel. The embankment is nearly twenty feet high and I do not believe that any Court will hold that a grade crossing under these circumstances, is either suitable or convenient or safe for the users, or in any respect a compliance with Mr. Speer's rights in the matter.

Please let me hear from you without delay.

Yours truly,

(Copy signed,) HALSEY M. BARRETT.

## Defendant's Exhibits.

## PETITION.

[Filed December 6, 1898.]

IN CHANCERY OF NEW JERSEY.

*To the Honorable Alexander T. McGill, Chancellor of  
the State of New Jersey:*

The petition of North Jersey Street Railway Company, a corporation organized under the laws of the State of New Jersey, respectfully shows, that under the authority of law it is now constructing a single-track street railway on Valley road in the town of Montclair, in the county of Essex and State of New Jersey, from the point where said Valley Road intersects Bloomfield avenue, and from thence running northerly along said Valley road to a point where said Valley road crosses the extreme northerly line of said town of Montclair, upon the county line between the county of Essex and county of Passaic, and there terminating; and that the said line of street railway upon Valley road crosses the railway line of the New York and Greenwood Lake railroad, now, as your petitioner is informed and believes, owned and operated by the Erie Railroad Company. 10

Your petitioner shows that the point or points of crossing the said railroad company's tracks lie outside of the limits of any of the cities of this State; that the New York and Greenwood Lake railroad is a line of railroad operated by steam; that your petitioner's street railway cars are propelled by electricity supplied by overhead wires; that the line of its construction has approached to and is now near to the right of way of the said steam railroad in Valley road aforesaid, and that it is necessary, in order to operate the same, to effect a crossing of the said steam railroad. 20

Your petitioner therefore makes application to your Honor to define the mode in which such crossing shall be 30

made and to cause reasonable notice of your petitioner's said application to be given to the municipal authorities of the town of Montclair and also to the Erie Railroad Company, and thereupon to make a decree defining and regulating the mode and manner of such crossing as may be equitable and just and according to law.

And your orator further shows that this application is made under and by virtue of the provisions of an act of the Legislature of this State, approved the twenty-second  
10 day of March, eighteen hundred and ninety-five, session laws of eighteen hundred and ninety-five, page 462, entitled "An act to regulate the crossing at points not within the limits of cities of this State, of steam railroads by steam or electric railroads hereafter to be constructed.

And your petitioner, as in duty bound, will ever pray,  
&c.

HALSEY M. BARRETT,

*Solicitor and of Counsel with Petitioner.*

State of New Jersey, County of Essex, ss.—David  
20 Young, being duly sworn on his oath, says that he is the vice president of North Jersey Street Railway Company; that he has read the foregoing petition and that the facts set forth in the same are true.

DAVID YOUNG.

Sworn and subscribed to before me this fifth day of December, eighteen hundred and ninety-five.

FREDERICK F. GUILD,  
*A Master in Chancery of N. J.*

## ORDER FOR HEARING.

[Filed December 6, 1898.]

North Jersey Street Railway Company having presented its petition to the Chancellor setting forth that it is now engaged in constructing a single track street railway in Valley road in the town of Montclair, extending from Bloomfield avenue along said Valley road in a northerly direction to the northerly line of said town of Montclair, and that the said line of street railway crosses the railway line of New York and Greenwood Lake railroad, a line of railroad operated by steam, and that the line of its construction has approached to and is now near to the right of way of the said steam railroad in Valley road aforesaid, and that it is necessary, in order to operate the same, to effect a crossing of the said steam railroad; and the said petitioner by its said petition, having made application to the Chancellor to define the mode in which such crossing shall be made and to cause reasonable notice of its said application to be given to the municipal authorities of the town of Montclair, and also to the Erie Railroad Company, the corporation owning or operating the railroad intended to be crossed, and thereupon to make a decree defining and regulating the mode and manner of such crossing as may be equitable and just and according to law: it is, on this sixth day of December, eighteen hundred and ninety-eight, on motion of Halsey M. Barrett, of counsel with the petitioner, ordered that the hearing of the petitioner's said application be brought on before the Chancellor at the Chancery Chambers in Jersey City, on Tuesday, the twenty-seventh day of December, instant, and that notice of said hearing be given to the municipal authorities of the town of Montclair and also to the Erie Railroad Company, at least ten days before the date fixed for said hearing.

ALEXANDER T. MCGILL, C.

Respectfully advised,

H. C. PITNEY, V. C.

## DECREE.

[Filed November 1, 1899.]

North Jersey Street Railway Company, a street railway company using electric power, having presented its petition setting forth that its railway upon Valley road, in the town of Montclair, will cross the railway line of the New York and Greenwood Lake railroad, now operated by Erie Railroad Company under lease, at said point, and praying the Chancellor to make a decree defining and regulating the mode and manner of such crossing as may be equitable and just and according to law, and this matter now coming on to be heard in the presence of Halsey M. Barrett, solicitor and counsel for the petitioner, and of Cortlandt Parker, solicitor and counsel for New York and Greenwood Lake Railway Company, and Erie Railroad Company, and of Alfred S. Badgley, solicitor and counsel for the town of Montclair aforesaid, in pursuance of notice given as required by law, and it being represented to the court that all of said parties have agreed that the public safety requires that a grade crossing shall be avoided at said point of intersection of said railway lines on Valley road aforesaid, and that said parties have agreed upon a plan and mode of avoiding such grade crossing, which agreement and plan is as hereinafter decreed, and the court having heard the said parties, through their counsel, and having considered the matter: It is thereupon, on this thirty-first day of October, eighteen hundred and ninety-nine, on motion of counsel for said applicants, decreed:

*First.* That it is reasonably practicable, and public safety requires, that a crossing of said steam railroad by the said electric street railroad at grade at said Valley road in said town of Montclair should be avoided.

*Second.* That it is necessary and the public safety requires, that in order to avoid such grade crossing, the tracks of said steam railroad shall be elevated, and the

grade of said Valley road shall be lowered so as to permit the cars of said street railway company to pass under the said steam railroad.

*Third.* That in order to enable said passage under said steam railroad to be effected it is necessary to reconstruct and rebuild such portion of the railroad tracks and line of the New York and Greenwood Lake Railway Company in the town of Montclair, as is shown upon a certain map marked *Exhibit A* in this matter, which map is to be filed with and be a part of this decree. 10

*Fourth.* That the portion of said railroad line to be rebuilt shall be constructed as shown upon and in accordance with a certain profile map, marked *Exhibit B* in this matter, which map is to be filed with and be a part of this decree.

*Fifth.* That the grade of Valley road at said point of intersection shall be lowered so as to allow and leave a clear headroom of thirteen feet between the grade of said Valley road and the bridge of said New York and Greenwood Lake railroad, as shown on said profile map. 20

*Sixth.* That the said bridge of said railroad shall be of steel, supported upon stone abutments, with steel columns on the curb lines, with an opening between the abutments equal to the full width of Valley road at said point.

*Seventh.* That the grade of such of the streets or highways of the town of Montclair as now cross said railroad at points where the tracks of said railroad are to be elevated, as shown on said maps, shall be raised, and the telford pavements removed from said streets for this purpose shall be relayed, and said portions of said streets shall be left in as good repair and construction as they severally were when said work was commenced. 30

*Eighth.* That provision shall be made for the suitable and proper drainage of any surface water that shall flow into Valley road where the grade of said street shall have been lowered in accordance with the terms of this decree, and provision shall be made for maintaining and keeping open such drain so that the water shall at all times have free exit at said crossing.

*Ninth.* That all of the work relating to the change of grade of said streets shall be done to the satisfaction of the town council of the town of Montclair, or of their engineer designated by them to supervise said work.

*Tenth.* That the said town of Montclair shall be indemnified and saved harmless from any and all claims of owners of property abutting on said streets for damages to their said property by reason of such change of grades of the said streets as shall be made in compliance with  
10 this decree.

*Eleventh.* That the North Jersey Street Railway Company shall pay one-third of the entire cost of elevating the line of said steam railroad, and of changing the grade of said streets, and of damages to property by reason of such changes of grades of said streets, if such damages shall be awarded or recovered against said Erie Railroad Company or said New York and Greenwood Lake Railway Company, or said town of Montclair; provided, however,  
20 Company shall not exceed the sum of nine thousand dollars; the New York and Greenwood Lake Railway Company consenting to pay two-thirds of said expense and damages; and further consenting that if such total expense and damages shall exceed the sum of twenty-seven thousand dollars, then to pay all of said expense and damages in excess of the sum of nine thousand dollars, which sum is the maximum sum to be paid by North Jersey Street Railway Company in this matter, and the said Erie Railroad Company, lessee of said New York  
30 and Greenwood Lake Railway Company, consenting hereto.

And it is further ordered that in case of any disagreement between the parties respecting the terms of this decree, or respecting the actual compliance therewith, in any of the details of said work, any of said parties may apply to this court for further directions.

ALEXANDER T. MCGILL, C.

Respectfully advised,

H. C. PITNEY, V. C.

Consent is hereby given to the entry of the above decree in behalf of the New York and Greenwood Lake Railway Company and Erie Railroad Company, by

CORTLANDT & WAYNE PARKER,  
*Their Solicitors and Counsel.*

A like consent is hereby given in behalf of the town of Montclair by

ALFD. S. BADGLEY,  
*Its Solicitor and Counsel.*

Resolution consenting to plan for avoiding a grade 10 crossing on Valley road in the town of Montclair:

WHEREAS, The Erie Railroad Company and North Jersey Street Railway Company have agreed upon a plan and mode, by which a grade crossing of the tracks of said railroad companies at Valley road, in the town of Montclair, shall be avoided, and a map showing said crossing, and a profile map showing the proposed method of avoiding said grade crossing have been presented to the council; be it

*Resolved*, By the council of the town of Montclair, in 20 the county of Essex, that said plan and mode of avoiding such grade crossing at Valley road is hereby consented to and approved, and that A. S. Badgley, Esq., counsel for the town of Montclair, is hereby authorized to consent to the entry of a decree by the Chancellor approving and requiring such mode of avoiding such grade crossing, and James Owen, Town Surveyor of Montclair, is hereby directed to supervise said work so far as the same relates to any change or changes in the grade of streets in Montclair, as shown on said profile map. 30

I hereby certify the above to be a true copy of a resolution adopted by the town council of the town of Montclair in the county of Essex on the thirty-first day of July, eighteen hundred and ninety-nine.

HARRY TRIPPETT,  
*Town Clerk.*

## OPINION.

[Filed March 6, 1905.]

The opinion of the court was delivered by

SWAYZE, J. The facts of the case are stated in the opinion of the Vice Chancellor. The bill was filed for the specific performance of a covenant in the deed from John A. Speer to the Montclair Railway Company, of which the defendant is the successor. The covenant required the railway company to provide the grantor "with  
10 a suitable and convenient road crossing across the track of said railway" where the grantor might direct. The decree directed the railroad company to construct a tunnel through its embankment and across its right of way, twelve feet wide and twelve feet high, and to maintain the tunnel at all times thereafter.

The rights of the complainant depend upon the provision in the deed, and not upon section 14 of the General Railroad law of 1873 (P. L. 1873, 88; Revision of 1877, 929; as amended in 1891, General Statutes, 1661).  
20 Section 14 of the General Railroad law as originally passed, applied only to companies incorporated under the act. It is not necessary now to consider whether the clause subsequently inserted could affect railroads existing under a special charter, for there is no proof that the Montclair railway or either of its successors is within the terms of the description. The defendant is the lessee of the New York and Greenwood Lake Railway Company, which acquired by foreclosure sales the property and franchises of the Montclair Railway Company. The  
30 last-named company was incorporated in 1867. P. L. 1867, 301. The provisions of its charter as to road crossing differ from the provisions of the General Railroad law, in that the charter requires the railway company to construct and keep in repair bridges over or under the railway where any public or other road shall cross the same, and omits the provision as to wagonways

where the railroad intersects the farm or lands of an individual. The provision as to the crossing of roads is intended for the protection of the public who have the right to travel therein, and is applicable only to roads in which the public have such a right; these are public roads, private roads and by roads. *Green v. Morris and Essex Railroad Co.*, 4 Zab. 486, 490; *Wood v. Hurd*, 5 Vr. 87.

The provision as to wagonways in the General Railroad law is intended for the benefit of individual landowners, 10 to secure them access from one portion of their lands to another, notwithstanding the construction of the railroad. The language of the General Railroad law is similar to the language commonly used in railroad charters before the incorporation of the Montclair railway in 1867. *Camden and Amboy Railroad*, P. L. 1839, 88; *New Jersey Railroad and Transportation Co.*, P. L. 1832, 104; *Morris and Essex Railroad*, P. L. 1835, 29; *Morris and Easton Railroad*, P. L. 1837, 426; *Somerville and Easton Railroad*, P. L. 1847, 133. 20

The omission of the usual provision as to wagonways in the charter of the Montclair Railway Company indicates that the Legislature did not intend to impose that burden on the company.

The crossing involved in this case was a mere wagon-way connecting portions of the complainant's lands which had been severed by the construction of the railroad, and was protected by bars and a fence, which the deed compelled the railroad company to make and maintain.

Even if the charter provisions had been in the form 30 usual at that date in railroad charters, it would have been competent for the owner of the land to agree with the railroad company as to the method of crossing, and where a deed for the land is made embodying such an agreement, it is to that deed we must look for the obligations of the parties. *Brearley v. Delaware and Raritan Canal Co.*, Spenc. 236; *Perry v. Pennsylvania Railroad Co.*, 26 Vr. 178, 184; *Pipe Line Co. v. Delaware, Lackawanna and Western Railroad Co.*, 33 Vr. 254, 272.

In construing the deed we are helped by an examination of the language at that time common in railroad charters, and afterwards used in the General Railroad law. In all except the earliest, that of the Camden and Amboy, the railroad company is required to construct passages "over or under" the railroad. The general law adds the word "across." These citations from the statutes suffice to show that from the beginning of railroads in this State, a difference was recognized between  
10 a crossing over and a crossing under the railroad. The natural meaning of the expression used in the deed—"a suitable and convenient road crossing *across the track* of said railway"—is a grade crossing. And so the parties to the deed themselves construed it at the time.

The decree of the Court of Chancery gives the owner of the land a tunnel under the railroad, instead of the grade crossing provided for by the deed, at a cost of over \$5,000 to the railroad company for the sole benefit of land of the complainant worth about one-third that  
20 amount. Such a result could certainly not be deemed equitable, unless the crossing provided for by the deed had become impracticable through the fault of the defendant. In this case the impracticability of maintaining the crossing in its former state is due to the enforced change of grade made by the railroad company in obedience to a decree of the Court of Chancery pursuant to the statute (P. L. 1895, 462; G. S. 2717, 343) in order to subserve the advantage and safety of the public by doing away with a crossing at grade of the railroad  
30 and the street railway. It is inequitable to force the defendant to substitute for the crossing which its predecessor in title agreed to give a better passage of a different kind and much more onerous to the company—more onerous not merely in the first cost, but in the future maintenance of the tunnel and the railroad structure above. The incapacity of the defendant to carry the contract into execution affords a ground of defence in a suit for specific performance. Fry on Specific Performance, § 658; Danforth v. Philadelphia and Cape May Short

Line Co., 3 Stew. Eq. 12, 16. And even where it is possible to perform the contract, specific performance is refused if the burden upon the defendant greatly outweighs the advantage of the complainant, and the party is left to his action at law for damages.

Instances where specific performance of contracts similar to the present has been denied by the courts are *Murfeldt v. New York, West Shore and Buffalo Railway Co.*, 102 N. Y. 703; 7 N. E. Rep. 404; *Conger v. New York, West Shore and Buffalo Railway Co.*, 120 N. Y. 29; 23 10 N. E. Rep. 983; *Goding v. Bangor and Aroostook Railway Co.*, 94 Me. 542; 48 Atl. Rep. 114.

An early case is *Clark v. Rochester Railroad*, 18 Barb. 350. In the latter case the court refused specific performance because "a crossing would be of small value to the owner and would entail much expense on the company." Judge Strong, in delivering the opinion of the court, said: "The court will never compel a performance specifically when, looking at all the circumstances on both sides, it is apparent that injustice would thereby be 20 done."

Most of the cases cited from the New York reports by the respondent involves the performance by the railroad company of a statutory duty, and the courts held that it was no defence that the performance of that duty might be very onerous. The specific performance of a contract of which exact performance is impossible stands upon a different footing.

The case of *Post v. West Shore and Buffalo Railway Co.*, 123 N. Y. 580; 26 N. E. Rep. 7, is more like the 30 present case, but there is this important difference: the change of the highway in that case was the voluntary act of the railway company, although made to meet the objection of the highway commissioner to the road as at first proposed; and Judge Andrews was careful to say: "But the covenant with the plaintiff was not discharged by the objection of the commissioner, for the company was under no legal compulsion to follow his discretion in the matter." In the present case the company was under the

compulsion of a decree of the very court which makes the present decree.

In the present case it is not physically impossible for the railroad to construct a railroad crossing as the deed requires. It cannot indeed construct a grade crossing at exactly the same point of space; the change of grade makes that impossible. It has offered to construct a grade crossing at the same point in its line, but at the new grade. To make such a crossing it will be necessary  
10 either to construct approaches on the company's land parallel to and on both sides of its track, making a considerable greater distance for the complainant to travel; or to construct approaches at right angles to the track, for which purpose complainant's land must be used. It has been held in a similar case in Massachusetts that the expense of preparing the approaches on his own land must be borne by the landowner (*Williams v. Clark, Receiver*, 140 Mass. 238; 3 N. E. Rep. 802, 804), but  
20 quired the railroad company to make a crossing entirely within the limits of the land conveyed, from which the court inferred that what was necessarily done outside of those limits must be done by the landowner, for the railroad company could not enter upon his lands without committing a trespass.

In *Storer v. Great Western Railway Co.*, 2 Younge & C. 48, the Vice Chancellor decreed that the railroad company should perform its agreement and that the plaintiff must afford them all reasonable assistance in his  
30 power. The opinion states that the plaintiff undertook to put the railroad company in possession of the land necessary for the approaches.

In the present case the complainant is unwilling to accept a grade crossing with approaches constructed on the railroad company's land, or to allow the approaches to be constructed on his own land. He insists upon a tunnel. Where specific performance of a contract in exact accordance with its terms has become impossible, the courts have in some instances required the defendant

to perform as nearly as possible. Pomeroy on Specific Performance, §§ 296, 297. If that rule is applicable to a case like the present, we think the methods of crossing proposed by the defendant both approximate more closely to the original crossing than the tunnel. The complainant cannot, rejecting those plans, equitably compel the defendant to give him such an entirely different passage at an expense nearly ten times as great.

Although we think the complainant is not entitled to a decree for specific performance, we think he is entitled 10 to compensation for the destruction of his crossing. It is true, as counsel for the defendant argued, that he was bound to anticipate a possible change of grade in the railroad as public necessity might require. Central Railroad Co. *ads.* State, 3 Vr. 220, decided in 1867, three years before the date of the deed now in question. He was not bound to anticipate that his crossing would thereby be destroyed. The right of the railroad to change the grade as the need arose was subject to an obligation to preserve fairly the private use. Nor can he be 20 deprived of his crossing without compensation, because the change of the grade was made under compulsion of the Court of Chancery. The change of grade did not make it necessary for the railroad company to destroy the crossing; they might, if they had chosen, have built the tunnel which the complainant demands; and although we think it inequitable to give the complainant more than the deed entitles him to, we think he is entitled to be made whole for what he has lost. He was not bound to accept the new methods of crossing suggested 30 by the defendant, since they differed materially from the crossing as it had existed. The only way in which the complainant can be made whole is by the payment to him of the value of what he has lost.

The jurisdiction of the Court of Chancery to award damages where both parties submit themselves to the jurisdiction of the court is established. The cases are collected in Vice Chancellor Pitney's opinion in Sparks Manufacturing Co. *v.* Town of Newton, 12 Dick. Ch.



Parker, solicitors of appellants, ordered, adjudged and decreed that said complainant is not entitled to the specific performance sought by his said bill, and that the decree of the Chancellor in this cause, dated the thirteenth day of April, nineteen hundred and three, be and the same is hereby wholly reversed, set aside and for nothing holden.

And it is further ordered that the record and proceedings be remitted to the Court of Chancery with direction that the bill of complaint be dismissed by said court, with costs, unless the complainant shall elect to submit to the said Court of Chancery the question of damages sustained by reason of the destruction of the crossing mentioned and described in the bill of complaint, in order that such damages may be ascertained by said court, and that if he do so elect the said record and proceedings may be by said court retained and proceeded with for the ascertainment of such damages according to law, the practice of the said court and the directions of this order. And it is further ordered that the appellants do recover the costs of their appeal to be taxed.

Service acknowledged this 3d day of April, 1905.

HALSEY M. BARRETT,  
*Sol'r for Respondent.*

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**DECREE ON REMITTITUR.**

[Filed March 30, 1905.]

Upon opening this matter this day to the court by Cortlandt & Wayne Parker, of counsel with the Erie Railroad Company, and it appearing that the said Erie Railroad Company filed an appeal from the decree in this cause, made on the thirteenth day of April, nineteen hundred and three, to the Court of Errors and Ap

peals in the last resort; and that the said appeal has been determined by the said Court of Appeals and the proceedings have been remitted to this court to proceed further thereon according to law, and on reading the remittitur from the Court of Appeals, whereby it appears that it was ordered, adjudged and decreed that said complainant is not entitled to the specific performance sought by his said bill and that the decree of the Chancellor in this cause, dated the thirteenth day of April, nineteen hundred and three, be and the same was thereby  
10 wholly reversed, set aside and for nothing holden, and that it was ordered that the record and proceedings be remitted to the Court of Chancery with direction that the bill of complaint be dismissed by said court, with costs, unless the complainant shall elect to submit to said Court of Chancery the question of damages sustained by reason of the destruction of the crossing mentioned and described in the bill of complaint, in order that such damages may be ascertained by said court, and that if  
20 he do elect, the said record and proceedings may be by said court retained and proceeded with for the ascertainment of such damages according to law, the practice of said court and the directions of said order; and that the appellants do recover the costs of their appeal to be taxed:

It is therefore on this twenty-ninth day of March, nineteen hundred and five, on motion as aforesaid ordered that the decree of the said Court of Appeals be and the same is hereby made the decree of this court, and that  
30 an execution issue out of this court for the said costs according to the practice of this court.

And it is further ordered that the complainant do, within thirty days from the date of service of a copy of this order upon him or his solicitor, file in this cause his election to have damages ascertained as set forth in said decree of remittitur, and in default thereof that the defendant may apply to this court for an order dismissing the said bill, with costs.

W. J. MAGIE, C.

Service of a copy of within decree acknowledged this  
3d day of April, 1905.

HALSEY M. BARRETT,  
*Sol'r for Complainant.*

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**TESTIMONY.**

Transcript of shorthand report of the evidence given  
upon the trial of the above-state cause, on Thursday,  
October 5th, 1905, at the Chancery Chambers, New-  
ark, N. J.

Before His Honor VICE CHANCELLOR STEVENS. 10

*Mr. Barrett* and *Mr. Faulks*, appearing for the com-  
plainant.

*Messrs. Cortlandt* and *R. Wayne Parker*, appearing  
for the defendant.

*Frank Crane*, sworn.

Direct examination by Mr. Barrett.

Q. Where do you reside?

A. Montclair.

Q. What is your business?

A. Civil engineer and surveyor. 20

Q. How long have you been in Montclair?

A. Nearly all my life.

Q. That is how many years?

A. Forty-six.

Q. How long have you been practicing the profession  
of civil engineer and surveyor?

A. About sixteen years.

Q. Where?

A. Montclair—that is, I have been sixteen years in  
Montclair? 30

Q. Do you hold any official position in the town of Montclair?

A. Yes, sir; I am the town surveyor.

Q. How long have you held that position?

A. Four years.

Q. Are you familiar with the property belonging to the estate of Abram Speer, in the town of Montclair, a tract of land extending from the Valley road westerly to Cliffside avenue?

10 A. Yes, sir.

Q. Are you familiar with the property adjacent to this tract of land?

A. Yes, sir.

Q. What part of Montclair do you personally live in?

A. On Fullerton avenue, near the center of the village or town.

Q. Will you state what map has just been pinned up here?

A. It is made up from two sheets of the official tax  
20 map of the town.

Q. And what area or territory does it cover—first, who made it?

A. I did.

Q. Now, what area or territory does it show?

A. It shows all the territory between Bellevue avenue and Watchung avenue on the north and south, and North Mountain avenue, formerly Cliffside avenue, and the Valley road on the east and west.

Q. Watchung avenue is north?

30 A. Watchung avenue is south.

Q. Bellevue avenue is north?

A. Yes, sir.

Q. I see there is a street marked North Mountain avenue; is that the same as Cliffside avenue?

A. Yes, sir.

Q. When was the name changed?

A. The name was changed, I think, about two years ago.

Q. State what property is included within the colored lines?

A. That is the estate of Abram Speer.

Q. What frontage has the estate of Abram Speer on North Mountain or Cliffside avenue?

A. Ninety-four feet.

Q. And what is the distance easterly from North Mountain avenue to the Greenwood Lake Railroad along a line along the center of that property?

A. It is about 1,200 feet. 10

Q. These figures, 1,090, represent the distance from what point to what point?

A. That represents the distance from the Greenwood Lake railroad right of way to a point a hundred and seventy-five feet east of North Mountain avenue.

Q. Is this map drawn to a scale?

A. A scale of a hundred feet to an inch.

Q. What is the width of the Speer tract; it varies a little, but the average width west of the railroad?

A. A little short of three hundred and fifty feet; I 20 think it is three hundred and forty feet.

Q. What is the distance from the Greenwood Lake railroad easterly to Valley road?

A. It is three hundred and fifty feet on one side and three hundred and forty feet on the other, an average of three hundred and forty-five.

Q. What is the frontage of the property on Valley road?

A. Well, I don't know exactly.

Q. Can you tell by measuring? 30

A. Three hundred and eighty-five feet.

Q. This represents all the property—shows the tract west of the railroad divided into lots?

A. Yes, sir.

Q. What is the size of those lots?

A. Fifty feet front and running back to the north and south boundaries of the lot; the depth varies somewhat; on the north side of the proposed street the lots are all one hundred and fifty feet deep; on the south side the depth

varies from one hundred and ten to about one hundred and fifty.

Q. Will you mark on the map the fifty feet frontage and the depth on the north side?

[Witness did so.]

Q. What is the distance from Watchung avenue to Bellevue avenue, about?

The Court—What is the entire acreage?

Q. Oh, yes; what is the entire acreage of the plot  
10 west of the railroad?

A. About nine acres.

Q. More or less?

A. A little more.

Q. And the acreage of the plot east of the railroad?

A. About between two and three.

Q. What is the distance from Watchung avenue north  
to Bellevue avenue?

A. I don't know, but I think it is about a half a mile.

Q. The squares or marks on the several plots shown on  
20 the map, what do they indicate?

A. They indicate buildings.

Q. What class of buildings do they indicate?

A. They are all residences except in a few cases, where the little marks are, back from the street, and with the exception of the Water Company's plant; this (indicating) is the pumping station of the Montclair Water Company.

Q. That portion of the map marked "Edgemont road,"  
just north of Watchung avenue, is that a private road or  
30 a public road.

A. It is a public road.

Q. And what is the enclosure or the space enclosed in  
the center?

A. That space, I believe, is—the title to it is in the name of the original owners, Mr. Lord and Mr. Parsons; it was intended for a little park-like effect.

Q. Is that the way it appears on the town map?

A. Yes, sir.

Q. When was Brookfield road opened?

A. Brookfield road was opened about four years ago.

Q. Is it a public street of Montclair?

A. Yes, sir.

Q. What improvements are there on Brookfield road in the way of construction of streets?

A. It is about half of it macadamized.

Q. Which half?

A. The north half, and it is——

Q. Well, you mean half of it longitudinally?

A. The west half is macadamized, sidewalk and curb; 10  
the east half has a sidewalk on one side.

Q. What is the width of Brookfield road?

A. Fifty feet.

Q. What is the character of the houses with respect to value and cost on Brookfield road, generally?

A. Why, most of them are small houses; there are one or two pretty fair-sized houses.

Q. What do you mean by small houses—cost about what?

A. A house that could be built at the present time for 20  
about \$3,000 or \$3,500 perhaps.

Q. And that is the average character of the development?

A. Yes, sir, except—I want to qualify that, Mr. Barrett—except on the westerly portion, that is macadamized, and those are all large, fine houses, costing from \$6,000 up.

Q. What is the grade or level of the property fronting on Brookfield road as compared with the grade or level of the property of the Speer estate? 30

A. The fall is all towards Valley road; Valley road is lower than North Mountain avenue, and——

Q. Yes, but what I mean is as compared with the grade of property on the north side of Brookfield road, with the property of the Speer estate, how do the levels compare?

A. There isn't much difference in elevation.

Mr. Barrett—I am willing to agree that all the evi-

dence which was in the case before that is material and relevant to this shall be regarded as evidence in this case.

Q. I call your attention to what appears to be an unnamed street running from North Mountain avenue easterly towards the Greenwood Lake railroad in the plot lying north of the Speer property. Is that an open street?

A. There is no street there, Mr. Barrett; in fact the property was laid out on paper with a street through it, 10 as shown there, and lots fronting on that street, but the street was never graded.

Mr. Parker—Which one are you speaking of?

Mr. Barrett—This one [indicating].

Witness—It is on the Booth property; the street was never graded.

Q. Is it worked at all to indicate the lines of the street?

A. At that time the brush was simply cut off, that is all.

20 Q. The tract marked "Essex County Park" and lying north of the Booth property, is that a public park?

A. Yes, sir.

Q. Is it a part of the Essex County park system?

A. Yes, sir.

Q. When was that acquired as a part of the county park system?

A. That was deeded by Mr. Charles W. Anderson to the town of Montclair, and they turned it over to the Essex County Park Commission, and they developed it, 30 and it is just about finished up now.

Q. How long ago was it turned over to the park commission?

A. Two years this summer, or two years this fall.

Q. What is the character of the development there?

A. Why, it is simply a park for foot passengers; there are no wide roads through it.

Q. Are there walks?

A. Walks through it; yes, sir.

Q. Is it graded or leveled as a park?

A. Yes, sir; graded, and grass and lawn and shrubbery set out.

Q. Do you know about the area of that Essex County Park?

A. I do not.

Q. Can you estimate it from your knowledge of the size as shown on this map?

A. I cannot very well; it is perhaps a little more than twelve acres. 10

Q. Well, I won't go into the question of the grades of the Speer property; that all appears in the maps which I have. Mr. Crane, is there a brook running north and south, or running from north to south, crossing the Speer property?

A. Yes, sir.

Q. And where on the map; will you please mark it and indicate it?

[Witness did so.]

Q. And is that a live stream? 20

A. Yes, sir.

Q. What is it called?

A. It is called Tony's brook.

Q. And Tony's brook runs all through Montclair, Bloomfield and Belleville to the Passaic river, doesn't it?

A. Yes, sir.

By Mr. Parker.

Q. It runs south?

A. It runs south; yes, sir.

Further direct. 30

Q. I forgot to ask you, Mr. Crane, if that is a correct copy and representation of the maps as filed in the official office in Montclair?

A. That is an exact reproduction of two sheets of the official tax map.

Q. And those are in the custody of whom?

A. There were a number of copies there; I have a copy and the clerk has a copy, and the collector; the originals are in the vault, in the custody of the clerk.

Q. Did you make the originals of those maps?

A. No, sir.

Q. Do you know by whom they appear to have been made?

A. The originals were made by Mr. Owen.

Q. Can you say, from your knowledge of the property, or from your official position, whether those originals of which this is a copy show accurately what appears on this map?

A. They do.

Q. That is all.

Cross-examination by Mr. R. Wayne Parker.

Q. Do you mean to say, Mr. Crane, that that map is a complete and accurate copy of the two tax maps?

A. It is a reproduction of the lines, Mr. Parker; the figures, the frontages and the other data shown on the tax maps, from which the assessors work, is left off; that is the size of the properties and the block and lot numbers, &c., are left off; that is a reproduction of the lines.

Q. Leaving off the lot numbers?

A. Yes, sir.

Q. Then there is nothing on this map that wasn't on the tax map?

A. There is nothing on this map now except the blue lines that I have made there that are not on the tax map.

Q. And do you mean to say that this street down the middle of the Speer property is on the tax map?

A. That is not.

Q. And do you mean to say that those lots shown there are not on the tax map?

A. They are in different color; the black lines show what is on the tax map.

Q. Well, you gave it to be understood that there was a street shown on the tax map?

- A. There were no streets shown there, that was——
- Q. You have answered my question when you say there is no street shown there; there is no street shown here?
- A. No, sir.
- Q. There isn't any street there in fact?
- A. No, sir.
- Q. Have you been over that Speer property?
- A. Yes, sir.
- Q. There is no grade over there? 10
- A. No, sir.
- Q. You say there is a little difference between the Brookfield road and the Speer property?
- A. Yes, sir.
- Q. Which is the lower?
- A. Brookfield road.
- Q. Is lower?
- A. Yes, sir.
- Q. The Brookfield road is dry and along near the stream on the Speer property is very wet? 20
- A. Brookfield road has been filled up, that is the reason it is dry.
- Q. Then it is higher than this property?
- A. Higher than the bed of the stream.
- Q. Higher than this property?
- A. Brookfield road itself, I don't think, is over a foot difference.
- Q. Have you leveled it?
- A. No, sir.
- Q. Then you are speaking only by guess? 30
- A. From memory.
- Q. When you walked over this property, did you see some cattails?
- A. A little bunch of cattails about where your finger is.
- Q. Did you walk from Mountain avenue down to the Greenwood Lake railroad?
- A. Yes, sir.

- Q. Did you find any bridge over the brook?  
A. Yes, sir.  
Q. A bridge remaining there?  
A. Yes, sir; a foot bridge.  
Q. No, wagon bridge?  
A. No, sir.  
Q. When did you do this?  
A. The day before yesterday.  
Q. How deep did you go in?  
10 A. I had these shoes on, and didn't get my feet wet, and they are patent leather shoes.  
Q. How deep did you go in?  
A. Not in the mud at all; my feet were dry.  
D. Did you have to jump from hummock to hummock?  
A. No, sir.  
Q. Did you see any there?  
A. No, sir; I walked right down through the center of the property.  
20 Q. How long ago were these tax maps made?  
A. The originals were made, I think, about eight years ago.  
Q. Did you find on the ground a graded street running from Brookfield road to the line of the Speer property?  
A. There was a graded street there.  
Q. There is a graded street there?  
A. It has been closed.  
Q. Isn't open in Brookfield road?  
30 A. No, sir; it has been closed.  
Q. Is there any fence across there?  
A. That I cannot say.  
Q. It was there the other day when I walked down there?  
A. There was a street graded across there; I did the work.  
Q. You did the work yourself?  
A. Only part way, Mr. Parker.

Q. Within four feet of the Speer line? •

A. No, sir; only across the property that belonged to Mr. Lord and Mr. Parsons through there [indicating].

Mr. Barrett—Will you describe more accurately the indication there.

Q. Have you a map which shows that?

A. I have in the office.

Q. Haven't you it here?

A. I don't know whether that shows it or not, sir; I can indicate that. 10

Q. Were you not subpoenaed to bring a map down here?

A. I was, yes.

Q. Where is the map?

A. On the table.

Mr. Barrett—Well, are you cross-examining the witness, or calling him as your own witness. I would like to have the witness indicate it so that it will appear on the map.

Mr. Parker—He has a map which shows it. 20

The Court—The witness has made a mark on the map, but he has not indicated that mark by any letter so that we cannot identify it when we come to read the testimony in the stenographer's notes. Identify it by the letter "A."

[Witness did so.]

Q. Is there a map posted in the town clerk's office which shows this neighborhood, hydrants, &c., and shows that little street which you have spoken of?

A. There is a map posted on the wall in the town clerk's office which shows hydrants, but I don't know whether it shows that street or not. 30

Q. Have you the map with you?

A. Yes, sir.

Q. Will you please produce it—who made it?

A. I did.

Q. It is accurate?

A. Yes, sir; it is made from the tax map.

Q. Doesn't that map show that street as it stands?

A. Since this map was made that street has been closed.

Q. How closed?

A. By the owner.

Q. Well, but in what manner?

A. By abandoning it.

Q. There has been no fence put across it, and nothing to prevent anyone going down there?

10 A. There isn't any end to it; it doesn't end anywhere.

Q. There is just as much end to it as there ever was; it never went anywhere except into that property; but has there any act of closing been done that shuts off that street from the road?

A. I believe there has been a deed made, covering that whole property.

Q. I am not asking you that; I ask if any act had been done which shut that street off from the road?

A. Yes, sir.

20 Q. An act that shows it on the ground?

A. No fence.

Mr. Barrett—I think the witness should be allowed to state the ground of his belief. He started to say that he believed a deed had been made, and I think the witness should be allowed to answer that question and state the ground of his belief.

The Court—I think he has answered the question. He says that the act that he refers to was a deed.

Witness—A man don't stand with a club and keep  
30 people off.

Mr. R. Wayne Parker—Will your Honor permit my brother to ask a question or two?

The Court—Certainly.

By Mr. Cortlandt Parker, Jr.

Q. Mr. Crane, there are tax maps in the town assessor's office of Montclair and in the town clerk's office in Montclair?

A. Yes, sir.

Q. And they show the lots on which the taxes are assessed and the streets in that vicinity?

A. Yes, sir.

Q. You are familiar with this property on the north-west corner of Brookfield road and Edgemont avenue, are you not?

A. Yes, sir.

Q. Is not that owned by Mr. Alfred B. Robinson?

A. I believe it is, sir.

Q. Now, as a matter of fact, about that ground there, 10 cannot you walk and drive on the road or this extension of Edgemont road from Brookfield road to the Speer line?

A. No, sir.

Q. Is there not a fence across—a wire fence on the Speer line?

A. I don't think there is a wire fence on the Speer line; there is a wire fence at the rear of the Robinson line—there was the last time I was there.

Q. Is not there a wire fence that separates the Robinson land from the Speer land? 20

A. Yes, sir.

Q. Doesn't Mr. Robinson's land extend from up to the Speer line?

A. Not to my knowledge.

Q. Isn't it so represented on those maps and books in the town clerk's and town assessor's office?

A. Not to my knowledge.

Q. Is not this street represented as going to the Speer line? 30

A. No, sir.

Q. On the town clerk's maps and the town assessor's office?

A. No, sir.

Q. Is there not a hedge along the east side of the Robinson property that is well developed up to what was the old Wilbur property on the west side of the extension of Edgemont road?

A. I don't know.

Q. Didn't you see a hedge standing there?

A. I haven't been there on that property lately.

Q. Well, when is your information of that property, then, the last time you were there?

A. I was on the Speer property the day before yesterday; I didn't go to Edgemont road.

Q. You did not examine to find whether or not there was an extension of Edgemont road to the Speer line by  
10 a street that had been worked, and with the dirt thrown up in the middle and gutters at the side?

A. I didn't examine that; it is not there to my knowledge.

Q. When was your last knowledge of the property?

A. The last knowledge that I had of it was in walking through the Brookfield road; I haven't examined the other property in any way whatever.

Q. Then you did not turn in there?

A. No, sir.

20 Q. And you say that there is no extension of Edgemont road represented on those town maps from which you made this copy, from Brookfield road to the Speer line?

A. No, sir; it shows on the tax maps, to the northerly boundary of the property that belonged to William H. Parsons and Frank Lord; that is as far as it shows on the tax maps; it was graded to there and macadamized to there, and I did the work, but beyond that I don't know anything about it.

30 Q. You don't know what happened on the north side of Brookfield road?

A. Only on the Lord and Parsons property; I want it distinctly understood that I don't know anything beyond that property.

Q. What you call the Wilbur property—it was Parsons' property, wasn't it?

A. It was acquired afterwards, and not in the partnership between Mr. Lord and Mr. Parsons.

Q. It was Parsons' property, though?

A. It was his individually, and it was not in the original development of the whole tract.

Q. But was acquired by Parsons in 1898, wasn't it?

[Objected to as not cross-examination. Objection sustained.]

Q. Is this map made from the town records and not from your own observation?

A. No, from survey, sir.

Q. Can you tell us the distance between the southerly 10 line of the tract of Speer to Brookfield road measured along the Greenwood Lake railroad?

A. Only by scale, sir; I haven't the figures with me.

Q. Will you kindly tell us by scale?

A. About two hundred and eighty feet.

Q. How far is it in a direct line from the intersection of the southerly line of Speer with the westerly line of the railroad to Brookfield road?

A. Just a moment, was you first question from the line of the Speer property to Brookfield road along the 20 railroad?

Q. Yes.

A. Then I want to change that answer; it is four hundred and thirty feet.

Q. (By the Court.) From what point to what point?

A. Four hundred and thirty feet from the northerly line of Brookfield road measured along the Greenwood Lake railroad to the southerly line of Speer property.

Q. (Further cross.) How far is it measured in a direct line? 30

A. At what point?

Q. From a point where the southerly line of Speer intersects the westerly line of the railroad to Brookfield road?

A. Three hundred and forty.

Q. And how far would it be if you extended Edgemont road from the northerly line of Brookfield road to the Speer line?

A. Two hundred and sixty-five feet.

Q. This Valley road that you speak of as laid down here is the road that runs towards the town of Montclair, does it not?

A. From Montclair to Paterson.

Q. One of the chief roads leading from this vicinity to the town of Montclair, is it not?

A. Yes, sir; has a trolley line on it.

Q. Where is Upper Montclair station?

10 A. Upper Montclair station is to the north of Bellevue avenue and east of North Mountain avenue, indicated on the map by the blue square with a cross in it.

Q. How far is it from the Speer line along North Mountain avenue to the station?

A. About nineteen hundred feet.

Q. And how far is it from the Speer property to the Park avenue station of the railroad?

A. That I don't know, sir; it don't show it on the map.

Q. Would it appear on this map?

20 A. Yes, sir.

Q. Can you tell us along the nearest road?

A. Twenty-one hundred, as near as I can make it.

Q. You measured only to Brookfield road, did you not?

A. When?

Q. Didn't you measure only to Brookfield road when you said it was twenty-one hundred feet?

A. No, sir; I measured from that bend on Valley road marked with the letter B; the reason I measured  
30 from that bend was because it was the only point on Valley road that I could locate on this map with such a small scale, and it shows on this map the bend in Valley road, and the same bend as there [indicating] where it was located.

Q. I see six houses here on the northeast corner of North Mountain avenue and Watchung avenue in one enclosure, is that property formerly of one Predham?

A. No, sir; I think that property belonged to a man

named Condict and was sold to Frazee; he built the six houses.

Q. Isn't it the Predham tract?

A. No, sir; not to my knowledge.

Q. You don't recognize it by that name?

A. No, sir; it has been the Condict property as long as I know it.

Q. These four houses that are on the northeast corner of Brookfield road and North Mountain avenue, are they all in one enclosure? 10

A. There is no fence between them, sir.

Q. Have they got any rear line fence or designation?

A. No, sir.

Q. Doesn't the tax map show where they are?

A. Doesn't show any division between them at all.

Q. This street that you call North Mountain avenue was formerly known as Cliffside avenue, wasn't it?

A. Yes, sir.

Redirect examination.

Q. Who employed you to lay out an extension of 20 Edgemont road, which has been indicated by the blue lines marked A?

A. Mr. Lord and Mr. Parsons.

Q. What are their names?

A. Frank Lord and William H. Parsons.

Q. Were they the owners of the property, so far as you know?

A. They were at that time.

Q. Has that extension of Edgemont road ever been accepted by the town as a public street? 30

A. Not to my knowledge.

Q. Do you know of any dedication of the property as a public street in any form?

A. No, sir.

Q. Was it macadamized?

A. I believe it was.

Q. What work did you do?

A. I did the surveying and engineering.

Q. Mr. Crane, this street—indicated street—running east and west through the Speer property, you said doesn't appear on the property itself; it is simply an indicated street on this map, is it not?

A. Yes, sir; showing the plan of development.

Q. What is the distance from North Mountain avenue easterly to Valley road, inclusive, as shown on that proposed street, inclusive of the right of way of Greenwood Lake railroad?

A. One thousand six hundred and five feet.

Q. Are you familiar with the specifications and the cost of macadamizing and grading streets in Montclair and in that vicinity?

A. Yes, sir.

Q. What, in your judgment, would be the expense of opening and grading a street fifty feet wide, located as this proposed street is shown on the map, and macadamized by the entire distance, from North Mountain avenue to Valley road?

A. With sidewalks on both sides?

Q. You may add those; yes, sir.

A. About \$5,000.

Q. What width of macadam would be put down in that estimate?

A. Sixteen feet wide.

Q. And what depth?

A. Eight inches.

Q. And what grade have you in mind as compared with the grade of Brookfield road, higher or lower?

A. Well, it would be a little higher than Brookfield road when it was completed, it being further up the street.

Q. And then slopes down towards the south, doesn't it, there?

A. Yes, sir.

Q. What width of sidewalks and what kind of construction have you estimated?

A. Four feet flag walk.

Q. On both sides?

A. Yes, sir.

Q. And the total cost would be about \$5,000?

A. About \$5,000; yes, sir.

Recross-examination.

Q. Your estimate of \$5,000, did that include grading?

A. Everything complete, sir.

Q. And the sewer?

A. No, sir.

10

Q. No sewer?

A. No sewer.

Q. Well, to sell those properties out for residence property you would require a sewer there, wouldn't you?

A. A sewer should go there, but it is not absolutely necessary.

Q. Would you have to fill up any of the lots?

A. I presume some of them would have to be filled up.

Q. Is there a sewer in Valley road?

A. Yes, sir.

20

Q. This Tony's brook is much lower than Valley road, is it not?

A. Somewhat lower.

Q. A sewer run through that property could not be drained from the vicinity of Tony's brook into any sewer that was in Valley road, could it?

A. Yes, sir.

Q. You think so?

A. Yes, sir.

Q. Well, how would you get it to run up hill?

30

A. Make it deeper in Valley road.

Q. Then you would have to deepen the sewer on Valley road?

A. Not the present sewer; it was built with the idea of draining it.

Q. How did you get at that?

A. About sixteen feet deep.

Q. It is sixteen feet deep there?

A. Yes, sir; Brookfield road runs into Valley road—the sewer in Brookfield road.

Q. And Valley road in front of the Speer place is higher than it is at Brookfield road?

A. About three feet.

Q. Doesn't Brookfield road run into where the other road is very much depressed in order to get over the railroad?

10 A. Yes, but the sewer is only eight feet deep there.

Q. How much would the cost of sewerage be?

A. About a dollar a foot.

Q. That is all.

*Robert B. Harris* sworn.

Direct examination. Mr. Barrett.

Q. You reside in Montclair?

A. Yes, sir.

Q. What is your business?

A. Real estate.

20 Q. How long have you been in business as a real estate agent?

A. Over thirty years.

Q. In Montclair all the time?

A. In Montclair all the time.

Q. Do you hold any official position in the town?

A. A member of the board of assessors.

Q. How long have you been a member of the board of assessors?

30 A. Well, with an intermission of three years, for twenty-two years.

Q. Are you actively engaged in the sale of real estate?

A. I am.

Q. At the present time?

A. At present.

Q. Are you familiar with the property of the estate of Abram Speer as shown on that diagram?

A. I am, sir.

Q. I show you a map which was offered in evidence and marked *Exhibit 5* for the complainant, and ask you if you recognize that as a map of the Speer property, which is also shown on the map which Mr. Crane has referred to?

A. I do.

Q. Is there any extension of Edgemont road beyond the property line indicated in the plot marked blue and A?

A. No, there isn't.

19

Q. As shown on the Crane map?

A. No, sir; there isn't.

Q. Is there any street in Montclair extending from Brookfield road northerly to the Speer property?

A. There isn't.

Q. Is there any which comes anywhere near the Speer property, except that extension of Edgemont road which has been referred to?

A. There isn't.

Q. If a person wished to go from the portion of the Speer estate lying east of the railroad to the portion lying west of the railroad, how would they have to go through the public streets?

A. Valley road south to Brookfield, Brookfield road west and North Mountain avenue, and along North Mountain avenue.

Q. And that would be the shortest?

A. The nearest.

Q. You know of the existence of the embankment of the Greenwood Lake railroad through this property?

30

A. I do, sir.

Q. About how high is it through this property?

A. I should think about eighteen or twenty feet.

Q. What is the frontage of the Speer property on North Mountain avenue?

A. Ninety-four feet.

Q. And the depths have been testified to and appear on that map. If no development of this Speer property

should be made by means of opening a street through it, in your judgment, how could it be most advantageously used?

A. As a whole?

Q. You mean as a whole?

A. With the exception of one lot or two on North Mountain avenue.

Q. Now, how much does that tract west of the railroad contain?

10 A. I should think a little over nine acres.

Q. If it were to be sold as a whole, lying, as it now lies, with the embankment there, what, in your judgment, would be its value, and how do you reach such conclusion?

A. I would value the ninety-four feet on North Mountain avenue at \$20 a front foot, one hundred and seventy-five feet in depth, the balance of the land between that one hundred and seventy-five feet lying east of the railroad embankment at an average of \$300 an acre.

20 Q. Will you take a pencil and just see what value that will reach?

A. \$4,580.

Q. Are you familiar with the grades and location and character of improvement on Brookfield road?

A. I am.

Q. Will you state whether in your opinion this Speer property is capable of the same sort of development and improvement as the property where Brookfield road is located?

30 A. I think it is and is a little better—a little higher—above sea level.

Q. Do you know what property is worth on Brookfield road to-day, with the macadam and a sidewalk, on the side of the street that has a sidewalk?

A. From fifteen to twenty dollars a front foot.

Q. What is the average depth of the Brookfield road lots that sell for from fifteen to twenty dollars a foot?

A. They run from one hundred and thirty-five, I think, to two hundred feet.

The Court—Do I understand that that refers to the part of Brookfield road which lies east of the brook?

Mr. Barrett—I will ask the witness.

Q. What part of the Brookfield road do you refer to?

A. You speak of the property of where the macadam was, and that is from Edgemont road west.

Q. Is there any macadam from Edgemont road east?

A. I think there is a macadam there of perhaps two hundred feet, although I am not positive of that.

Q. Then the part that you refer to that is worth from 10 \$15 to \$20 a foot, as shown on the Crane map, lies west of Edgemont road?

A. From a point about where?

Q. From a point about out there near the water company's property?

A. No, the water company's property is down here, from a point in Brookfield road.

Q. (By the Court.) From a point at the letter "D" at the word "Road?"

A. Yes, sir; west, North Mountain avenue. 20

Further direct.

Q. And that is property that is worth from \$15 to \$20 a foot front, in your judgment?

A. Yes, sir.

Q. Now, if a street had been opened or could now be opened through the Speer property running from North Mountain avenue easterly to Valley road, and crossing the Greenwood Lake railroad at its grade before the embankment was put in, how would property fronting on that street compare in value with property on Brookfield 30 road, assuming that there were the same improvements?

[Objected to. Allowed subject to objection.]

[Question read.]

A. About of equal value.

Q. Now, if instead of having the crossing at the railroad of the full width of the street, the crossing at the railroad were twelve feet wide, and that the grade of the

railroad above the embankment was about there, to what degree would that make lots on this proposed street of less value than those on Brookfield road, assuming that any purchaser of those lots had the right to use that crossing?

The Court—What would be the value of this property with such a crossing?

Mr. Barrett—I will withdraw that question.

Q. Now, Mr. Harris, if such a road and such a crossing as was referred to in the former question existed, 10 what would be the value of lots on this proposed street per foot front, assuming that they were from one hundred and twenty-five to one hundred and thirty-five feet in depth, as shown on this map?

A. Beginning at a point one hundred and seventy-five feet east of North Mountain avenue and running to the railroad, my judgment is that they would average \$10 a front foot.

Q. And what is the value of the lot on North Mountain avenue having a frontage as it would have of forty- 20 four feet and a depth of one hundred and seventy-five feet, and a depth on the east line of one hundred and ten feet as shown on that map?

A. I think that lot, situated just as it is, having control in the rear there of that strip on North Mountain avenue, is worth \$3,000.

Q. What would be, in your judgment, the value of the frontage on North Mountain avenue fifty feet, which would have to be taken for the construction of such a road?

30 A. Twenty dollars a foot a hundred and seventy-five feet deep.

Q. What would be, in your judgment, the value of the plot of land on Valley road fifty feet wide and three hundred and forty feet on the south side and three hundred and fifty feet on the north side, which would be taken for the construction of the Valley road end of such a street?

A. From Valley road west to the railroad?

Q. Yes.

A. Twenty-five dollars a foot front.

Q. Now, if instead of an open public street across the railroad, the crossing at the railroad were twelve feet wide, and such crossing were only available to the uses of people who purchased lots or their grantees, how much would the lots west of the railroad on such proposed street be worth per front foot?

[Objected to.]

[Question repeated.]

10

A. Does that mean as it was before this embankment has been raised?

Q. Yes.

A. On that basis of the time of the grade crossing?

Q. Yes.

A. Unless it were fenced off over the railroad where the twelve foot in width came, I don't think that it would be a very material difference in values.

Q. Now, suppose that there were gates and a fence, and those gates were so that they could be opened and used by a person wishing to go through such gates and having the right to go through, what would be the value of the frontage per foot front of these lots?

20

The Court—Well, having the right to go through; specify what the right is.

Q. And having the right appurtenant to their ownership of lots on this proposed street?

A. Each side of the crossing with the gates on a twelve foot right of way?

Q. Yes.

30

A. I don't think it would improve very little over what it is to-day.

Q. You think that if there was such a restriction of the use by gates at both sides that the land would be worth no more than it is without a crossing?

A. Very little more, if any.

Q. Now, Mr. Harris, what is the character of the improvements on Brookfield road?

A. These four houses?

Q. Were you familiar with the condition of this property prior to the elevation of the tracks of the railroad?

A. I was.

Q. Now, can you say, in your opinion, whether the property is worth less without having the right of connection and access between the two parts than it was when it had such a right of access and connection?

A. It certainly is.

10 Q. Now, treating the property as a whole, what was it worth as an entirety with the right of a crossing before the grade of the railroad was changed—about twelve acres of land—nearly twelve acres of land in the entire plot?

A. The value is asked for now of the property when?

Q. In the condition in which it was in 1900, before the embankment was put there?

A. With a railroad crossing through the property about two feet above the surface at that time?

Q. Yes.

20 A. Two feet high, as I understand it, and now it is nearly twenty.

Q. Yes.

[Objected to.]

Q. Mr. Harris, I will put the question in this form: What amount, in your judgment, is the difference between the value of the Speer property—about twelve acres as an entirety—as it was with the right of this farm crossing as compared with its value with such farm crossing destroyed—as it has been destroyed?

30 [Objected to. Allowed.]

A. Seven hundred dollars per acre damages for the injury for the interior land from a point one hundred and seventy-five feet east of Mountain avenue to a point one hundred and seventy-five feet west of Valley road, per acre.

Q. Will you state, in a general way, the character of the improvements in the vicinity of this Speer property?

A. Those are four new houses, finished the last of the

last year, with a cost from \$6,000 to \$8,000 apiece, on the north side of Brookfield road.

Q. (By the Court.) That don't mean anything on the stenographer's notes; you will have to describe where the four houses are.

A. On the north side of Brookfield road and the east side of North Mountain avenue.

Further direct.

Q. Those are within a year?

A. Finished the last one, I think, within a year. 10

Q. It seems to me Brookfield road was opened since 1900, wasn't it?

A. No, sir; here is a house there.

Q. Well, that doesn't locate anything when you come to read the testimony?

A. The house on the north side of Brookfield road, nearly opposite Edgemont road, is about \$6,500 value; this is a house on the north side of Brookfield road, nearly opposite Edgemont road, \$6,500 to \$7,000; a frame house on the south side of Brookfield road and the east 20 side of Edgemont road at \$8,500; a house on the south side of Brookfield road, about two hundred feet west of Edgemont road, \$4,000; six new houses on the east side of North Mountain avenue, corner of Watchung avenue, average of \$5,500 apiece, perhaps \$5,000 apiece; three houses on the west side of Edgemont road, between Watchung and Brookfield road, \$4,500 each; a house on the corner of Edgemont road and Watchung avenue, the property sold for \$7,800, house and land; this is a new house in course of construction, and I don't know about 30 it; and this house on the north side of Watchung avenue, two hundred feet east of Edgemont road, \$3,000; it has a small outbuilding on the rear of the lot; also a new house in course of construction which is just framed now, that is also on Watchung avenue, north side of Watchung avenue, about three hundred and fifty feet east of Edgemont; the Montclair Water Company has a big pumping

station there, marked on the map; on Valley road, south of Brookfield road, are two semi-detached houses costing one \$4,000 and the other \$5,500, with a small barn in the rear; a house on the south side of Brookfield road, three hundred and fifty feet west of Valley road, was moved from the Essex County Park reservation, remodeled and is worth to-day \$3,500; a house on the south side of Brookfield road, four hundred and fifty feet west of Valley road, \$3,000; a new house just finished there,  
10 five hundred feet west of Valley road, looks like a \$4,500 house, perhaps \$4,000; north side of Brookfield road, three hundred feet north of Valley road, \$3,000; and then there are three more adjoining that, with one exception, on the north side of Brookfield road, about the same price houses.

Q. Let me ask you a general question: is that portion of Montclair improving—is real estate in that portion of Montclair going up in value or has it reached what you conceive to be its limit?

20 A. It is increasing all the time in value, from actual sales made; land has brought an increased value from a purchaser six months ago to last week of \$5 per front foot, of my own knowledge.

Q. Now, the property north of the Speer property, and what is generally known as Upper Montclair, how do the improvements there compare with those of other parts of Montclair?

A. North of—Upper Montclair?

Q. North of the Speer property, yes.

30 A. The improvements in that section are an average cost of dwelling-houses, it is all dwelling property of from \$4,500 to \$10,000, about the same character as in Montclair proper, with a few exceptions, Montclair avenue and Fullerton avenue, and some three or four streets there; with that exception, all about the same character of property—of value.

Q. Is the population in that section of the town growing rapidly or slowly?

A. Growing rapidly.

Q. And what portion of Montclair is now showing the most rapid growth?

A. I don't believe there is any difference.

Q. Growing throughout the entire town?

A. Going about and seeing new houses being built all over the entire town, it is hard to answer that question.

Q. What street is the main thoroughfare connecting what is known as Upper Montclair with the center of Montclair at Bloomfield avenue?

10

A. Valley road.

Q. A trolley line is on that road?

A. A trolley line; yes, sir.

Q. What other road is there north and south from Bloomfield avenue to Paterson or the county line?

A. Park street and Grove street and Mountain avenue, not quite direct, Mountain avenue is a jog.

Q. There is only one street west of this that runs through, is there not, to the county line?

A. That doesn't go through direct, there is an offset, 20 but that comes the nearest to it, and it is the only one that runs through; there are two Mountain avenues; there is North Mountain avenue and Mountain avenue north, four hundred feet west of it, which runs through the entire distance; this doesn't run through beyond Loraine avenue, which is four hundred feet north of Bellevue.

Q. Is there any other trolley line from Bloomfield avenue or the center of Montclair running north than the Valley road line?

30

A. There isn't.

Q. One question about the character of this land of Speer's. When were you on it the last time?

A. Last Thursday.

Q. And what was its condition with respect to wetness or dryness?

A. I started here at Valley road at the bend in Valley road, walked down and climbed over the railroad embank-

ment, and went down and went to the edge of the brook there; it was dry; I had been the week before, a week ago—two weeks ago to-day I had been up here and had walked to North Mountain avenue and had walked about half way down to this property, and it was dry.

Q. Half way down to where?

A. Half way down between Mountain avenue and the brook.

Q. Didn't go all the way to the brook?

10 A. No, sir; not on that occasion.

Q. Well, was the land between the points where you stopped and the brook dry or wet?

A. As far as I could see it was as dry as it was where I did stop.

Q. When was this?

A. Two weeks ago to-day.

Cross-examination.

Q. Mr. Harris, are you one of the assessors?

A. I am, sir.

20 Q. Does your knowledge of real estate come any other way except as assessor?

A. I have been in the real estate business over thirty years, and sold half of Montclair over.

Q. Then it is because you have also been a real estate agent?

A. Yes, sir.

Q. And you have certain maps in your assessors' office there?

A. Yes, sir.

30 Q. And don't you remember my being in your office a few days ago?

A. I think you were there, yes; nothing was said particularly.

Q. Did you say that your tax maps do not show any extensions of Edgemont road up to the line of Mr. Speer?

A. I said that the tax map—on that occasion you mean when you were there?

Q. Yes.

A. There was nothing said about Edgemont road when you were there, sir.

Q. (Question repeated.) I mean did you say in your testimony here?

A. Oh, I did, yes, sir; I said that.

Q. Is that a fact?

A. I believe it to be the truth, sir.

Q. Well, of course, you believe it to be true, but I want to know what you know; are you talking of your belief or your own knowledge?

A. Not having my attention called to that point I cannot state positively here, but that is my belief that the end of the Edgemont road, as shown on our tax maps, ends there on that line.

Mr. Barrett—He says ends there at that line.

Witness—What is known as the Wilbur property—the south line.

Mr. Parker—Can we mark Wilbur property on that?

Mr. Barrett—Yes, sir.

20

Witness—Now known as the estate of I. H. Searles.

Q. It is now marked on your tax map as being in Searles, is it not?

A. It is.

Q. There has been no change made in your tax maps in your office since I was there in relation to Edgemont road, has there?

A. When you were there when, sir?

Q. I only called once; I think it was on Monday of this week?

30

A. No changes to my knowledge.

Q. I understood you to say that the valuation of Speer's land except the lots immediately fronting on Mountain avenue, without access to Valley road, was about \$300 an acre?

A. I said so.

Q. That is the present value?

A. To-day.

Q. The property of Mr. Searles lying immediately south of Speer's property then is not worth over \$300 an acre that has no access to Valley road?

A. No, sir; no more than the other.

Q. And you say that property fronting on Brookfield road, east of a point about one hundred and seventy-five feet west of Edgemont road, is worth about \$10 an acre?

A. I didn't say anything of the kind; that question wasn't asked me, sir.

10 Q. You did not say so?

A. No, sir; it wasn't asked me, that question.

Q. I understood you to testify—these improvements that you have spoken about have all occurred subsequently to the opening of Brookfield road and Edgemont road; have they not?

A. With that exception on the north side of Watchung avenue, two hundred feet east of Edgemont; and with that exception on the Valley road of two houses on the west side of Valley road, on the corner of Brookfield, the  
20 rest are new development.

Q. Then, if I understand it, all the houses shown on that map, except two houses on Valley road and one on Watchung avenue, have been erected since the opening of Brookfield road and Edgemont road?

A. Yes, sir.

Q. That has made a new center of real estate brokers in that vicinity, has it not?

A. Simply an extension of the old line.

Q. And yet with the adjacency of Mr. Speer's land to  
30 this improvement you say it is now worth only \$300 an acre?

A. In its present undeveloped condition.

Q. What was the value of Mr. Speer's land west of the railroad while the crossing to Valley road existed as a fact, that is, a crossing of about twelve feet planked across the railroad, assuming that there were gates or bars at each side to be let down so that it gave access from

the property on the west side of the railroad to Valley road?

[Objected to. Allowed.]

A. The question came to me in direct testimony in a different way entirely from that on which I based my damage; there was nothing said about bars or anything of that kind; I figured that the property was worth with a street crossing without bars or any obstruction of that kind, to be \$1,000 an acre, and that the damage between that and the present value to-day was 10 \$700 per acre; I cannot see, in answer to this question, that it makes a great deal of difference in the value of property whether there is a bank eighteen or twenty feet high or two pairs of bars one each side of the track.

Q. (By the Court.) Well, the embankment makes the crossing impassable; the bars were bars which any person having a right on the land would be at liberty to remove, either bars or gates, a person passing would be at liberty to open the gate or remove the bars, that would be their right; that is the difference between the case of a 20 crossing which is absolutely impassable and the case of a crossing which can only be availed of by opening a gate, the person passing having the right to open that gate, or having the right to be there?

A. May I ask one question?

Q. Yes.

A. That would simply apply to a farm crossing twelve feet wide.

Q. As I understand the law, any person purchasing a lot of land west of the railroad would have the same 30 right to use those gates or to take down those bars that Mr. Speer would have, and his servants would have the same right, and any person who might desire to go to his house for any lawful purpose would have the same right, the only difference between an open passageway and a gate, so far as the legal aspects of the case is concerned, would be that in one case you would be put to the trouble of opening the gate or taking down bars, and in the other

case you would have not been put to that trouble. I think I make myself clear.

A. Yes, sir; I should think about \$500 an acre damages with the bars and the plank to this interior land.

Q. That is to say, you think that the presence of the gates or of the bars would make a difference of \$200; you said \$700 as the difference where there were no bars or gates, and now you say \$500 with the bars and gates?

A. There isn't very much difference between the—  
10 should say \$600 an acre.

Q. (By Mr. R. Wayne Parker.) I don't understand what the \$600 is?

A. I say that the valuation of the property, of the interior land—what I mean by interior land—was worth, with a grade crossing without gates, \$1,000, and I think it is worth to-day, with the embankment as it is to-day, \$300 per acre for the interior property, and I think, with a grade crossing, even with bars and all that sort of thing, that it is worth \$400 an acre; that makes \$600 damages  
20 per acre.

Q. I understand you to say that there is a certain amount of interior land here between one hundred and seventy-five feet from North Mountain avenue to the railroad?

A. Nine acres.

Q. You say that that nine acres is worth, as it is now, \$300 an acre; you say that if there was a clear right of way right straight through it would be worth \$1,000 an acre, and you say——

30 A. Oh, no.

Mr. Barrett—He said a clear right of way and such a crossing as there was at the railroad before the embankment was put there.

Q. And the last statement you made, I understand to be, that if it were only a twelve-foot crossing with bars or a gate available only to persons on this land, their servants, visitors or inmates, it would then be worth \$400 an acre, making a difference in valuation of \$900?

A. Six hundred dollars.

Q. How do you make \$600 for nine acres as the difference between—

A. Six hundred dollars per acre.

Q. Six hundred dollars per acre less you mean—

A. May I state it again?

Q. We asked for the value as it is, and you say \$300, and you say, with this particular sort of a crossing it is worth \$400 an acre; is not that a difference of \$100 an acre? 10

A. I would like to state the thing just as I understand it.

Q. Won't you answer that; is not that a difference of \$100?

Mr. Barrett—I object to having both counsel cross-examine the witness.

The Court—Let the witness tell us what he means. I don't understand.

A. I think that the values to-day of the land, under its present condition, from the point one hundred and seventy-five feet east of North Mountain avenue to the west side of the railroad, is worth \$300 per acre; I think that with an open development of twelve feet wide, planked across the railroad there as it was on a grade crossing, was worth \$1,000 an acre; I think that with a grade crossing over the railroad twelve feet wide, planked over, bars at both sides and all, it is worth \$400 an acre. 20

Q. (By Mr. Cortlandt Parker.) Do you mean to say that there is \$600 damage, that is a difference between \$1,000 an acre and \$400 an acre? 30

A. I do.

Q. There has been a great deal of activity around there in the last five or six years, around that vicinity?

A. Yes, sir.

Q. And do you mean to say that this property was worth \$1,000 an acre with that crossing, such as has been described in 1900?

A. Please repeat the question.

[Question read.]

A. Is that the same question I answered a few minutes ago?

Q. No, sir; you were speaking about the present value?

A. I say that the property is worth \$300 per acre.

Q. I want to know what it was worth in 1900, not now?

The Court—The values you give, were they present value or the values as of the year 1900?

Witness—The year 1900.

Q. What is it worth now, assuming that it had this crossing of which you have spoken?

Mr. Barrett—Is that a proper inquiry?

Q. What was the worth of the Searles tract in 1900 without any crossing at all?

[Objected to.]

A. At that time there was a crossing there, in 1900; that same kind of property; there was a crossing ran  
20 across it here [indicating].

Q. You say without the crossing it was worth \$300?

A. I say it was worth to-day \$300 per acre, the same character as the other land in question of Speer's.

Q. What is the value of land fronting on North Mountain avenue?

A. Twenty dollars a front foot, one hundred and seventy-five feet deep.

Q. Was that the value in 1900?

A. No, sir.

30 Q. How much was it worth then?

A. Twelve dollars to \$15, I should say; 1900? yes, \$12 to \$15.

Q. And on the Valley road, what is the value now?

A. How deep, sir.

Q. Three hundred feet?

A. The whole depth?

Q. Three hundred and fifty feet?

A. Twenty-five dollars a foot.

Q. And what was it in 1900?

A. I should think about \$20 a foot.

Q. Well, now, Mr. Harris, I understand you to say that the value of property on Valley road has risen some twenty per cent., and yet there has been no rise in the value of the land in the middle of Speer's tract; is that so?

A. A very small increase from that, because it is interior undeveloped property at present, and it has got to be sold in its entirety. 10

Q. There has been an increase in value since 1900?

A. I don't think that there has been any particular increase in that.

Q. You think that the chances of its being developed, Speer's property, in connection with this property around Edgemont road and Brookfield road, is of no value to this property?

A. In a general way, yes.

Q. How much did you say that land was selling for on Brookfield road near Edgemont road? 20

A. I said from Edgemont road to North Mountain avenue where the macadam was, to a point about two hundred and fifty feet, where that check mark is, from \$15 to \$20 a foot.

Q. And that is \$4,000 an acre, is it not, about?

A. Twenty dollars a foot would be two hundred feet square, \$4,000 an acre.

Q. And though this property is within one hundred and fifty feet of it—property that has the value, in your estimation of \$4,000 an acre, which property has its value because of its proximity to Edgemont road and Brookfield road, yet it has had no effect on Mr. Speer in that inside property? 30

A. Very little.

Redirect examination.

Q. Is there any way which you know of of developing

the Speer property to advantage without having a crossing there at the railroad?

A. No practical way; that is the natural way of improving all that property there.

Q. And is not that the reason why it has not developed as the Brookfield road property has?

A. Certainly is the reason.

Q. (By the Court.) When was the trolley built on Valley road, how long ago?

10 A. Well, I don't know that; I should think six or seven years ago.

Q. That is all.

*William H. Parsons, sworn.*

Direct examination by Mr. Barrett.

Q. Where do you live?

A. Montclair.

Q. What is your business?

A. Real estate agent.

Q. How long have you been in that business in Mont-  
20 clair?

A. About sixteen years.

Q. Where is your office?

A. Upper Montclair, Bellevue avenue.

Q. How far north—on Bellevue avenue?

A. Yes, sir.

Q. That is the avenue shown here on this map?

A. Yes, sir.

Q. Are you actively engaged in the purchase and sale of real estate for yourself or others in Montclair?

30 A. I have been for myself, not at present, but I am in selling for others.

Q. You maintain your real estate offices and are actively engaged in that business?

A. Yes, sir.

Q. Are you one of the owners or were you one of the owners of the property on Brookfield road opposite Edgemont road?

A. I was, yes.

Q. The other owner was Mr. Frank Lord?

A. Mr. Frank Lord didn't own on the north side of the street; he owned on the south.

Q. Had you also owned on the south of Brookfield road?

A. In my arrangement with Mr. Lord I took the land on the north side of Brookfield road running to this line, Mr. Harris' line; I also took on the east side of Edgemont road running south from Brookfield road to a line 10 three hundred feet north of Watchung avenue; I took the corner, one hundred and fifty feet of frontage on the east side of Edgemont road, corner of Watchung avenue, and Mr. Lord took all the frontage on the north side of Edgemont, and on the south side of Brookfield west from Edgemont road and North Mountain avenue.

Q. Were you owner of the plot on the north side of Brookfield road where an extension of Edgemont road was proposed?

A. Yes, sir. 20

Q. Was that extension ever completed?

A. No, sir.

Q. When was it abandoned?

Mr. Parker—I object, he didn't say it was abandoned.

A. The road was never opened.

Q. And it was wholly private property?

A. Yes, sir.

Recess.

*William H. Trippet*, sworn.

Direct examination by Mr. Cortlandt Parker. 30

Q. Are you the town clerk of Montclair?

A. Yes, sir.

Q. How long have you been such?

A. Eleven years.

Q. I asked you to produce here the deeds of the dedication of Brookfield avenue; have you those deeds?

A. Edgemont road and Brookfield road.

Q. As to Brookfield road, who does that come from?

A. The first deed recorded——

Q. Give the dates?

A. Edgemont road and Brookfield road accepted by the council of the town of Montclair on October 28th, 1901; that is from Francis Lord et al. to the town of Montclair; the second deed is that of Brookfield road, from Catherina M. Harris et al. to the town of Montclair,  
10 accepted by the council on the 27th day of April, 1903; this second deed is that part of Brookfield road which was not dedicated in the first deed carrying it through.

Q. So these two deeds—Brookfield road is dedicated from North Mountain avenue to the Valley road?

[Objected to on the ground that the deeds speak for themselves.]

Q. Deed from Francis Lord and others to the town of Montclair, dated the 11th of January, 1901——

[By consent of counsel, it is stated that the contents of  
20 this deed is the dedication of Brookfield road, from North Mountain avenue to a point about one hundred and seventy-five feet east of Edgemont road, as shown on the Crane map, and also Edgemont road as shown on that map, between Watchung avenue and Brookfield road. The other deed, Catherine M. Harris and others to the town of Montclair, dated April 6th, 1903, is for Brookfield road from a point one hundred and seventy-five feet east of Edgemont road to the Valley road.]

Q. Have you got the minutes of the acceptance of these  
30 roads?

A. Yes, sir.

Q. Will you kindly read them for us?

Mr. Barrett—We will admit, Mr. Parker, that that portion of Brookfield road and Edgemont road covered by these deeds have been accepted.

Q. When was the date of the last acceptance?

A. It is in the minutes, I believe; the Lord deed was accepted October 28th, 1901; the Harris deed was accepted April 27th, 1903.

Q. When those roads were accepted they were actually — were they sewered?

A. No, sir; I don't know that.

Q. (By Mr. Barrett.) The question I want to ask is not cross-examination, and I would like to make him my witness for the purpose of this question. Mr. Trippett, do you know whether there is any application before the town council of Montclair now for the opening of any street from Upper Montclair avenue easterly to Valley road in the vicinity of Bellevue avenue or Watchung ave- 10  
nue?

A. The matter was brought before the council of the opening of a street between Berkely place and south of Bellevue avenue; Watchung avenue comes between those two streets; the distance is relatively the same between the Van Vleck street, the only open street south of Watchung avenue, and Watchung avenue from Brookfield road to Bellevue avenue, where there is no cross street.

Q. And this additional street which is before the 20 council is south of Watchung avenue?

A. Yes, sir.

Q. How far south?

A. Well, it has not been located; the matter came up; it was presented by one of the councilmen, and he had numerous complaints because there wasn't any cross streets to allow access from Mountain avenue to Valley road north of Van Vleck street until they got to Watchung avenue.

Q. The distance between Watchung avenue and 30 Berkely avenue is about how far?

A. I don't know the number of feet.

Q. That is all.

*William H. Parsons*, recalled.

Further direct examination. Mr. Barrett.

Q. Are you acquainted with the Speer property as shown on the Crane map?

A. Yes, sir.

Q. How long have you known it?

A. Oh, at least twenty-five years.

Q. Have you ever been on the property?

A. A number of times.

Q. When were you there last?

A. Last Thursday.

Q. What was the condition of the ground as regards dampness at that time?

10 A. Why, it was evidently damp in spots; I walked from the railroad to the brook without getting my feet wet through the center of the lot.

Q. Will you state whether or not property in the vicinity of the Speer property and at the north end of Montclair towards Bellevue avenue has increased in value rapidly or slowly within the last five years?

A. Why, there has been a gradual increase in valuation.

Q. Has that increase in valuation been pretty general  
20 or only along certain lines?

A. Why, it has been general, but of course faster in some particular spots than others, depending on developments.

Q. And the character of the improvements that have been constructed in what is known as Upper Montclair, which I believe is all that property north of the crossing of the Greenwood Lake railroad at Valley road?

A. Well, there is no dividing line between Upper  
30 Montclair and Montclair, but Watchung avenue is looked on as being the southern limit of Upper Montclair.

Q. What has been the character of the improvement in the vicinity of this property; I don't mean the immediate vicinity, but in that neighborhood?

A. Almost entirely private residences, very few of them costing less than \$4,000 or \$5,000.

Q. And from that up to what amount?

A. Well, as high as \$30,000, and even more.

Q. Is the district known as Upper Montclair a purely residential section?

A. There is very little business there, just what is dependent on the residents.

Q. What is your opinion as to property in the vicinity of the Speer property being adapted to good residences and becoming a good residential section in Montclair?

A. Why the property improved would be practically as good as any.

Q. Is Valley road the principal thoroughfare between 10 Montclair center and Upper Montclair?

Mr. Parker—Don't lead the witness quite so much.

Q. I ask him is it, he can say no.

A. I consider that it is.

Q. Have the improvements along the line of Valley road been of as good a character as those along the other thoroughfares leading north and south like Grove street and Park street?

A. Well, nothing as good as the improvements on Park street or Mountain avenue or North Mountain avenue, 20 probably as good as Grove street.

Q. Yes, those are the best. What is the principal thoroughfare between Montclair center and Upper Montclair?

A. Valley road.

Q. Is there any other trolley line between Montclair center and Upper Montclair than the one on Valley road?

A. No, sir.

Q. What do you understand to be the area of the Speer tract as shown on the Crane map? 30

A. Why west of the railroad approximately nine acres or something over.

Q. Yes, and east of the railroad?

A. I haven't figured east of the railroad, but probably between two and three.

Q. What, in your judgment, was the value of the entire Speer tract in 1899, having a right of access to the two parts severed by the railroad by a suitable and con-

venient crossing which was practically at grade, the crossing of the railroad which was practically at grade, such crossing being twelve feet in width, such private crossing being available to any person or persons owning portions of this property or those having a lawful right to visit them?

Mr. Parker—Objected to.

A. I should figure that the Valley road frontage at that time was \$15 a foot running back to the railroad.

10 Q. And the property west of the railroad?

A. Cliffside avenue as it was down to North Mountain avenue now at \$15 a foot about, say one hundred and seventy-five feet deep, and the land in the rear of those lots to the railroad at \$1,200 an acre.

Q. At \$1,200 an acre?

A. Yes, sir.

Q. What, in your judgment, was the value of that same property about a year later, with this crossing destroyed or taken away?

20 A. The Valley road frontage I should consider of about the same value; it would be worth a little more; in fact, you would have to leave an outlet for the west land, and probably a little increase in value on account of the difference in time; the Cliffside avenue frontage I would put at \$12 instead of \$15, and the rear land at \$500 an acre.

Q. Now, what, in your judgment, was the value of that property in 1899, having the crossing which was referred to in my first question, provided such crossing  
30 were barred on both sides of the railroad by gates which could be opened, but which had to be opened in order to provide access.

The Court—By gates, I suppose you mean bars?

Mr. Barrett—Yes, sir; gates or bars.

Q. Would there be any obligation of the parties using those to shut the gate or put up the bars after going through?

Q. We will assume that they would have to leave the thing as they found it?

A. That is a pretty hard question to answer.

Q. Then, instead of having bars, assuming that there were swinging gates at both sides of the railroad at these crossings?

A. Why, I should say perhaps \$300 an acre; it would make that difference in the value of land—would be worth \$300 less.

Q. Than if the access were free of gates? 10

A. Yes, sir.

Q. Mr. Parsons, in your judgment, would the differences between the values of this land under these different conditions be more or less, as the land is to-day, than such differences were in 1899 or 1900?

A. I should think it would be about the same.

Q. Now, if this property had access on two parts, although a street could be opened easterly from Cliffside avenue to Valley road, such a street, for example, as Brookfield road, how would the Speer property compare in value with the property which was developed by Brookfield road opening? 20

A. You mean after improvements had been made?

Q. Yes, if it were susceptible, if there were no obstacles to opening a street like Brookfield road through it?

A. I should think it might make a difference of perhaps \$5 a foot; it would be worth \$5 a foot less than Brookfield road on account of the railroad crossing.

Q. On account of the grade crossing?

A. Of having a crossing there with gates. 30

Q. Now, if there was a suitable and convenient grade crossing there opened to persons who might own the property, would this property be susceptible of development on lines similar to Brookfield road?

A. Yes, sir.

Q. In what other way than on lines similar to Brookfield road is this property available for developments?

A. Why only by acquiring rights through other properties.

Q. Then, without acquiring rights through other properties, you have no idea of any other method of development?

A. Not east of the Cliffside avenue frontage.

Cross-examination. Mr. Parker.

Q. You were the owner, Mr. Parsons, in 1898 to 1901 and 1902, of a tract known as the Wilbur tract immediately south of the Speer property, were you not?

A. Yes, sir.

10 Q. That property is shown and marked on the map here, and you recognize it, do you not?

A. Yes, sir.

Q. And you purchased that—it contained about how many acres?

A. I have forgotten the area.

Q. It contained about four acres?

A. Probably about that.

Q. And you purchased that on January 31st, 1901?

A. I have forgotten the date.

20 Q. How many feet front did that have on Cliffside avenue?

A. About ninety-nine, full depth, and a small gore there twenty-eight feet deep.

Q. That property was worth \$15 a foot on Mountain avenue, wasn't it?

A. I should say about \$12 at that time.

Q. Twelve hundred dollars an acre?

A. Yes, sir.

08  
30 Q. How deep were the lots that you counted as selling at \$12?

A. Approximately one hundred and seventy-five feet deep.

Q. Then three-quarters of an acre was about worth \$1,200 dollars on Mountain avenue?

A. A little less than half an acre.

Q. Half an acre was worth \$1,200?

A. About two hundred feet deep would have been half an acre.

Q. And you paid \$2,500 for that land, didn't you?

A. The consideration in the deed I think was \$2,500.

Q. You put a revenue stamp on of \$2.50 on that deed?

A. That is all the money consideration.

Q. Then three acres and a half of that rear land was worth about \$1,300?

A. If that is all it had been worth I wouldn't have taken it at that price.

Q. That is what the sale was made for?

A. Yes, sir. 10

Q. What was that rear land worth on the Wilbur tract, 1901, when you purchased it?

A. Do you mean with reference to the land I owned adjoining, or what I expected to get.

Q. I mean what it was worth between a person wanting to sell and a person willing to buy, and one willing to sell?

A. Well, it was worth more to me than it was to some others.

Q. That may be; what was its fair market value? 20

A. I wouldn't consider it on that piece, taking it alone, worth more than \$400 or \$500 an acre.

Q. (By the Court.) Did it have an outlet?

A. One hundred feet on Cliffside avenue—that was the only outlet.

Further cross.

Q. Now, you made an agreement on the 25th of June, 1901, to sell to the Erie Land and Improvement Company about fifty feet in depth along the Greenwood Lake railroad, between the land of Harris and the land of Speer, did you not? 30

[Objected to as not cross-examination and not bearing on the facts. Allowed.]

A. As I recollect, I gave them an option for thirty days on a piece of property there.

Q. How much?

A. I have forgotten the consideration.

Q. Two hundred and twenty-five dollars?

A. Yes; and they were to do certain things to that piece of property if they took it, by making a road and either macadamizing or graveling it, and, if I am not mistaken, a sidewalk; so of course we gave them a finished frontage there, which I consider part of the consideration.

Q. Will you point out on the map where that was?

A. The extreme eastern end of the Wilbur piece.

10 Q. Right about here [indicating]?

A. Yes, sir.

Q. Marked "C" on the map?

A. Yes, sir.

Q. Are you not mistaken in saying that they made any agreement to build any road?

A. That is my recollection of it; that was the intention.

Q. It was the intention to open a road there, but not to build it—to give the land for a road?

20 Mr. Barrett—I think the best evidence of that will be the option itself.

Mr. Parker—It is already in evidence.

Mr. Barrett—Then it will speak for itself.

Q. I show you *Exhibit Option 2*, for defendant.

A. Also agreed verbally that it was to be graveled.

Q. Graveled and put in good condition for driving; well, did you have anything to do with securing an option for continuation of that proposed street and the Brookfield road?

30 A. I did not.

Q. Across the land of Harris?

A. No.

Q. Would that street, if it were put through, give a convenient and available way to get from the Speer property to the Valley road?

[Objected to. Objection sustained.]

Mr. Parker—Counsel offers to put in evidence the fact that there is certain land immediately adjacent to the

Greenwood Lake railroad on the west, and extending from the Speer line to the Brookfield road, which is so situated as to be adapted to the construction of a road from the Speer line to Brookfield road, which road, if constructed, would afford an outlet for the Speer land to the Valley road; that this land is of comparatively little value, not exceeding \$400 or \$500 an acre for the rear land and \$10 a foot for the frontage on Brookfield road; that it is in the hands of parties ready and willing to sell for a fair price and for the price stated.

10

[Offer overruled.]

Mr. Barrett—I now ask to have that entire offer stricken from the record on the ground that it is an attempt to put upon the record, by the statement of counsel, certain suggestions as to facts and conditions, testimony as to such facts and conditions being inadmissible itself. I don't think there ought anything to appear on the record placed there in that manner by such an ingenious offer of evidence. It seems to me that by the rules counsel should be limited to offering to prove certain things by this wit- 20  
ness, and that those offers to prove should be in the form of questions which could be passed upon, and it seems to me that it would be very unjust and very improper if counsel could get before this court, or before the Court of Errors if the case shall subsequently go there, his theory of how the estate of Speer might be relieved from some of the damage resulting from the construction of this crossing, and I ask to have that offer stricken from the record.

The Court—I cannot strike an offer from the record. I can overrule it, but cannot strike it from the record, 30  
because counsel has the right to make any offer on the record on either side of the case.

Mr. Barrett—I don't want it to appear in the case.

The Court—I cannot exclude it from the case.

Mr. Barrett—Have they a right to put it in the form of either an argument or a statement—and this is partly both—simply with a view to having it there to be overruled?

The Court—If it is an improper offer in that point of view, why, that is an additional reason, perhaps, why it should be overruled, but I cannot do any more than overrule it.

Q. The development of that section, Mr. Parsons, has been between north of Watchung avenue and in a direction running north and south, has is not?

A. Why there has been a general development in that whole section, east and west and south and north.

10 Q. But the development of the streets in Montclair, of the residential streets in which property sells at the best price, is usually in a northerly and southerly direction, is it not?

A. No, sir; there are more houses built on streets facing east and west than on north and south.

Q. The expensive houses and expensive grounds?

A. Not altogether; the most expensive house in Upper Montclair is——

Q. I am not talking about the most expensive  
20 houses——

The Court—Well, that is a direct answer to your question.

Q. Very well, let him go on and answer it.

A. The most expensive house built to-day in Upper Montclair faces on a cross street—east and west.

Q. Is not Park avenue one of the chief streets and fashionable streets?

A. Some of the best property in the town is on Park street.

30 Q. And Clairmont avenue runs in the same direction, does it not?

A. Clairmont?

Q. No, it goes the other way; well, what other streets run north and south?

A. Mountain avenue has some very fine properties on it; Park street and Upper Mountain avenue are the two streets that have the nicest residences, all running north

and south, but there are a number of streets running east and west that have——

Q. There is no physical objection or provision to extending Edgemont road northerly through Mr. Speer's place, is there?

A. Why, it can be done.

Q. The ground is perfectly level between the proposed extension, or the end of the proposed extension of Edgemont road, and Speer's property, is it not?

A. I don't think there is any proposed extension to 10 Edgemont road at present.

Q. There was then at some time a proposed extension?

A. There was, yes.

Q. And that extension went so far as to actually grade a road up to the Speer line, did it?

A. Why, it was done for this reason——

Q. Answer my question.

A. I took the earth out of there to fill in around houses; I needed the earth, and at that time I contemplated the extension of Edgemont road and thought I would move 20 the dirt when I needed it.

Q. You made an actual roadway up from Brookfield road to the Speer line?

A. I took all the dirt that would probably be removed in making the extension up to about four feet of the Speer line.

Q. And the road was rounded up in the middle with gutters on each side, wasn't it?

A. I presume it was shaped somewhat similar to a road. 30

Q. And you sold lots fronting on that proposed extension, did you not?

A. I sold one piece of property fronting on that proposed extension and gave a right of way over it.

Q. Just show us where you sold the lot fronting on that proposed extension. In here [indicating], wasn't it?

A. That lot marked "d."

Q. And that extension runs up to the Speer line?

A. There was about four feet that I didn't touch.

Q. And you sold a lot immediately north—south of the lot you have marked "d" with the side fronting on the proposed extension of Edgemont road, did you not?

A. I sold a lot fronting on Brookfield road which would have touched the extension in this line of Edgemont road; I have forgotten the wording of the deed.

Q. You sold that lot on Brookfield avenue before you sold the lot immediately behind it, did you not?

10 A. I did.

Q. And you sold a lot fronting on Brookfield avenue with its westerly side on this proposed extension, too, didn't you?

The Court—Do you want to show a right springing out of the grant, is that what your idea is?

Mr. Parker—I want to show that immediately next to Speer's property is a road, and I want to find out who he sold that lot to here [indicating].

Mr. Barrett—Why not ask him whether he doesn't own  
20 that land himself. From his testimony that is what I gather to be the fact, that he still owns it.

Q. Have you sold the lot lying on the north of Brookfield road immediately west of the blue lines marked in the proposed extension of Edgemont road?

[Objected to.]

Mr. Parker—I offer in evidence a certified copy of a deed from William H. Robinson to Alfred B. Robinson, dated the 23d day of March, 1903, and recorded in B 36 of Deeds for said county, on page 553.

30 Mr. Barrett—I shall object to the admission of this instrument on the ground that it contains nothing that relates to the case before the court and that it is wholly incompetent and irrelevant.

The Court—Mr. Parker can point out to what clause in that deed he relies.

Mr. Parker—This is a deed to Alfred B. Robinson conveying property in the town of Montclair beginning at a point in the westerly line—

The Court—You cannot put that in, but on what clause in that deed do you rely as showing this to be a public highway?

Mr. Parker—It is a part of my proof that it is a public highway.

The Court—What clause do you rely on as making it a part?

Mr. Parker—They speak of it as the proposed extension of Edgemont road, and the tract is bounded on that. I desire to offer that as part of my proof. 10

The Court—I overrule your offer.

Mr. Parker—I should like to have it marked for identification *D 1*, of this date.

Mr. Barrett—I object to having it marked.

The Court—I overrule it.

Mr. Parker—If we can identify it on the record only as to what we offer, that is all we care about.

Also, another deed from William H. Parsons to Alfred B. Robins, dated the 7th of February, 1903, and recorded the 9th of February, 1903, in book B 36 of Deeds for said 20 county of Essex, on page 316.

The Court—I make the same ruling.

Q. Did you sell another piece of property on the south side of the proposed extension of Edgemont road, on the east side and the north side of Brookfield road?

Mr. Barrett—I object to that. If he sold it there must have been a deed given.

[Allowed.]

A. No, I did not.

Q. You still own that property, then? 30

A. No, sir.

Q. Who owns it?

A. That I don't know; I haven't seen the record or transfer.

Q. How did it pass out of your possession?

A. Sheriff sale.

Q. Now, Mr. Parsons, I understand that your estimate of the damages of this property by reason of the destruc-

tion of the crossing is based on the theory that if that crossing were present a street might be laid through the middle of the property similar to that delineated on the Crane map?

A. Would allow for developments of that kind.

Q. And you think that land that was only accessible to the highway by a crossing across two tracks of a railroad, the crossing being twelve feet in width, and being a private crossing only adapted to and only legally usable by  
10 the owners of the lots in the tract west of the railroad, that a street could be constructed and made popular, and lots thereof salable?

Mr. Barrett—I object to that on the ground that it is not a cross-examination, and that the witness has said nothing of the sort.

Q. Salable for good prices then?

Mr. Barret—The question is also too long involved, I think, to admit of any answer by anybody.

[Question withdrawn.]

20 Q. If you were developing that property, Mr. Parsons, and had this crossing over the railroad that has been described, what do you think would be the best way of doing the development?

A. It is practically suggested on that map—open the street and improve it.

Q. Who would you expect to live on the street, what class of persons?

A. That might depend on how I developed it.

Q. Well, how would you expect to develop it?

30 A. I should consider it would be suitable for houses costing about from \$3,000 to \$5,000.

Q. And you think that people would want to live in a street that only had this crossing across the railroad?

A. I think they would.

Q. With gates that could be shut and closed against people that didn't have any right to go there?

A. I think I have a right to say so; unless I am mistaken, there is a similar case in Montclair to-day.

Q. I am not asking about similar cases; I want your opinion?

A. I can judge a little from that case, as I seen it.

Q. Well, I want your opinion?

A. I think they would, provided their friends had access to the place as well as themselves.

Q. How much did you expect to get per foot for that?

A. I think a fair price would be \$10 a foot—average—if the street were improved.

Q. (The Court.) By improved you mean what? 10

A. Macadamized and flagged and sewered.

Further cross.

Q. Sewered you mean, too?

A. Yes, sir.

Q. That would cost about \$5,000.

The Court—Well, according to the estimate of the witness \$5,000 for the other improvements and \$1 a foot for the sewer, that would be more than \$5,000.

A. I think probably to flag both sides, macadamize it and put in a sewer and grade the street as I know the 20 ground, would probably cost about \$3.50 a front foot for the amount of road that was laid.

Q. You count the front feet on both sides of the road?

A. No, front foot of the street itself.

Mr. Barrett—Lineal feet.

Q. You don't think, as a good business man, endeavoring to make this property more valuable, you would endeavor to get access to Edgemont road or Brookfield road at other places?

Mr. Barrett—I object. I don't see how that question 30 is competent.

[Overruled.]

Q. Now, Mr. Parsons, didn't you offer Mr. Speer to open that road if he continued across his land?

[Objected to. Overruled.]

Q. Did you have any conversations during Mr. Speer's

lifetime with him in regard to opening Edgemont road across Speer's land?

[Objected to.]

The Court—I think the question should state the time.

Q. Did you have any within the past six years?

[Objected to. Overruled.]

Q. Did you have any such conversation in the year 1899?

[Objected to. Overruled. Exception.]

10 Q. That is all.

*Gibian H. DeWitt* sworn.

Direct examination. Mr. Barrett.

Q. Where do you live?

A. In Montclair.

Q. How long have you lived there?

A. About twenty-two years.

Q. What is your business?

A. Real estate.

Q. Where is your office?

20 A. In Upper Montclair, on Bellevue avenue.

Q. How long have you been engaged in that business?

A. About eight years.

Q. Have you, during the past eight years, conducted sales and exchanges of real estate in Montclair?

A. Yes, sir.

Q. Is your business throughout the town of Montclair, or is it chiefly in what is known as Upper Montclair?

A. Throughout the whole town.

30 Q. Do you know the Speer property which is shown on what I have called the Crane map?

A. Yes, sir.

Q. Have you ever been upon it?

A. Yes, sir.

Q. When, last?

A. Last Thursday.

Q. What was the condition of that land on Thursday last with respect to dampness when you were on it?

A. When I was on it and crossed over there it was practically dry—no water.

Q. What part did you cross over?

A. Crossed from the Valley road west to the railroad, crossed over the railroad about half way up to North Mountain avenue.

Q. At what point did you stop?

A. Well, I think about half way up.

Q. At the brook?

A. At the brook, yes.

10

Q. You went to the brook?

A. Yes, sir.

Q. And you said it was dry?

A. Yes, sir.

Q. Is this section of Montclair known as the neighborhood of Upper Montclair—is that the way it is known, Upper Montclair?

A. Yes, sir.

Q. What is the character of that neighborhood with respect to residences and improvements?

20

A. Well, that is practically as good a residential place as the majority of them up around there.

Q. What is the thoroughfare, if there is one, from the center of Montclair north to Upper Montclair?

A. Valley road is the main one.

Q. There is a trolley on Valley road; it has been testified to?

A. Yes, sir.

Q. How far east of Valley road is Park street, about?

A. Well, I don't know exactly; I should think in the neighborhood of eight hundred feet.

30

Q. At this point of the Speer property?

A. Yes, sir.

Q. And Mountain avenue is how far west of Upper Mountain avenue or Cliffside avenue, as it has been called?

A. I think that is about in the neighborhood of four hundred feet.

Q. Then Valley road is between the two, between the high grounds of the mountain and the high ground of Park street?

A. Yes, sir.

Q. Were you familiar with the condition of the Speer property about 1899?

A. Not much, no, sir; I wasn't.

Q. Well, when I say the condition, I don't mean its physical condition; I mean its location?

10 A. Yes, sir; that part of it; yes, sir.

Q. In 1899?

A. Yes, sir.

Q. Now, what, in your judgment, was the value of the entire Speer tract between Valley road and Cliffside avenue in 1899, having a right of way for a crossing over the tract of the Greenwood Lake railroad, such crossing twelve feet wide and being available to any person owning portions of that land or having a legal right to visit persons there; the value of the entire tract under the conditions I have made?

20

A. With an outlet over the railroad?

Q. With a crossing at grade or substantially at grade, twelve feet wide?

A. Well, I think it would be worth in the neighborhood of \$600 an acre.

Q. At that time?

A. Yes, sir.

Q. Now, what, in your judgment, was the value of that same tract a year later or about a year later with such right of crossing destroyed?

30

A. That would be the property as it is now.

Q. From your observation?

A. About \$300 an acre.

Q. When you speak of these valuations of \$700, I think you said, didn't you—\$600 and \$300 per acre—do you refer to the entire tract, including the frontage on Valley road and the frontage of Cliffside avenue or only the interior land?

A. No, sir; just the interior.

Q. Where, in your judgment, does the interior begin, how far back from Cliffside avenue?

A. One hundred and seventy-five feet.

Q. How far back from Valley road?

A. About three hundred feet.

Q. (By the Court.) You mean all the land to the west of the railroad?

A. West of the railroad.

Further direct.

10

Q. And up to within one hundred and seventy-five feet of Cliffside avenue, what is the value or was in 1899 of the frontage on Cliffside avenue?

A. Well, that was worth about \$15 a foot.

Q. About how much more would you add—you testified that there was ninety-four feet—how much more would you add to that for this irregular piece which has no frontage on Cliffside avenue, which is about sixty-six feet?

A. Do you mean that corner lot there?

20

Q. What would you call that entire corner lot at the corner of Cliffside avenue?

A. About \$3,000.

Q. What, in your judgment, was the value in 1899 of the Valley road property, frontage lying east of the railroad?

A. All the way back?

Q. All the way back to the railroad; yes, sir?

A. About \$20 a foot front.

Q. Mr. DeWitt, will you state whether or not the property of Speer's is adapted for residential purposes?

30

A. It is; yes, sir.

Q. And what class of houses would you consider appropriate to build there on—remunerative to build there if it had a crossing right for those who purchased the land?

A. That land there would carry a house from \$3,000 to \$3,500.

Q. Is that land capable, in your judgment, of profitable development on any other lines than of putting a street in it which shall run from Cliffside avenue easterly?

A. No, sir; that is the only practical way of opening it up.

Cross-examination.

Q. What is the land worth per front foot on Valley road?

A. To-day?

10 Q. No, we are talking of 1900?

A. About \$20 a foot, its full depth back.

Q. I think you stated it was worth \$15 a foot on Cliffside avenue?

A. Back one hundred and seventy-five feet, in 1899?

Q. And this was worth \$20, going back the whole depth of the railroad?

A. Yes, sir.

Q. Mr. DeWitt, you say that in 1900, after the crossing was abolished, the land, practically as it is now, is  
20 worth \$300 an acre; would it make any difference if the bank wasn't there, but simply the right of crossing taken away?

A. If the bank wasn't there, so that they could get over the railroad crossing, over the railroad?

Q. I say, if the crossing were taken away and the bank were not there, if it was simply a tight fence, would it make any difference; does the bank do any injury or add to the land—to its value?

[Objected to.]

30 Q. In your answer, did you take the fact of the bank into consideration in making up your answer?

A. No, sir; I didn't; I don't think that would make any difference in it.

Q. Then you say, as I understand you, that this interior land from the railroad to a point one hundred and seventy-five feet from North Mountain avenue was worth

in 1900 \$300 an acre only, the right of crossing the railroad having been taken away?

A. Yes, sir.

Q. If that right of crossing were a simple wagonway over the railroad, protected by bars and a fence, and a gate could be substituted for those bars on both sides of the railroad, would that right of way add anything to the value of that interior land, and if so, how much?

A. I don't think it would make much difference with it; no, sir. 10

Q. Then you give your answer supposing that the twelve-foot right of way was open?

A. Yes, sir.

Q. If it were closed by a gate, you think that that right of way didn't make much difference in the value of the land?

A. If you had a gate or bars there.

Q. Gate or bars on both sides of the road; how much do you think that interior land was worth in 1899 if the right of way across the railroad was a twelve-foot right of way, protected at each end by bars or a gate, how much was that interior land then worth per acre? 20

[Objected to.]

Q. Well, I will say, by a gate on either side which would have to be opened and shut by people who passed through; I ask what was the value of that interior land with such a right of way as I have described, protected by gates which have to be opened and shut?

A. About \$500 or \$600 an acre.

Q. Then you think it worth as much with gates at 30 either side of the railroad as if there were no gates?

[Objected to. Allowed.]

[Question read.]

A. As if there were no gates; if it was thrown open there it would be worth more without any gates, certainly.

Q. Didn't you state the value without gates at \$600, some little time since?

Q. (By the Court.) You put a valuation of \$600 per

acre upon this land; now, on what basis did you put that valuation, on the basis of there being a road there, a private road twelve feet wide with gates, or on the basis of there being a private road there twelve feet wide without gates?

A. Without gates, right of way across there on a grade crossing.

Q. Suppose there was the same right of way there for the same people, precisely the same people, and suppose  
10 that there was a swinging gate there or two swinging gates, one on each side of the track, would you think that those gates would make any difference?

A. Yes, sir.

Further cross.

Q. How much would the land be worth per acre?

A. Wouldn't be worth over \$300 an acre.

Q. Then the gates would not benefit the land at all from what it would be if there were no passage there at  
all?

20 A. If there was a grade crossing there you have to put gates there.

Q. (By the Court.) Well, we are assuming that there was a grade crossing. It is three separate questions that have been put to you, the first relates to this interior land, without any access, having no access whatever to Valley road, you understand that?

A. Yes, sir.

Q. As to that you think that in that event the interior land would be worth \$300 an acre; then you were asked  
30 suppose there was a right of way, a private right of way twelve feet wide, open, entirely open, that is, without any gates, what would be the value of the interior land, and you said \$600; now, the last question that was put to you was, suppose there should be the same private right of way, but with two gates there, the grade being precisely the same, there being no embankment there, now I understood you to say that you thought that the interior land would be worth \$300 an acre; in other

words, you think that that land, if it were enclosed by a gate, would be no more valuable than the land shut off entirely from the Valley road; now, is that what you mean?

A. No, sir; I don't think it would be much more valuable.

Q. That is all.

*William M. Taylor* sworn.

Direct examination by Mr. Barrett.

Q. Where do you live? 10

A. Montclair.

Q. What is your business?

A. Real estate.

Q. Where is your office?

A. In Montclair.

Q. Near where?

A. Near the D., L. & W. station.

Q. How long have you been in this business?

A. About fifteen or sixteen years.

Q. Have you been actively engaged in it during this 20 entire time?

A. Yes, sir.

Q. Do you hold any position in the town of Montclair?

A. I am assessor at large in Montclair.

Q. Does that include valuations of the entire township, assessor at large?

A. Yes, sir.

Q. That means elected from the entire county and not from a ward?

A. Yes, sir. 30

Q. Have you been upon the Speer property within a short time?

A. Yes, sir.

Q. When were you there last?

A. Last Thursday a week.

Q. At that time what portion of it did you go upon?

A. Well, from Valley road over the railroad and up as far as the brook.

Q. Did you go across the brook?

A. No, sir.

Q. Have you been familiar with the location and surrounding and condition of the Speer property since 1899?

A. Yes, sir.

Q. What is the main thoroughfare from the center of Montclair, north?

A. The most traveled thoroughfare is Valley road.

Q. We understand that the area of this Speer tract is  
10 about nine acres west of the railroad, and about three  
acres east of the railroad; what amount, in your judgment,  
was the value of the entire Speer tract in 1899, consisting  
of about twelve acres in 1899, having at that time an  
actual crossing at or near grade, which crossing was  
twelve feet wide and was available to Mr. Speer or to  
any person who might then have or afterwards acquire  
an interest in the property and to all persons having a  
right to visit him or such other persons?

A. The Mountain avenue front was worth about \$15;  
20 the Valley road front about \$18, I think, and the interior  
land about from \$600 to \$700 an acre.

Q. And what depth of land would you say should go  
with the Valley road front?

A. All the way back to the railroad.

Q. And what depth of land would go with the Cliffside  
avenue front?

A. One hundred and seventy-five feet.

Q. What would you say would be the value of the piece  
at the Cliffside avenue front, as shown on the Crane map,  
30 about forty-four feet actual frontage on the avenue, one  
hundred and seventy-five feet deep, and about one hundred  
and ten feet in width?

A. Forty-four feet front would be at \$15 a foot, and  
that interior land, with no frontage, would be worth probably  
five or six hundred dollars.

Adjourned until Friday, October 6th, 1905, at 10  
a. m., at the Chancery Chambers, Newark, N. J.

Transcript of shorthand report of the evidence given upon the trial of the above-stated cause, on Friday, October 6th, 1905, at the Chancery Chambers, Newark, N. J.

Before His Honor VICE CHANCELLOR STEVENS.

*Mr. Barrett* and *Mr. Faulks*, appearing for the complainant.

*Messrs. Cortlandt* and *B. Wayne Parker*, appearing for the defendant.

*William M. Taylor*, recalled.

10

Further direct examination. Mr. Barrett.

Q. Mr. Taylor, the last answer was the interior land, \$500 or \$600, according to the stenographer's notes; by that interior land what did you refer to?

A. Land in the rear of that little strip on Mountain avenue; I refer to this piece right in here [indicating], and it has no frontage.

Q. The portion——

A. That has no frontage on Mountain avenue.

Q. The portion of the plot having a small frontage on 20 Mountain avenue?

A. I gave the price of this piece of forty-one odd feet, and the balance of that piece in there [indicating], that has no frontage on Mountain avenue or anywhere else.

Q. Mr. Taylor, what, in your judgment would be the value—was the value of this land in about 1900, at the time that the crossing of the railroad was totally destroyed?

A. The answers that I gave yesterday I suppose gives that; \$15 Mountain avenue frontage; \$18 Valley road 30 and \$700 an acre interior land, west of the railroad.

Q. Was that with the crossing destroyed?

A. With the crossing, I suppose.

Q. Now, then, what would be the value of that same land in 1900 with the crossing destroyed?

A. Without any right to cross, you mean?

Q. Without any ability to cross?

A. Why, \$300 an acre I should think ought to be the value of that piece.

Q. And what portion of the land do you refer to when you say \$300 an acre?

A. I am referring to the land west of the railroad up  
10 to within one hundred and seventy-five feet of Mountain  
avenue.

Q. Now, what would you say was the value of this land if there were a grade crossing of the sort which has been referred to, about twelve feet wide and available to any person owning any portion of the land, or any other persons having the right or occasion to visit such persons or their property, provided such crossing were subject to swinging gates at both sides of the railroad and the crossing were at grade as it was before the destruction of the  
20 crossing?

A. I don't think that the gates would make any difference in value at all, unless the railroad would furnish a man to keep them closed.

Q. What is the reason for your judgment that gates there would not make any difference in the value of the land unless the railroad kept a man to keep them closed?

A. I know of another street, a similar case, where they have gates, and the gates are never closed.

Q. Where is that?

30 [Objected to as irrelevant. Objection sustained.]

Q. You have been on this property, you said; now, what in your judgment would be the most available method and the most profitable method of developing that property, assuming that there was a right of crossing of the railroad at grade, either with or without gates?

A. Why, the way it could be developed to the best advantage is as shown on the map there.

Q. On the Crane map?

A. Yes, sir.

Q. And if it were developed as indicated on the Crane map, what, in your judgment, would be its value as compared with property near by shown on that map and having a frontage on Brookfield road?

A. The interior property on each side would average \$10 a foot, judging from other sales made there.

Q. Now, if the property is not developed or cannot be developed in such a way as this because of having no access or outlet at the eastern end of it, for what uses, in your judgment, is it adapted, the interior land?

A. Why, it is not of much use, the interior land, in its present condition, unless it had a right of way across the opening.

Q. Sir?

A. Unless it had a right of way through, it is not of much use.

Q. What would you say that rear land would be worth with no right of way or outlet except such outlet as is had from Cliffside avenue? 20

A. I don't think it would be any more valuable than it was five years ago; \$700 an acre; I doubt if it could be sold for that.

Q. For how much?

A. Seven hundred dollars an acre.

Q. I understood you to say that \$700 an acre was your appraisal of the value of the interior land if it had an outlet across the railroad; now then, if that outlet is totally destroyed, what do you say would be the value of that rear land, having no outlet or access except by way of Cliffside avenue? 30

A. Well, if there is no possibility of having a right of way through there, that would depreciate in value at least one-half.

Cross-examination. Mr. Parker.

Q. I didn't get your full name?

A. William M. Taylor.

- Q. You went up to this land last Thursday?  
A. Yes, sir.
- Q. When were you last there before?  
A. I cannot say when I have been on the land.
- Q. Ever?  
A. Oh, yes; I was on it.
- Q. You walked last Thursday as far as the brook?  
A. Yes, sir.
- Q. Did you ever walk all the distance through?  
10 A. I can't say that I ever did walk all the way across.
- Q. Why did you stop at the brook?  
A. Because of the brook; the part where we were I didn't see any way of getting across.
- Q. You didn't see any plank across the brook?  
A. Not where I was; no, sir.
- Q. Where you stood on the edge of the brook, I suppose you were on the remains of the old road that used to be there?  
A. I didn't see any indication of it.
- 20 Q. It wasn't in here [indicating] where you stood then; it was on either side?  
A. I don't think it was.
- Q. Did you see cattails and hummocks on this side?  
A. I did not; no, sir.
- Q. Saw no cattails?  
A. No, sir.
- Q. If they are there, you simply didn't see them?  
A. I didn't see them.
- Q. When you got to the brook, how far was the ground  
30 that you stood on above the water, how many feet?  
A. Why, I should judge about a foot.
- Q. Did you notice the ground on the other side of the brook?  
A. Yes, sir.
- Q. You didn't see any roadway there, either?  
A. Not where I stood; no, sir.
- Q. There were no remains of it that you could see?  
A. I didn't see any.

Q. No marks of ever having been traveled by wagons?

A. Not where I stood; I don't know, there might have been in other portions of the land than where I stood.

Q. You are a real estate agent and accustomed to directing the opening of land?

A. Yes, sir.

Q. If you had these lands and couldn't get across the railroad, would you, as a prudent owner, attempt to find an access, say from Brookfield road, to these lands?

[Objected to. Allowed.]

10

[Question read.]

A. Yes, I think I would.

Q. Did you examine the lands on Brookfield road adjoining and within fifty feet, say, of the right of way of the Greenwood Lake division?

A. Not particularly; no, sir.

Q. Did you see their general character?

A. Yes, sir.

Q. In your judgment, what would such a strip be purchased for?

20

[Objected to. Question withdrawn.]

Q. In 1900, was the house which appears upon the Crane map at the corner of Valley road and Brookfield road—was that erected?

A. I think it was; I think those two houses have been there for years, if I am not very much mistaken.

Q. It appears by the map, doesn't it, that there is fifty feet between the corner of that house—the map is drawn to a scale; there seems to be fifty feet between that house and the road?

30

A. Yes, sir.

Q. Were these lands on either side of Brookfield road—who were they owned by in 1900?

A. Between Brookfield road and this Speer property was owned by Mr. Harrison—E. M. Harrison—and the Wilbur property.

Q. And the lands on the other side of Brookfield avenue, to whom did they belong in 1900?

A. I think the name is Brouck; I think that is the way it is spelled.

Q. Mr. Brouck?

A. Yes, sir.

Q. Have these lands since that time been in the market for sale?

The Court—Were they in 1900?

Q. Were they in 1900 in the market?

A. No, sir; not that I know of.

10 Q. Was this land along the railroad within fifty feet of it, from the Speer property to the Valley road, available for the construction of a road—physically available?

A. Yes, I think so.

Q. If such a road had been constructed or were constructed from the Speer property, would it or not afford shorter access to the Park avenue station than by crossing the railroad and coming down the Valley road?

A. That appears on the map; not a great deal of difference—a little bit shorter.

20 Q. And without crossing the railroad?

A. Yes, sir.

Q. Would the acquisition of such a road relieve the Speer land from the necessity of sacrificing fifty feet of front—

Mr. Barrett—Well, that is obvious; they could not do both.

Q. As a real estate agent, considering the shape of the Speer property between the Greenwood Lake railroad and the Valley road, would the construction of a road through  
30 it, as shown on the Crane map, divided into two parcels, help or injure its value as a plot of ground?

A. I don't think it would change the value much; the value of the lot taken would be counted on by getting the lot in the rear, the lots in the rear one on each side; it would just about make things pretty near even.

Q. Mr. Taylor, you testified on direct examination that the existence of gates on a right of way across the railway would not injure the right of way if the railroad

people did not close the gates; suppose that the party who had to cross the railroad had always to open and close the gates on both sides of the railroad?

A. I don't think they would do it.

Q. Suppose they were forced by law to do it?

A. It seems to me that if everyone had access across there, and wanted to see any of the several parties, that there would be a great deal of trouble.

The Court—Suppose the gate were a spring gate?

Q. Suppose it were a spring gate that everybody could 10 open but had to allow to close?

The Court—It would close itself.

A. I doubt if it would make much difference in the value of it.

Q. What do you mean by doubting whether it would make much difference in the value of it?

A. Well, the fact of these gates there would not, in my judgment, if the right of way was open there, would not affect the value of the rear land very materially; it might make a little difference. 20

*William B. Jacobus*, sworn.

Direct examination. Mr. Barrett.

Q. What is your full name?

A. William B.

Q. Where do you live?

A. Upper Montclair.

Q. How long have you lived there?

A. Fifty-five years.

Q. What is your occupation?

A. Builder and real estate contractor. 30

Q. How long have you been in that business?

A. In which?

Q. As a builder and real estate dealer and contractor in Montclair?

A. Thirty odd years.

Q. Do you hold any official position in the town of Montclair?

A. I do.

Q. What?

A. Assistant assessor.

Q. As such does it become your duty to assess property throughout the town or only in some particular ward or taxing district?

A. Throughout the town.

Q. How long have you held that position?

A. Two years—nearly three years.

10 Q. Are you familiar with the property of the Speer estate, as shown on the Crane map?

A. Yes, sir.

Q. Have you ever been upon it or any part of it?

A. I have.

Q. How long ago?

A. Last Wednesday.

Q. What portion did you visit on Wednesday?

A. I came down the railroad track and went down the bank, and so up to the brook, and then crossed the brook  
20 and went up over on the upper section.

Q. Up towards Cliffside avenue?

A. Yes, sir.

Q. How did you get across the brook?

A. Well, there were some ties lying there that I stepped on and went across.

Q. At that time what was the condition of the land—that back land there—with respect to dryness?

A. Well, I went all over it dry shod; I didn't get my feet wet anywhere.

30 Q. Were you familiar with this property of the Speer estate in 1899 and 1900?

A. Yes, sir.

Q. What, in your judgment, was the value of that property in 1899, consisting of about twelve acres and having a right of access across the railroad substantially at grade by a right of way twelve feet wide?

A. Well, the property on Mountain avenue or Cliff-

side avenue was valued, I think, at about \$15 a foot at that time.

Q. The frontage?

A. Yes, sir; and the Valley road about \$20.

Q. About what depth would go with the frontage of Cliffside avenue?

A. On Cliffside avenue?

Q. Yes?

A. About one hundred and seventy-five feet.

Q. And what depth would go with the frontage of 10 Valley Road?

A. I should think about the same.

Q. What additional value would you allow for the portion of the plot fronting on Cliffside avenue, which has no frontage—that portion of the plot which has no frontage on Cliffside avenue but is shown on the Crane map in that southwest corner?

A. You mean if it was improved?

Q. No, sir; how much more—you put a value per front foot on this piece; it has forty-four feet without the proposed street which is shown or ninety-four with it, and then it has a portion lying south of it which has no frontage; I refer to this piece here; how much more, if any, would you say that plot was worth than the \$15 a foot front which you have named?

A. At the present time?

Q. No, sir; in 1900?

A. It would be about \$2,000.

Q. About \$2,000 additional?

A. Yes, sir.

30

Q. Now, in 1899, what valuation would you put upon the interior of that land, as we have called it, extending from a line one hundred and seventy-five feet back of Cliffside avenue easterly to the Greenwood Lake railroad and containing about nine acres, such property having a right of way, there being appurtenant to such property a right of crossing of the Greenwood Lake railroad substantially at grade, such crossing being twelve feet wide?

A. I should think on an average of about \$400 an acre.

Q. What value would you place upon the rear of the Valley road property extending from a point, I think you said, about one hundred and fifty feet, did you say?

A. One hundred and seventy-five.

Q. Extending from a point one hundred and seventy-five feet west of Valley road back to the railroad, such distance being, and as shown on the map, an average of one hundred and seventy-five feet?

10 A. I should think about the same.

Q. About \$400 an acre?

A. About \$400 an acre.

Q. What, in your judgment, was the value of that entire property west of the railroad in 1900, with such right of crossing and access to Valley road destroyed?

A. Grade crossing?

Q. With no crossing, with the crossing which had existed there destroyed?

A. That is the interior?

20 Q. Yes, sir; about nine acres, extending from Greenwood Lake railroad westerly to a point one hundred and seventy-five feet from North Mountain avenue?

A. I should think it would be worth less.

Q. How much less?

A. One-half.

Q. And that would be about how much an acre?

A. That would be about \$400 an acre for the interior land, if there was no grade crossing.

Q. No crossing?

30 Mr. Parker—He said \$400 with the crossing.

Mr. Barrett—That's what I understood him to say.

A. I understood the first question was to be without the crossing.

Q. Then, without the crossing, that interior land, in your judgment, would be worth \$400 an acre?

A. Without the crossing; yes, sir.

Q. Now, then, with a crossing in 1899, such crossing

being twelve feet wide, what would you say that interior land of about nine acres was worth?

A. I should think it would be worth about \$800.

Q. From your knowledge of that land, what method of development would be most likely to be profitable and remunerative?

A. The plan shown upon this Crane map.

Q. Is the land physically capable of being laid out as shown on this map?

A. I think it is; in my best judgment I think it is. 10

Q. And if laid out, as shown on this map, with a right of crossing the Greenwood Lake railroad and access to Valley road, what would, in your judgment, be the average value per foot front of lots fronting on the proposed street?

A. I should think on an average about \$10 a foot.

Q. How would the Speer land, laid out and developed in that manner, compare in desirability for residences with the land on Brookfield road near to it?

A. There is very little difference, if any. 20

Cross-examination.

Q. How long have you been a real estate dealer?

A. Real estate dealer?

Q. Yes.

A. I have taken it up within the last six or seven years.

Q. Did you stop being a dealer when you took it up?

A. No, sir; I carried the building on with it.

Q. You own real estate in Montclair, now?

A. Yes, sir.

Q. Anywhere near this place? 30

A. No, sir.

Q. None in Upper Montclair?

A. It is in Upper Montclair, about three-quarters of a mile.

Q. When you went through west of the brook did you find any road?

A. Nothing but a path; I could see the outlines of the

old road that was there, but it was overgrown with grass and weeds.

Q. Can you identify exactly what part of the property it is on?

A. Sir?

Q. Could you identify exactly what part of the property it was on, or is that a mere matter of survey?

A. Yes, I can identify the property that was on.

Q. Well, do you remember whether the road corresponded with the Owen map?

A. Well, the path line ran through the center of the property—nearly through the center.

Q. And there it is marked on the Owen map; you cannot tell whether that is exactly as it was or not?

A. Well, from my judgment, I think it is about the line.

Q. You say you got through dry shod?

A. Yes, sir.

Q. Had to pick your way a little?

20 A. Not necessarily until I got to the brook.

Q. After the brook you did?

A. After I got crossing the brook I had to be careful.

Q. And after that, didn't you have to be careful?

A. Of course, we had to be a little careful; from the location, of course, we would expect something of that kind, but I found nothing to wet my feet.

Q. It had been pretty dry weather last Wednesday?

A. Well, it had been dry for the last day or two.

Q. The place seemed to be subject to overflow, didn't it?

A. Owing to the obstruction of the brook.

Q. Covered with furze near the brook and not with grass?

A. Furze and some grass.

Q. Were there any hummocks near the brook?

A. No; what do you mean?

Q. I mean was there tufts of grass you had to step on with wet places in between?

A. No; I stepped in between where I went and found it was dry and was very much surprised.

Q. You had been there before when it was wet?

A. No, sir.

Q. Then, why were you surprised?

A. Owing to the obstruction of the brook I thought it would be naturally wet.

Q. When you went there before, was it wet?

A. No, sir; the last time I went through there I came out perfectly dry. 10

Q. That was the last time?

A. No, the time before that, when I got through I was dry.

Q. Did you go all the way through this last time?

A. Not all the way to Cliffside avenue; I didn't think it was necessary, because it was perfectly dry.

Q. In making your estimate of the value of the land with the crossing over the railway twelve feet wide, did you assume that that crossing would be perfectly open?

A. At a grade crossing, yes. 20

Q. And open no gates to it?

A. No gates.

Q. If there were gates on either side, with the persons having the right to cross out and open and close, would you give the same answer?

A. Yes, sir.

Q. Wouldn't make any difference?

A. Not to me; no, sir.

Q. Not in your opinion for the value of the land to purchase it? 30

A. Not for the value of the land; I don't think it would make any material difference.

Q. You think that people who bought lots there would be just as ready to use a right of way that they had to open and close gates on each side?

A. Well, if they were forced to do it it might decrease the value somewhat, but my experience is that they were never closed.

Q. I am not getting your experience; a right of way across a railroad would have to be closed, and if they had to be closed and the parties were forced to close gates after them every time, what would be the effect upon the value of the land?

A. Probably decrease it.

Q. Let us take the land as it actually was in 1899, where there was a right of way across the railroad which was closed on either side by bars, which had been estab-  
10 lished by the railroad and the owner, what was the value of that interior land under those circumstances?

[Objected to.]

Q. Just taking the land, assuming that in 1899 there was a right of way and that the railroad company, by agreement with the owner, had put posts and bars there which the owner must take down and put up every time he crosses the railroad, what was the value of that interior land at that time?

[Objected to. Allowed.]

20 A. I think the value of the land is about \$800; I don't think that it increases or diminishes, in my estimation.

Q. That is all.

Complainant rests.

*Nathan Harrison* sworn.

Direct examination by Mr. Cortlandt Parker.

Q. Where do you live?

A. Montclair.

Q. How long have you lived there?

30 A. All my life.

Q. How far do you live from the property of Abram Speer?

A. About half a mile, I think.

Q. Do you own any property in that vicinity?

A. Yes, sir.

Q. Do you still continue to own any of it?

A. Yes, sir.

Q. How long have you owned this property that you speak of, in the vicinity of Abram Speer?

A. It seems to me thirty years at least.

Q. Look at this map called the Crane map and tell me what property it was that you originally owned?

A. By the way, the property is in the name of my wife at present; not always.

Q. Will you show the property that you once owned and is now in the name of your wife on the map, if you can; I understand this is the Wilbur property and this is the Speer property here marked in red [indicating]. 10

A. I own on both sides of Brookfield road from Valley road up to about one hundred and seventy-five feet from Edgemont road.

Q. Have you had the management of that property since it was in the hands of your wife?

A. Certainly.

Q. And can you tell us when Brookfield road was laid out and opened?

A. I should think about ten years ago; I haven't the date. 20

Q. Was it prior or subsequent to the elevation of the railroad over Valley road?

A. Before the elevation.

Q. In the construction of that road was the road sewered, Brookfield road; did you construct it?

A. Yes, sir.

Q. Was it sewered?

A. I don't think it was at that time; it was, I think, later. 30

Q. It has been sewered lately?

A. Yes, sir.

Q. Do you know whether it was sewered when the railroad was raised.

A. I think it was.

Q. Who paid for that improvement, the laying out of the road and grading the road and putting the sewer in?

A. I did.

- Q. Was any pavement put on the road?  
A. You mean a hard road?  
Q. Yes; was it macadamized?  
A. No, sir.  
Q. Was the sidewalk put there?  
A. One.  
Q. On which side?  
A. North.  
Q. Did you sell lots out of that tract?  
10 A. Yes, sir.  
Q. Can you tell us what, in the early part of 1900, was the value of lots fronting on the north side of Brookfield road extending through to the land formerly of Wilbur?  
[Objected to.]  
Q. Did you make sales about that time?  
A. I made sales on the road after the road was laid out and worked; I did sell lots on it.  
Q. And at what prices did you sell?  
A. Ten dollars a front foot.  
20 Q. Did you sell for any less price?  
A. Two lots, I think, at about \$8.  
Q. Where were those lots you sold at \$8?  
A. I think about there [indicating].  
Q. On the south side of Brookfield road?  
A. Yes, sir.  
Q. Does your family still own land on Brookfield road?  
A. Some; yes, sir.  
Q. And immediately adjoining the railroad do you  
30 own there on the north side of Brookfield road, adjoining the railroad?  
A. Yes, sir.  
Q. What would you sell——  
[Objected to.]  
Q. Do you own any block of lots up near Edgemont road?  
A. Is that Edgemont road there?  
Q. Yes?  
A. They owned about there.

Q. Pointing to a cross on the map where the word "Brookfield" road is?

A. This one I mean [indicating], not that one; we have it right here.

Q. About how many feet front have you got there on each side of the road?

A. I have about a hundred on each side next that of Mr. Parsons or whoever it may be.

Q. Have you ever been over the Speer land, Mr. Harrison? 10

A. Yes, sir.

Q. Can you tell us the condition of that land in 1900 as regards wetness or dryness?

A. Were the water works there at that time?

Q. I don't know, sir; yes, the water works had been established then, I believe?

A. It was very much dryer than before the water works were there; at the same time it was low ground and subject to be wet.

Q. How is its condition now, do you know? 20

A. Quite dry; usually, as far as I have seen, I have been over it a few times; never with any special reference to that.

Q. What part of the land have you been over?

A. The lowest part more especially.

Q. Mr. Harrison, you were the gentleman who, in 1901, made an agreement with the Erie Land and Improvement Company to give a strip of land, fifty feet wide, along the railroad, for the consideration of \$50?

[Objected to.] 30

A. I gave such an option to Mr. Keegan.

Q. Just look at the signature and see if it is yours?

A. That is my signature.

Q. And there are other signatures there?

A. Yes, sir; those are my signatures and I presume that is the agreement.

Cross-examination by Mr. Barrett.

Q. Mr. Harrison, just a question; at the time you sold the lots on Brookfield road for \$10 a foot front, were those lots on the side where the sidewalk was or on the other side?

A. Both.

Q. Both sides; you got the same price without regard to sidewalk?

A. Yes, sir.

10 Q. And at that time was the property sewered?

A. I am not sure whether it was when the first was sold or not, sir; very soon afterwards, I think.

Q. Well, can you recall whether you had paid sewer assessments at the time that you sold those lots, so that they were free, or whether there were sewer assessments to grow due by installment, to be paid by the property owners?

A. I paid them all, sir; everything, I am almost sure.

20 Q. Did you lay the sewer yourself—a private sewer, or was it laid by the town?

A. No, no; private.

Q. Do you remember whether these sales of lots on these plots were before 1900 or after?

A. No, I cannot tell that without looking into it.

Q. When did you make your first sales?

A. I can't give you the date now.

Q. Can't you tell approximately how near to 1900 it was that you sold land for \$10 a foot front?

A. 1900?

30 Q. Yes; that is five years ago, about?

A. Oh, yes, yes; what was the question, please.

Q. The question that I asked you is, when did you sell lots fronting on Brookfield road at \$10 a foot front?

A. I should think both before and after that time, sir.

Q. Before and after 1900?

A. Yes, sir.

Q. Was the land which you developed by the opening of Brookfield road higher or lower in grade than the Speer property?

A. That part was about the same [indicating]; originally it was very much higher than most of it, the center of it; of course, not all of the Valley road or Mountain avenue.

Q. But it was further south?

A. Yes, sir.

Q. And the stream ran down through your property also, didn't it?

A. Yes, sir; and one stream ran through mine—was lower, but there was a high ridge in about the middle of 10 mine that was entirely different from anything else there was in the surrounding land, and that is where I built.

Q. And that was where you built houses, you mean?

A. Yes, sir.

Q. That is all.

*George Booth* sworn.

Direct examination by Mr. Cortlandt Parker.

Q. Where do you live?

A. Montclair.

Q. What is your business?

20

A. Builder.

Q. I find in the records of Essex county a conveyance in about the year 1896 from J. Wesley Van Geisen and others to Ella Booth, wife of George Booth, of some property on Cliffside avenue, in Montclair; do you know the Ella Booth referred to in that deed?

A. She is my wife.

Q. Did you have anything to do with that property and the management of it?

A. Yes, sir.

30

Q. Was there a map made of the property?

A. Yes, sir.

Q. I show you a blue printed map here, entitled map showing property of Ella Booth in Upper Montclair, N. J.; is that the map you made?

A. That is the property.

Q. How soon after you purchased the property was that map made and the property laid out in lots?

A. Very shortly after.

Q. I see a street set forth in that map; did you lay out a street through the property?

A. Yes, sir.

Q. And were any lots sold on the street?

A. Yes, sir.

10 Q. Can you point out the property that you own on this map?

A. Right there marked "Booth."

Mr. Parker—I desire to offer that blue print in evidence.

[Objected to.]

The Court—When was this property laid out?

Mr. Parker—Shortly after 1896.

The Court—It was bought in 1896, I understand?

Witness—It was laid out two weeks after it was bought.

Q. That property still exists there on the map?

20 A. As far as it has been foreclosed, and the rear part has been taken away.

Cross-examination.

Q. The street ends where it is shown on the map, doesn't it?

A. Well, there isn't any street there any more.

Q. It ends about one hundred and fifty feet north of Mountain avenue?

A. Yes, sir.

Q. That is all.

30 *Ernest Hink*, sworn.

Direct examination. Mr. Parker.

Q. What is your business?

A. Real estate broker and operator.

Q. How long have you been such?

A. Since 1890.

Q. Where have you engaged in this business of agency and operating?

A. In Montclair and also New York City.

Q. Where is your chief business then?

A. Montclair.

Q. Have you bought and sold property for your own account?

A. Yes, sir.

Q. And for others?

A. Yes, sir.

Q. To what extent?

A. You mean in what way, Mr. Parker? 10

Q. In Montclair; can you give us some idea of the amount of money?

A. Well, since the first of January, I should say, this year, about \$270,000; that is, for myself and for others.

Q. Have you been doing that since 1890?

A. Selling and buying—not to that amount.

Q. Where have your operations been; in what part of Montclair?

A. North of Bloomfield avenue mainly.

Q. Where does Bloomfield avenue run? 20

A. Bloomfield avenue runs from Glenridge to Caldwell.

Q. It is the main road through Montclair?

A. Yes, sir.

Q. Have you bought and sold in the vicinity of Abram Speer property at Upper Montclair?

A. I should judge within a mile.

Q. Do you know the tract of Montclair that is called Upper Montclair?

A. Yes, sir. 30

Mr. Barrett—I think before this witness is questioned as to particular property I would like to ask some questions as to his qualifications myself.

Cross-examination. Mr. Barrett.

Q. Mr. Hink, in 1899 and 1900, were you engaged as an agent or broker in the purchase or sale of real estate in Montclair for others?

A. Yes, sir.

Q. How long have you been so engaged?

A. Since 1890.

Q. And where was your office?

A. In Christopher street.

Q. Isn't it true that during the last fifteen years your operations have been chiefly in handling and developing your own and your father's property?

A. No, sir.

10 Further direct.

Q. Are you familiar with the land of Abram Speer?

A. Yes, sir.

Q. How long have you known it?

A. I have known the land for a good many years back; that is, my attention specially has not been called to it from any other property around there in that section.

Q. Did you visit the land with me a few days ago?

A. Yes, sir.

Q. Do you remember what day it was?

20 A. I think it was Friday.

Q. Where did you go on the land?

A. First, up Valley road—that is, Valley road frontage; then over to Edgemont road to the adjoining property of Searles—this part in here [indicating]; then up Brookfield road and to North Mountain avenue to the Speer property.

Q. Did you approach the property from Brookfield road?

A. Yes, sir.

30 Q. Will you describe what kind of an approach there is to the property from Brookfield road?

A. To Edgemont road?

Q. Yes?

A. Well, there has been a road, but it is somewhat grown over now, yet the part of the road is there; there is plain surface there; there was a road; it shows very plainly that there was a road to the fence.

Q. To whose fence?

A. To the Speer fence.

Q. Is any fence in between Speer's fence and Brookfield road?

A. Right at the Speer line there is a fence.

Q. But between that fence and Brookfield road is there any fence?

A. No, sir; not on Speer's land to Brookfield road; no, sir.

Q. Did you observe the property of Mr. Robinson 10 there lying on both sides of this old road, as you call it?

A. Yes, sir.

Q. Were there any boundaries between that property and this old road?

A. There certainly showed indications of a boundary there.

Q. In what way?

A. By rise of the sidewalk.

Q. Did you see any hedge there?

A. Yes, sir; there was a hedge there.

20

Q. And you went on the property by means of this old road, did you, from Brookfield road?

A. Yes, sir.

Q. How far down did you go on the property towards the Greenwood Lake railroad?

A. Why, I should judge a distance of about two hundred feet from the extension of Edgemont road.

Q. Why didn't you go any further?

A. There wasn't very good walking, that is, as far as the brush was concerned, and the growth of underbrush 30 and weeds, very heavy weeds.

Q. Did you see any marshy grass there?

A. I cannot exactly say how to explain marshy grass.

Q. Did you see any bunches of cattails?

A. I don't know; there were thin cattails; I don't know whether they would be termed cattails or what.

Q. Then you went back up North Mountain avenue?

A. Yes, sir; up Brookfield road and then up North Mountain avenue.

Q. Now, can you tell us in the early part of 1900 what was the value of that property of Mr. Speer's that laid west of the Greenwood Lake railroad?

[Question withdrawn.]

Q. Can you tell us what was the value of that property from one hundred and seventy-five feet from North Mountain avenue east to the railroad, assuming that the  
10 owner of the property and his grantees would have a right to pass over the New York and Greenwood Lake railroad at a level, by a passage about twelve feet wide, which was usually closed by gates to be operated by the persons using the gates so as to give access to Valley road and the other portion of the Speer property?

A. That is in 1899 you ask for?

Q. Yes?

A. Well——

Q. (By the Court.) And the early part of 1900?

20 A. Yes, sir; I don't think that, to my judgment—I mean that certain land is not worth—wasn't worth then any more than it is at the present time.

Further direct.

Q. What is it worth now?

A. I should judge around \$400 an acre for the inland.

Q. What was it worth then with this right of way that has been described?

A. Well, the right of way, to my idea, would not affect the land to any extent at all.

30 Q. Why don't you think so?

A. Because I don't think that the town of Montclair, that is, the people living in the town of Montclair, would consider a twelve-foot right of way; there would be an objection, if anything, to enter a property that had a twelve-foot right of way, and also the property on Valley road is a class that with a twelve-foot right of way it would really injure the property than to benefit it.

Q. The property on Valley road you are speaking of?

A. The property on Valley road is of a class that has buildings inferior—right above the Speer property the streets and chief dwellings, that is, some of the tenement house districts—if they had access to the property by twelve feet it would really be an objection to the other property that is on the west side of the railroad.

Q. So, as I gather from you, you don't think that a connection of any sort with this rear land to Valley road would be beneficial to the rear land?

A. Any street connection as shown on this map. 10

Q. If you were developing that property, with your experience in laying out and developing property, how would you attempt to develop it?

[Objected to.]

The Court—The proper way, in your judgment to develop it, is that what you mean?

Mr. Parker—That is what I mean.

A. My idea in looking over the ground and studying it up carefully would be to open up a road from Brookfield road along the line of the railroad and then to give 20 a certain park next to the railroad, that is, a sort of a park, and then macadamize and develop the rest of the stretch up to Mountain avenue.

Q. Which would, in your estimation, be more expensive to do that, by a road running across Greenwood Lake railroad and carried down to the Valley road, as on the map, or by turning a road down towards Brookfield road along the railroad?

[Objected to.]

Q. Which would be the most expensive plan to do? 30

[Objected to.]

No cross-examination.

*Ira S. Crane*, sworn.

Direct examination by Mr. Parker.

Q. Mr. Crane, what is your business?

A. Hardware.

Q. And have you had any public position in Montclair?

A. Yes.

Q. What?

A. Town committeeman, town councilman.

Q. Are you connected with any banking institution there?

A. Yes, sir.

Q. What?

10 A. The Bank of Montclair, the Trust Company Savings Bank.

Q. And what has been your business in connection with those banks, with relation to valuing land?

A. Well, I am on the real estate committee of the savings bank, and the real estate committee of the trust company and of the building loan.

Q. How long have you been employed in those ways?

A. On the building loan for about seventeen years, and both of the banks since their organization.

20 Q. How long was that?

A. The Bank of Montclair about twelve or thirteen years; the trust company five or six.

Q. In your business does it call you to examine and appraise the value of lands around Montclair?

A. Yes, sir.

Q. And you say you have been doing that for fifteen or sixteen years?

A. Yes, sir.

30 Q. Have you bought and sold real estate there for others?

A. Not for others; I have for myself.

Q. To what extent?

A. Well, I owned a number of pieces of property, one near this, a small piece.

Q. Where did you own that, near where?

A. Near the Well property on Watchung avenue, just south of Brookfield road.

Q. Do you remember when you bought and sold that?  
Mr. Barrett—He didn't say he sold it.

A. I bought it about ten years ago, and sold part of it in trade this summer.

Q. Are you familiar with the Speer land that we are considering in this case?

A. Yes, sir.

Q. How long have you known that?

A. Thirty-five or forty years.

Q. Did you at my request go to visit that land some days ago?

A. Yes. 10

Q. Just tell us what parts of the land you looked at and examined?

A. I was over all of the land on either side of the railroad except that part near the brook—close to the brook.

Q. Between the brook and the railroad?

A. Yes, sir; I was over some of the property between the brook and the railroad, but instead of crossing there we came out and went out to Brookfield road, and then over to the railroad, instead of going through.

Q. What day was that, do you remember? 20

A. I think last week, Tuesday.

Q. And weren't you over the ground some years ago?

A. Yes.

Q. When this case was first tried?

A. Yes, sir.

Q. Just describe the character of the ground from the Greenwood Lake railroad to North Mountain avenue?

A. That part of Mountain avenue is very fair building property; the property, of course, where the railroad and the brook is is what we call swampy land. 30

Q. Were you able to go down to the brook from the west?

A. From the west?

Q. Yes, from North Mountain avenue?

A. Well, I suppose it could be done, but I went as far as I thought it was well to go and stopped.

Q. Did you approach the Speer tract from Brookfield avenue?

A. Yes.

Q. How did you get into the Speer tract from Brookfield avenue?

A. I went in through the property here at the end of Edgemont road, where the road had been partly opened or practically opened up to the Wilbur land, over the fence and on to the Speer property.

Q. Then you went over a road opened from Brookfield road up to the Speer fence?

Mr. Barrett—He didn't say so.

10 A. I rode up nearly to the Wilbur property in an automobile and found it pretty rough and stopped and walked the rest of the way.

Q. Can you tell us what the value of the Speer property, one hundred and seventy-five feet west of North Mountain avenue to the Greenwood Lake railroad was, in the early part of 1900, with a right to cross the railroad for the owner of that part of the property, and his grantees and persons having a lawful right to visit him, to get to the property on the east side of the Greenwood  
20 Lake railroad and the Valley road, and this twelve-foot right of way across the railroad being closed by gates on either side?

A. You mean property commencing one hundred and seventy-five feet east of Mountain avenue to the railroad?

Q. Yes?

A. I should say it was worth about \$300 an acre.

Q. What difference would it make in that valuation if the right of way were closed?

A. I should say no difference.

30 Q. Why not?

A. Because, if the right of way—well, yes, I should say no difference either way, because of the prospect of developing the property either way; if the property were developed, as laid on the map, with a twelve-foot right of way through it, it would not be worth any more, probably not as much as if it were developed with a roadway through to Edgemont road; I don't know of any property in Montclair, except, possibly, one piece further north, than this where there is just the right of way across

the railroad, if it were developed with the right of way across the railroad twelve feet wide, the class of people that would be apt to buy that property, I think, would probably depreciate the value of the price of property on Valley road or Mountain avenue, so that it would not bring as much money as it would developed to Edgemont road; or, in other words, if there was a road of the regular fifty feet width from Mountain avenue to Edgemont road, in the regular way, I am under the impression that the property would sell for more money than it would developed through the twelve-foot right of way. 10

Q. Is there any other connection besides Edgemont road that you think a prudent owner might—

A. It need not be particularly Edgemont road; no, sir; west of the railroad, down by the brook, probably, would be even better, because it would make a better drainage all the way through, and in other words, if it were developed with a full width street, the whole property would give better net results than it would if the roadway were cut through with a twelve-foot opening under the railroad or above. 20

Cross-examination by Mr. Barrett.

Q. When you speak of a twelve-foot opening on the railroad, or above, has your estimate been made on the assumption that the whole means of access from Cliffside avenue down to the railroad would be only twelve feet wide?

A. Oh, no, not taking fifty feet road on either side down to the railroad.

Q. And twelve feet at least across the railroad? 30

A. Across or underneath, either way.

Q. That is all.

*William B. Holmes* sworn.

Direct examination by Mr. Cortlandt Parker.

Q. Where do you reside?

A. Montclair.

Q. How long have you lived there?

- A. Thirty-nine years.
- Q. What is your business?
- A. Real estate at the present time.
- Q. How long have you been engaged in real estate?
- A. About twelve years.
- Q. Have you bought and sold lands in the vicinity of Montclair?
- A. Yes, sir.
- Q. During those times?
- 10 A. Yes, sir.
- Q. To what extent, do you say?
- A. I can hardly tell you to what extent—a good many pieces here and there.
- Q. It has been your continuous business, has it not?
- A. Yes, sir.
- Q. Are you familiar with this tract of Speer's, in Upper Montclair?
- A. I know something of it; yes, sir.
- Q. How long have you known it?
- 20 A. Well, twenty-five years or more.
- Q. Did you, at my request, go and visit the property last week?
- A. Yes, sir; the week before last, I think it was.
- Q. And how did you approach the property?
- A. I went up on Valley road and examined that portion between Valley road and the embankment—Greenwood Lake embankment—and then went through Brookfield road to Edgemont road, and up across a little other land by the Speer line.
- 30 Q. Can you tell us what was the character of the land?
- A. Well, the land lies somewhat low—most of it—except on Valley road and on lower Mountain avenue, and it is rather rough and weedy.
- Q. What do you mean by somewhat low, Mr. Holmes; how low?
- A. Well, relatively to other property—relatively to Valley road.
- Q. And how about the stream; how far above was it—the brook?

[Objected to. Question withdrawn.]

Q. Can you tell us what the value, in the early part of 1900, was of the lots one hundred and seventy-five feet deep, fronting on North Mountain avenue?

A. Strictly speaking, there would be no lots except on North Mountain avenue.

Q. Yes?

A. I should judge that those were worth \$15 a front foot.

Q. And what was the value of frontage on Valley road, 10 running back to the railroad?

A. Fifteen dollars to \$20.

Q. Now, what was your value of the remaining portion of the Speer land, assuming that it had a connection over the Greenwood Lake railroad to lands fronting on Valley road, and to Valley road by a right of way twelve feet wide across the railroad, closed by gates, and which way was available to the person that owned this remaining tract or his grantees, and persons lawfully transacting business with them, in addition to any rights which they 20 might have to pass to North Mountain avenue?

A. Excluding Valley road and North Mountain avenue property?

Q. Yes?

A. I should say from \$300 to \$400 an acre.

Q. Now, what was the value of that portion with no connection over the Greenwood Lake railroad, after all connection was destroyed?

A. It would make a difference of about \$50 an acre less. 30

Q. Why do you think that it would be less valuable to that extent; just give your reason, will you, please?

A. I didn't mean to say less; I meant more, \$50 more.

Q. You mean to say that it was worth more with the connection destroyed?

A. A little more, yes—oh, with the connection destroyed?

Q. Yes.

A. Oh, no.

Q. Less?

A. Yes, sir.

Q. (By the Court.) Then your answer was right?

A. Yes, sir.

Further direct.

Q. Will you kindly give your reasons for estimating the right of way which you have spoken of at \$50 per acre?

A. You mean the reason for it being less after the  
10 right of way was destroyed?

Q. Yes?

A. Well, the right of way was destroyed in consequence of the embankment being raised, that is one thing.

Q. Yes?

A. Well, of course, land that has no interior access is not worth as much ordinarily as land which has. What would be the object of giving the right of way? It would not advance the property.

Q. With such a right of way, for what was the prop-  
20 erty adaptable?

A. It could only be available by opening streets at either end.

Q. Do you know for what purpose?

A. Building purposes.

Q. Do you think, Mr. Holmes, that the right of way would be useful for building purposes and for residential purposes of property on the west side of the railroad?

A. Simply for convenience in crossing.

Q. Merely as a convenience?

30 A. Yes, sir.

Q. Would it be adaptable to be used in connection with a street to be laid up and down the property, similar as shown on the map?

A. It would not be an advantage to the street; it would be detrimental in that respect; but I am speaking of the ability to cross from one side to the other.

Q. Have you observed the laying-out and development of property in Montclair?

A. Frequently; yes, sir.

Q. You are familiar with that?

A. Yes, sir.

Q. Could you tell us what a prudent and reasonable man, if he had this property of Mr. Speer's with no connection to Valley road whatever, what he would do towards developing it and making it marketable?

A. You mean at the present time?

Q. In 1900, after the raising of the railroad?

A. I don't see that he could do very much.

10

Q. You don't see that he could do very much?

A. He could cross at grade; yes, sir.

Q. I am not talking about crossing the railroad; I am speaking of developing the property by opening streets through it?

A. Oh, yes.

Q. So as to get out by, and to securing streets to get out by?

A. Well, he could open streets up to the embankment on either side, and connect with any other street crossing 20 above or below.

Cross-examination. Mr. Barrett.

Q. I understand, Mr. Holmes, that you consider the elevation of the line of the railroad a hopeless barrier to developing this property, as it could be developed if there were a grade crossing, don't you?

A. Well, I consider it a menace to the property.

Further direct.

Q. Consider the grade crossing a menace?

A. No, sir; the raising of the embankment.

30

Q. Do you think that the fact of there being an embankment there damages the property to the extent of \$50 an acre?

A. Raising it to the extent that it now is.

Q. How?

A. Well, it is an obstruction.

Q. That is all.

*Harrison Van Duyne*, sworn.

Direct examination by Mr. Cortlandt Parker.

Q. Where do you live?

A. I live in Newark.

Q. How long have you lived here?

A. Forty odd years.

Q. You have had experience in real estate transactions throughout the county?

A. I have.

10 Q. In Montclair and Upper Montclair?

A. Not as much—excepting I laid out and appraised property in Montclair and Upper Montclair, and served as a commissioner in dividing property where the questions of valuations came in.

Q. You have had large experience in that way?

A. I think so.

Q. Did you, at my request, go up and examine the Speer land?

A. I did.

20 Q. When was this?

A. Within a couple of weeks.

Q. Just describe what you did when you went up there, and describe the land? \*

A. Starting from North Mountain avenue, the land is high, running quite rapidly down to the brook; it is a little east of the middle of the tract; and then from the brook to the railroad it is quite flat, on either side of the brook; in fact, it is quite flat and wet and marshy.

30 Q. Where did you go on the land; where did you enter?

A. We went in, first, Edgemont road, and then walked down to within perhaps one hundred feet of the brook.

Q. Why didn't you go any further?

A. Why, the ground commenced to be wet, and I wasn't provided with rubber boots, so I didn't go any further.

Q. Did you see any signs there of standing water—in the way of vegetation?

Q. (By the Court.) When was it you went?

A. A couple of weeks ago.

Q. That was while it was raining a good deal?

Further direct.

Q. Had it been rainy or dry weather?

A. I don't think it was; it is the character of ground, the flat part there, that after a storm retains the water sometimes; it wouldn't very quickly run off, because it is so very nearly flat, and, in my judgment, you couldn't dig six inches in that ground, most any time, and especially after rain, you couldn't put a cellar down and dig six inches in the ground there and not have water.

Q. Can you give us an idea of the value of the property on North Mountain avenue, extending one hundred and seventy-five feet deep, in 1900?

A. Why, my estimation of the value—

Mr. Barrett—It doesn't appear that this witness has done any business in relation to Montclair property prior to 1900, or that he was familiar with this property then; he says he served as commissioner to lay out lands. 20

The Court—Well, you can cross-examine him in regard to that.

A. On North Mountain avenue, in 1900, it would be from \$12 to \$15 a front foot.

Q. What do you think of the frontage three hundred feet deep on Valley road?

A. I think that is worth a little more; perhaps \$18 or \$20.

Q. What do you think of the value of the property from one hundred and seventy-five feet deep to the Green-wood Lake railroad? 30

A. As undeveloped land?

Q. As it was in 1900, with a twelve-foot crossing across the railroad available, blocked on each end by gates which could be opened and which crossing and right of way was available by the persons who might own this remaining property, and persons having a lawful right to come there to visit them and be with them?

A. I think the lower half of that property at that time was not worth over \$250 an acre; the upper half was worth perhaps \$500 or \$600 an acre.

Q. What was its value after this right of way and crossing was destroyed?

A. As undeveloped property I don't think it had any effect.

Q. Why not; just explain fully?

A. Because in the development—if the time had come  
10 for the development of that property by opening streets,  
in my judgment it would be less desirable to attempt to  
open a street even if you could have a good grade cross-  
ing running all the way out to Valley road; it would be  
less desirable to do that than it would to arrange to reach  
Valley road running parallel with the railroad by way  
of going out to Brookfield avenue; Valley road takes  
quite a turn to the east in this property, and if the time  
had come to sell lots on a street opened through the middle  
a direct outlet to Valley road at Greenwood avenue would  
20 be shorter and more in the line of travel towards Mont-  
clair center than a grade crossing and coming out to  
Valley road as that street is; besides that the front of  
Valley road that would also have to be taken is certainly  
worth more than the front if you had to acquire it, run-  
ning out to Brookfield road, so that, in my judgment, as  
laying out and developing property the natural develop-  
ment would be the other way, and the cheaper develop-  
ment would be the other way, that is, parallel with the  
railroad, or in some way getting a street out to Brookfield  
30 road in connection with the street running through the  
center of the tract.

Q. The street that you suggested running alongside  
of the railroad would avoid a grade crossing, would it  
not?

A. That would avoid a grade crossing and would save  
the Valley road front which is of more value than the  
Brookfield road front.

Q. And avoid gates and the crossing of the railroad at a level or otherwise?

A. Any way.

Cross-examination by Mr. Barrett.

Q. Were you familiar with the Speer property in 1899 and 1900?

A. I was familiar generally with the land there, but not knowing it just as Speer property.

Q. When did you first have any knowledge of this specific property, the Speer property, or have your attention called to its uses or adaptations?

A. Just this narrow plot?

Q. Yes?

A. Not until lately.

Mr. Parker—I offer in evidence a certified copy of a mortgage executed by the owner, Parsons, and bounding upon the extension of Edgemont road, not the proposed extension, but the extension.

The Court—Who made the mortgage?

Mr. Parker—William H. Parsons, in December, 1901. 20

[Objected to.]

The Court—Do you rest?

Mr. Parker—We do, with the exception that we should like to call Mr. Robinson to testify to it being worked in there.

The Court—Is he here now?

Mr. Parker—No, sir; but if he comes in before the case is closed, I should like to call him.

The Court—Very well.

*Frank Crane* recalled.

30

Further direct examination by Mr. Barrett.

Q. Do you know when Brookfield road was opened?

A. I think it was opened after the embankment was put there; I remember at the time Valley road was depressed that they built the bridge, and the road was either opened at the same time or just after.

Q. You mean the bridge on Brookfield road over this Toney's brook?

A. No, the bridge on the railroad over Valley road comes out and encroaches on the Brookfield road; Brookfield road has not the full fifty feet in width where it comes on to Valley road, and I think that it was worked after the embankment was put there; I am not positive about that.

Q. Are you positive whether the sidewalks and sewers  
10 were put down after the embankment was there?

A. The sewer was put down after, but the sidewalk was partially laid, and that was laid around the corner of the bridge afterwards.

Cross-examination by Mr. Parker.

Q. The sidewalk was partly laid at the time the elevation was made in the railroad?

A. Yes, sir.

Q. It was laid on Brookfield avenue?

A. Yes, sir.

20 Q. Edgemont road was in the same condition at that time?

A. That whole development there, Mr. Parsons and Mr. Lord, and Mr. Harris was going on at about the same time; Mr. Parsons' and Mr. Lord's was a little bit ahead of Mr. Harris'; their part of Brookfield road was graded before Mr. Harris' was finished.

Q. Did you examine your maps on which you made this map to see whether there was any extension of Edgemont road upon them?

30 A. The maps from which I worked to make that map shows the extension of Edgemont road closed.

Q. Closed—but did it show any extension of Edgemont road?

A. It showed that there had been an extension on the map of Edgemont road to the Speer line, but it is closed now.

Q. What do you mean by closed, scratched out?

A. It is rubbed out, from the fact that a deed has been placed——

Q. Was it rubbed out or wasn't it rubbed out?

A. I said it was rubbed out.

Redirect examination.

Q. Can you recall whether the sidewalk was laid on Brookfield road near the junction with Valley road in 1900, and before the embankment was raised?

A. I don't think it was, sir; I think it was laid after the bridge was built, because there is a bend, and it has to come out around the corner of the bridge to get to Valley road.

Q. And there had been, so far as you remember, none before that was removed?

A. Not that I remember.

Recross-examination.

Q. Had there been any, can you speak positively or not?

A. Not that I can remember.

Q. That is all.

20

*William H. Parsons*, recalled.

Further direct examination. Mr. Barrett.

Q. Had Edgemont road been opened by you and Mr. Lord prior to the time the embankment was raised about 1899 or 1900?

A. I think not.

Q. Are you sure?

A. I don't think it was opened prior to 1900.

Q. When did you buy the property?

A. My impression is in 1900; I haven't the dates with me.

Q. Do you remember when Brookfield road was opened—partly through your property, wasn't it?

A. The part through my property was done at the same time that Edgemont road was opened.

Q. And that you think was after the embankment had been raised?

A. I think so.

Q. Do you know whether the part of Brookfield road which was through Mr. Harris' property was opened before the embankment was raised?

A. It wasn't graded until after work on my section of Brookfield road had been practically completed.

Q. What was its condition before it was opened or 10 graded?

A. The ground starting from Valley road rose slightly for a few hundred feet, perhaps two hundred or two hundred and fifty feet, and then gradually sloped down to the brook.

Q. I know, but what was its condition—I mean as respects making a road?

A. It was simply a meadow.

Q. No sign of a road?

A. I think, as I recollect it, there had been ploughing 20 done over on Valley road by indicating a roadway before.

Cross-examination. Mr. Parker.

Q. How long before?

A. Several years before.

*William H. Harris* recalled.

Further direct examination. Mr. Barrett.

Q. Mr. Harris, do you remember whether Brookfield road was opened at the time the tracks of the Greenwood Lake railroad were elevated and the embankment put there?

30 A. My impression is that it wasn't, except formed with a plough or scraper a little on the east end of it, towards Valley road.

Cross-examination.

Q. Then there was at that time, Mr. Harris, according to your recollection, a road formed with a scraper at the east end, towards Valley road?

A. Indications of a road, not a road, not a passable road.

Q. How long had that scraping been there?

A. I don't know that there was a scraper used; it was ploughed up a little, formed up by a gutter or something of that kind, not a passable road.

Q. Was it formed up in the center?

A. Ploughed up a little bit.

Q. That is all.

*Nathan Harrison* recalled.

10

Further direct examination by Mr. Parker.

Q. What had you done on Brookfield road, if anything, before the railroad was raised?

[Objected to.]

A. We had ploughed up the gutters and scraped the road, the dirt up in the center, and formed a road; it was very crudely done, but it was done from Valley road west.

Q. How far?

A. My recollection would be from one to two hundred 20 feet, about as far as we could go.

Q. Did you go to the brook?

A. No, sir; I think not; I am very sure we did not; that was done before the railroad, a good while, my recollection is.

Q. That is all.

Mr. Parker—I offer now in evidence Mr. Dana's map.

Case closed.

**STIPULATION.**

It is hereby stipulated and agreed as a matter of fact, as if the same had been duly proved at the hearing of this cause before the Vice Chancellor:

1. That John A. Speer, the father of Abram Speer, on June 20th, 1870, at the time of his conveyance of the right of way in question to the Montclair Railway Company, in addition to being the owner of the tract of land intersected by the line of the Greenwood Lake railway,  
10 which tract extended from Cliffside avenue, in the town of Montclair, easterly to Valley road, was also the owner of another tract of land, having a frontage of about two hundred and forty-five feet on the easterly side of Valley road and extending easterly about eight hundred feet to Park street.

2. That on the death of the said John A. Speer the said tracts of land, extending from the easterly side of Cliffside avenue to Valley road, and from Valley road to Park street, descended to his son and only heir-at-law, Abram  
20 Speer.

3. That the dwelling-house of said John A. Speer and of his son, said Abram Speer, was located upon the tract on the east side of Valley road, directly opposite the tract extending from the west side of Valley road westerly to Cliffside avenue, and that the said Abram Speer continued to own and reside upon said tract up to the date of his death.

Dated, Newark, N. J., January 17th, 1906.

HALSEY M. BARRETT,  
*Solicitor for Complainant.*

30

The foregoing stipulation is made subject to the objection by the defendant that said facts are immaterial, irrelevant and incompetent.

CORTLANDT & WAYNE PARKER,  
*Solicitors for Defendant.*

## EXHIBITS.

## EXHIBIT OPTION 1 FOR DEFENDANTS.

## AGREEMENT.

Articles of Agreement, made this 25th day of June, 1901, by and between Nathan Harrison, of the Town of Montclair, Essex County, New Jersey, party of the first part, and the Erie Land and Improvement Company, party of the second part:

Witnesseth: That in consideration of the sum of five dollars, paid by said party of the second part, the receipt whereof is hereby acknowledged, said party of the first part hereby agrees to sell unto the said party of the second part, its successors or assigns,

All that certain tract, piece or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Town of Montclair, County of Essex and State of New Jersey. Being a strip of land fifty feet in width lying westerly of and adjacent to the right of way and lands of the New York and Greenwood Lake Railway Company, and extending across the lands of said party of the first part, from lands now or formerly of William H. Parsons on the north to the Valley Road and lands now or formerly of Malvina Breuck on the south, a distance of about 325 feet. Containing  $373/1000$  of an acre be the same more or less.

For the sum of fifty dollars.

It is hereby understood and agreed by and between the parties hereto as follows: That if said party of the second part elects to accept the terms of this agreement, it shall give notice in writing to said party of the first part of its acceptance within ninety days from the date hereof. If the terms of this agreement are accepted by said party of the second part, the sum of money hereby paid shall apply upon the purchase price hereinbefore stated. If said party of the second part shall fail to give such notice then this agreement shall be null and void

and the sum of money paid shall be forfeited to said party of the first part.

Said notice shall be delivered by said party of the second part to said party of the first part or shall be mailed to said party of the first part at Montclair, N. J., and said party of the first part hereby agrees as follows: That upon service of said notice as hereinbefore provided, said party of the second part may immediately enter upon and take possession of said above described  
 10 premises and that within thirty days after the service of said notice, and upon receipt of the sum of fifty dollars, as hereinbefore stated, less said sum of money hereby paid as hereinbefore provided, said party of the first part will deliver to said company, or to its successors or assigns, a full covenant warranty deed conveying said premises free and clear of all liens and encumbrances and will furnish said party of the second part a good merchantable title thereto.

The covenants of this agreement, if accepted, are to  
 20 be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof said party of the first part has hereto set his hand and seal the day and year first above written.

NATHAN HARRISON [L. S.]

Witness:

JAMES KEEGAN

Mr. Harrison expects to run a Road from Park street  
 30 to Valley Road the Valley Road end of said street will probably encroach upon the right of way of N Y & G L. R R the said Railroad Company hereby agrees to deed to said Harrison what land he may need for such road provided the N Y & G L. R R Co can spare the land.

JAMES KEEGAN.

The time for accepting the terms of the foregoing option or agreement is hereby extended for ninety days from this date.

NATHAN HARRISON

Dated, October first, 1901.

The time for accepting the terms of the foregoing option or agreement is hereby extended for ninety days from this date.

NATHAN HARRISON

Dated, Jany 8th, 1902.

10

[Endorsed]—Dated June 25th, 1901. Expires Sept. 23d, 1901. Consideration, \$50.00. Paid, \$5.00. Balance, \$45.00. Extended to Jan 1/02.

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EXHIBIT OPTION 2 FOR DEFENDANTS.

AGREEMENT.

Articles of Agreement, made this day of 25th day of June, 1901, by and between William H. Parsons, of the Town of Montclair, Essex County, New Jersey, party of the first part, and the Erie Land and Improvement Company, party of the second part: 20

Witnesseth: That in consideration of the sum of five dollars, paid by said party of the second part, the receipt whereof is hereby acknowledged, said party of the first part hereby agrees to sell unto the said party of the second part, its successors or assigns, all that certain tract, piece or parcel of land and premises hereinafter particularly described, situate, lying and being in the Town of Montclair, County of Essex and State of New Jersey. Being a strip fifty feet in width, lying westerly of and adjacent to the right of way and lands of the New York 30

and Greenwood Lake Railway Company and extending across lands of said party of the first part from lands now or formerly of Abram Speer on the north to lands now or formerly of Nathan Harrison on the south, a distance of about 145 feet. Containing  $166/1000$  of an acre, be the same more or less. It being understood that said tract of land is to be used for the purpose of a public street.

For the sum of two hundred twenty-five dollars.

10 It is hereby understood and agreed by and between the parties hereto as follows: That if said party of the second part elects to accept the terms of this agreement, it shall give notice in writing to said party of the first part of its acceptance within ninety days from the date hereof. If the terms of this agreement are accepted by said party of the second part, the sum of money hereby paid shall apply upon the purchase price hereinbefore stated. If said party of the second part shall fail to give such notice, then this agreement shall be null and void and the sum of money paid shall be forfeited to said party of the first  
20 part.

Said notice shall be delivered by said party of the second part to said party of the first part or shall be mailed to said party of the first part at Upper Montclair, and said party of the first part hereby agrees as follows: That upon service of said notice as hereinbefore provided, said party of the second part may immediately enter upon and take possession of said above-described premises, and that within thirty days after the service of said notice, and upon receipt of the sum of two hundred  
30 twenty-five dollars as hereinbefore stated, less said sum of money hereby paid as hereinbefore provided, said party of the first part will deliver to said company, or to its successors or assigns, a full covenant warranty deed conveying said premises free and clear of all liens and encumbrances, and will furnish said party of the second part a good merchantable title thereto.

The covenants of this agreement, if accepted, are to be binding upon and inure to the benefit of the heirs, execu-

tors, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof said party of the first part has hereto set his hand and seal the day and year first above written.

WILLIAM H. PARSONS. [L. S.]

Witness:

JAMES KEEGAN.

Said street to be continued across lands of Nathan Harrison to new street. Street to be graveled and put in 10 good condition for driving.

JAS. KEEGAN.

The time for accepting the terms of the foregoing option or agreement is hereby extended for ninety days from this date.

W. H. PARSONS.

Dated, October first, 1901.

The time for accepting the terms of the foregoing option or agreement is hereby extended for ninety days from this date. 20

W. H. PARSONS.

Dated, Jany 8th, 1902.

[Endorsed]—Dated June 25th, 1901. Expires Sept. 23d, 1901. Consideration, \$225.00. Paid, \$5.00. Balance, \$220.00. Extended to Jan 1/02.

## EXHIBIT D 1.

William H. Parsons to Alfred B. Robinson.

This Indenture made the Twenty third day of March in the year of Our Lord One thousand nine hundred and three, Between William H. Parsons (Single) of the Town of Montclair in the County of Essex and State of New Jersey of the first part: And Alfred B. Robinson of the Town of Montclair in the County of Essex and State of New Jersey of the second part: Witnesseth, that the  
10 said party of the first part, for and in consideration of One Dollar lawful money of the United States of America to him in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part there-  
with fully satisfied, contented and paid has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and  
20 confirm to the said party of the second part, and to his heirs and assigns, forever. All that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Town of Montclair in the County of Essex and State of New Jersey.

Beginning at a point in the westerly line of the *proposed extension of Edgemont Road* formed by the intersection therewith of the Northeasterly line of lands of Alfred B. Robinson said point being distant on a course  
of North thirty nine (39) degrees nine (9) minutes  
30 East one hundred and seventy four and sixty hundredths (174.60) feet from the intersection of said Westerly line of said extension with the centre line of Brookfield Road; running thence along said Westerly line of said extension North thirty nine (39) degrees nine (9) minutes East one hundred and fourteen (114) feet more or less to the Northeasterly line of lands formerly of Estate of

Martha Wilbur, thence along said Northeasterly line in a Northwesterly direction about one hundred and eighty (180) feet to a point therein where the same is intersected by a projection of the Westerly line of lands of said Robinson; thence along said projection South thirty nine (39) degrees nine (9) minutes West one hundred and ten (110) feet more or less to the Northwesterly corner of said lands of Robinson; thence along the same South sixty one degrees (61) forty four (44) minutes East one hundred and eighty (180) feet more or less to the point or place of Beginning. Including also as appurtenant to the land hereby conveyed and to run therewith a right of way over so much of the lands of said Parsons adjoining the premises hereby conveyed and lands of Alfred B. Robinson fronting on Brookfield Road on the East as will be comprised within the proposed extension of Edgemont Road from the Northerly line of Brookfield Road to the rear line of the premises hereby conveyed being line of land formerly of Wilbur now of Speer. 10

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining: Also all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof. To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever; and the said William H. Parsons does for himself, his heirs, executors and administrators covenant and grant to and with the said party of the second part, his heirs and assigns, that he the said William H. Parsons is the true, lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof, with 20 30

the appurtenances thereunto belonging; and that the said land and premises, or any part thereof at the time of the sealing and delivery of these presents, are not encumbered by any mortgage judgment or limitation or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever. And also, that the

10 said party of the first part now has good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. And also, that he the said William H. Parsons will warrant, secure and forever defend the said land and premises unto the said Alfred B. Robinson, his heirs and assigns forever against the lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

20 In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

WILLIAM H. PARSONS. [L. S.]

Signed, sealed and delivered in the presence of  
 Words "more or less" interlined in last line of type-written description before execution words "hereby conveyed and lands of Alfred B. Robinson fronting on Brookfield Road" interlined in fifth line of written description before execution.

30

JOHN R. HARDIN.

State of New Jersey County of Essex ss: Be it remembered, that on this Twenty third day of March in the year of Our Lord One thousand nine hundred and three, before me the subscriber a Master in Chancery of New Jersey personally appeared William H. Parsons who I am satisfied is the grantor mentioned in the within

Indenture, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

JOHN R. HARDIN  
*M. C. C. of N. J.*

Received in the Office March 24th A. D. 1903 at 9.58  
A. M.

ESSEX COUNTY REGISTER'S OFFICE

State of New Jersey, County of Essex, ss.—I, George 10  
E. DeCamp, Register of the County of Essex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by William H. Parsons to Alfred B. Robinson and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book B 36 of Deeds for said County on pages 553-554.

In Testimony Whereof, I have hereunto set my hand  
[L. s.] and official seal this 3rd day of October, A.  
D. 1905.

GEORGE E. DECAMP  
*Register.*

20

[Endorsed]—The original Deed, of which this is a copy, was received in the Register's Office of the County of Essex, State of New Jersey, on the 24th day of March A. D. 1903, at 9.58 o'clock in the forenoon and recorded in Book B. 36 of Deeds for said County on pages 553-554.

GEORGE E. DECAMP,  
*Register.*

## DEED.

William H. Parsons to Alfred B. Robinson.

This Indenture made this Seventh day of February in the year one thousand nine hundred and three, between William H. Parsons (unmarried) of the Town of Montclair, in the County of Essex, and State of New Jersey, of the First Part: And Alfred B. Robinson of the Town of Montclair in the County of Essex, and State of New Jersey, of the Second Part: Witnesseth, that the said party  
10 of the first part, for and in consideration of the sum of Ten (\$10.00) Dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the *second* part, his heirs, executors, and administrators forever released and discharged from the same, by these presents has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents does grant, bargain, sell,  
20 alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain tract, piece or parcel of land, situate, lying and being in the Town of Montclair, in the County of Essex, and State of New Jersey, more particularly bounded and described as follows:

Beginning at a point in the centre line of Brookfield Road, distant three hundred and twenty-seven and fifty-six hundredths (327.56) feet Easterly from the intersection of the centre line of Brookfield Road and Mountain  
30 Avenue: thence South fifty-six (56) degrees, six (6) minutes East along the centre line of Brookfield Road one hundred and eighty (180) feet: thence North thirty-nine (39) degrees, nine (9) minutes East along the Westerly line of the proposed extension of Edgemont Road one hundred and seventy-four and sixty hundredths

(174.60) feet to line of land formerly of Estate of Martha Wilbur; deceased: thence North sixty-one (61) degrees forty-four (44) minutes West along land of said Wilbur one hundred and eighty (180) feet: thence South thirty-nine (39) degrees nine (9) minutes West one hundred and fifty-seven (157) feet to the centre line of Brookfield Road and place of beginning. Subject to a mortgage made by the party of the first part to Emily S. Engle, to secure \$5500 and recorded in the Essex County Register's Office in Book N 15 of Mortgages for said 10 County, page 452.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances. To Have and to Hold, the above granted, 20 bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs, and assigns, to his and their own proper use, benefit and behoof forever. And the said party of the first part for himself, his heirs, executors, and administrators, does covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that the said party of the first part, at the time of the sealing and delivery of these presents was lawfully seized in his own right, of a good, absolute, and indefeasible estate of inheritance, 30 in fee simple of and in all and singular the above granted and described premises with the appurtenances, subject as aforesaid, and has good right, full power, and lawful authority, to grant, bargain, sell and convey the same in manner aforesaid. And that the said party of the second part, his heirs and assigns, shall and may, at all times, hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every

part and parcel thereof, with the appurtenances without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons, lawfully claiming or to claim the same. And that at time of the sealing and delivery of these presents, the said premises are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatever, by which the title of the said party of the second part, hereby made or intended  
10 to be made, for the same, can or may be changed, charged, altered or defeated in anyway whatsoever, except as aforesaid. And also, that the said party of the first part and his heirs and all and every person or persons, whomsoever, lawfully or equitably deriving any estate right, title or interest of, in, or to the hereinbefore granted premises, by, from, under or in trust for him or them shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and  
20 assigns, make, do and execute or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or required: And also, that William H. Parsons will warrant, secure, and  
30 forever defend the said land and premises, unto the said Alfred B. Robinson, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged, of and from all manner of encumbrances whatsoever, except as aforesaid.

In Witness Whereof, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

WILLIAM H. PARSONS. [L. S.]

Signed, sealed, and delivered in the presence of,  
 Cancellation in last line of first page made before execution.

ROBERT M. BOYD, JR.

State of New York, County of New York, ss.—Be it remembered, that on this Seventh day of February in the year of our Lord one thousand nine hundred and three, before me, a Master in Chancery of New Jersey, personally appeared, William H. Parsons, who, I am satisfied is the grantor mentioned in the within Indenture and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. 10

ROBERT M. BOYD, JR.,  
*Master in Chancery of New Jersey.*

Received in the Office, February 9th, A. D. 1903, at  
 10:24 A. M.

ESSEX COUNTY REGISTER'S OFFICE 20

State of New Jersey, County of Essex, ss.—I, George E. DeCamp, Register of the County of Essex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by William H. Parsons to Alfred B. Robinson and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book B 36 of Deeds for said County on pages 316-318.

In Testimony Whereof, I have hereunto set my hand  
 [L. s.] and official seal this 3rd day of October, A. 30  
 D. 1905.

GEORGE E. DECAMP  
*Register.*

[Endorsed]—The original Deed, of which this is a copy, was received in the Register's Office of the County,

of Essex, State of New Jersey, on the 9th day of February, A. D. 1903, at 10:24 o'clock in the forenoon and recorded in Book B 36 of Deeds for said County on pages 316-318. George E. DeCamp, Register.]

## OPINION.

[Filed January 26, 1906.]

*Mr. Faulks and Mr. Barrett*, for complainant.

*Mr. Cortlandt Parker, Jr., and Mr. R. Wayne Parker*, for defendant.

## 10 STEVENS, VICE CHANCELLOR.

The bill in this case was filed to restrain the defendant from maintaining its embankment where the complainant had a road crossing over defendant's railway, between the severed portions of his farm. This court decreed that the company should construct a tunnel or opening through the embankment, substantially at grade, such opening to be not less than twelve feet in height and width. On appeal it was thought that this direction was too onerous. It was held that the complainant's right to a crossing was  
20 not destroyed by the elevation of the tracks, but it was thought that the complainant was only, under the circumstances, entitled to damages, and that if he was willing to have them assessed in this court, the bill might be retained for that purpose. The submission has been made. The question thus presented is not without difficulty, for the amount of damages will depend upon the precise nature of the complainant's right. If the crossing is to be regarded as a mere farm or agricultural crossing, and  
30 not a crossing for all purposes, I think that \$500 would be adequate compensation for its destruction. But if the crossing is to be regarded as a crossing for all the pur-

poses for which the land is or may become adapted, then I think that his damages are considerably greater.

In the opinion on the application for injunction, I held that the covenant that the predecessor of the defendant company would "provide the party of the first part with a suitable and convenient road crossing across the track of said railway" gave an unlimited right: a right of passage for all purposes. I do not find in the opinion on appeal any dissent from this view, and further reflection has only confirmed me in its soundness. Speer, the complainant's ancestor, when he conveyed to the railroad company in June, 1870, was the owner of a farm extending easterly from Cliffside avenue to Valley road, and thence across Valley road to a line about eight hundred feet distant therefrom. The railroad, running north and south, cut this farm in two. The tract which lay west of the railroad embankment contained a little more than nine acres, and was completely severed, not only from the land lying east of the embankment and west of the Valley road, but also from the dwelling-house and barn, which lay east of that highway, and could only be reached, without trespassing upon neighborly property, by making a long circuit of three-quarters to seven-eighths of a mile. 10

Now, Speer's right being a right to pass from the land west of the railway to the land on both sides of Valley road and to Valley road itself and back again, can it be said that if he had built a house or barn on the severed tract he would not have had the right of passage therefrom to Valley road? And if he had built two or three houses, would not his right have been the same? And suppose he had conveyed the entire farm to two or three or twenty persons as tenants in common, would they not have acquired the same right? Where do we find it written or implied in the covenant that when Speer ceased to use the land for agricultural purposes his right to pass over the crossing terminated? The language of Master of Rolls Jessel, in *Newcomen v. Coulsen*, 5 Ch. Div. 133, is applicable to the situation here. "It was said that the 30

grant conferred a right to use the way only so long as the allotment was used for agricultural purposes. I cannot find any such restriction. The right is to the owner or owners for the time being of the land. Now, land, according to English law, includes everything on or under the soil. All buildings that you may erect on it, all mines that you may sink under it. I have no doubt that the word 'land' was used advisedly. This being so, it appears to me that the right is a general right of way: a  
10 right of way to all the houses that may be built on the land in question." That the right as Speer had it passed to his grantees has been conclusively settled in this case, for the suit has been adjudged by the Court of Errors to be maintained by the present complainant, who is the heir of the original grantee.

But it is contended, further, that while Speer and his grantees of the entire farm would have the right, a grantee of a lot in the tract west of the railway would not have it, and that consequently the possibility of utilizing  
20 portions of the land for building purposes and selling it for those purposes cannot enter into the question of value or of damages. In other words, that, so far as this question is concerned, the land must be regarded as farm land only, for all time to come. The cases relied upon to support this contention are *Marino v. Central Railroad Co.*, 40 Vr. 628, and the *Pipe Line Case*, 33 Vr. 254. In the first case a railroad company, empowered to take by condemnation, was required by statute to maintain over or under its road suitable wagonways where the railroad in-  
30 tersected the land of an individual owner, "so that he may pass the same." It was held that the owner had a right of way across the railroad appurtenant to each of his divided tracts, but that his right was not transmitted to a grantee of a portion of the lands lying only on one side of the railroad. Chancellor Magie said: "The right reserved and the duty imposed by that section (section nine of the charter of the S. & E. R. R. Co.) is only in favor of the person who owned the lands intersected by

the railroad when the railroad right was acquired by condemnation, or his grantees of the whole or a portion of said lands still intersected by the railroads." The decision was rested upon the authority of the Pipe Line Case. There one Stewart had conveyed to the Morris and Essex Railroad Company a strip of land on which to lay its tracks, with a reservation of "a suitable wagon-road or crossing \* \* \* so as to enable said Stewart to travel and cross freely between his lands on each side of said granted premises." The Stewart title, excepting the strip conveyed to the railroad, became vested in one Meagher. Meagher conveyed it to Breckenridge; not the entire farm (see page 275 of case), but two lots, each fifty by two hundred and fifty feet, one on the north side and the other on the south side of the lands conveyed to the railroad company. These lots adjoined such lands and extended on each side of them entirely across the passageway. It was conceded in that case that under the various conveyances Breckenridge had a right of crossing between these two lots thus severed, but it was held that such right did not give the right to lay oil pipes under the railway. Mr. Justice Depue said: "The laying of these pipes in the roadway in no sense conferred a benefit on the lands to which the way was appurtenant, nor were the pipes adapted to facilitate access between the two parcels of land to which the easement was appurtenant."

I have particularly mentioned these cases because it appears to me that, so far from supporting the position of defendant, they are authorities for the opposite view, at least to this extent: They concede that a grantee of a part of the land has a right of crossing if the land acquired lie on both sides of the crossing and adjoin it; and this, too, in cases where the right is a limited right and not a right of crossing for all purposes.

In the Marino case the right was held to be limited by statute in the same way that in the Pipe Line Case it was held to be limited by the explicit language of the deed. It was not decided in either of those cases that where the

crossing given was a crossing for all purposes the lot-owner owning on one side would not have the benefit of it. In the case of *United Land Co. v. Great Eastern Railway Co.*, L. R., 10 Ch. App. 586, cited with approval in the *Pipe Line Case*, it was held that he would. But I am not obliged to decide whether he would or would not, for the reason that it is quite within the power of the complainant to avoid the question altogether. I must assume that, as a reasonable man, intent upon getting the full value of

10 his property, he would subdivide his land so as to preserve and perpetuate all his rights. The complainant has put in evidence a map or plan. It and the additional evidence make it clear that the time the embankment was built and the crossing destroyed, the land in the neighborhood had come into the market for building purposes. New streets had been laid out around the Speer tract and new buildings had been erected. Upper Montclair had reached out to that point. The plan shows a road running east and west through the middle of the tract, touching

20 the crossing east and west of the railway. It also shows lots plotted on both sides of it. Now, it would be easy for the complainant to give to each purchaser of such a lot a right of way along the whole course of this road; or if that did not satisfy the requirements of the *Marino* and *Pipe Line Cases*, he could divide the land over which the road is shown into as many undivided parts as there are lots, and with each lot he could give one of these parts. The grantee of any lot would then own, in fee simple, land on both sides of the railway continuously from his

30 lot to Valley road.

But another and somewhat singular point has been raised. The entire clause in the *Speer deed* reads as follows: "The party of the second part [the railroad company] doth, for itself and its successors, agree to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the grading on said tract is commenced, and shall provide the party of the first part with a suitable and convenient road crossing

across the track of said railway where the party of the first part may direct." The proof shows that the company made the fences and put in sliding rails at the crossing. The argument is that the company had a right to maintain these rails; that those who might have lawfully crossed would have been obliged to replace them as often as they took them down, and that the lots west of the track would have derived from such a crossing, so obstructed, little if any benefit. The evidence is that if the lots fronted on a roadway thus barred they would have less value than they would if the crossing were unobstructed. 10

The company's right is asserted to have been an absolute right to maintain bars, however inconvenient they might have been to the lotowners. The deed itself is silent on the subject. The general rule is that gates or bars may be placed at the termini of a way, particularly an agricultural way. It is based on the great preponderance of convenience to the landowner over the slight inconvenience of the wayowner. It ceases when the preponderance of convenience is in favor of the wayowner. 20  
Godd. Easm. 331.

In *Jewell v. Clement*, 39 Atl. Rep. 582, Justice Wallace says: "From the creation of a way by deed in general terms, without a provision giving the owner of the land over which it passes the right to erect gates or bars, neither a grant nor a denial of that right is necessarily to be implied. But the right to erect them cannot be implied if they constitute an unreasonable obstruction to the reasonable and proper use of the way. Neither party could have intended that the reserved way was to be subject to any unreasonable obstruction. Whether the erection of the bars by the plaintiff was a proper use of his premises compatible with the defendant's reasonable enjoyment of the easement, or was an unreasonable obstruction of the way, is a question of fact." Gates or bars were deemed proper in the following, among other cases: *Boyd v. Bloom* (Ind.), 52 N. E. Rep. 751; *Connery v. Brooks*, 73 Pa. St. 80; *Short v. Devine* (Mass.), 15 N. 30

E. Rep. 148; *Bakeman v. Talbot*, 31 N. Y. 366. The right to maintain them was denied in the following: *Smith v. Worn* (Cal.), 28 Pac. Rep. 944; *Devore v. Ellis* (Iowa), 17 N. W. Rep. 740; *Jewell v. Clement* (N. H.), 39 Atl. Rep. 582; *Welch v. Wilcox*, 101 Mass. 162; *Williams v. Clark* (Mass.), 5 N. E. Rep. 802; *Dickinson v. Whiting* (Mass.), 6 N. E. 92.

*Williams v. Clark* was the case of a railroad crossing. H. conveyed to a railroad company by a deed which provided that the company should furnish him with two convenient crossings, to be thereafter designated. One was so designated and a crossing built. Justice Devens said: "While, in terms, it was not provided that this crossing should be unobstructed by gates or bars, yet the fact that it was to be convenient and that the company itself constructed and for many years permitted the existence of such a one sufficiently shows that what it intended to grant was a free right of passage. No usage or circumstances such as are shown where one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the right of the grantor or the use made by him of the premises, here exist. That a crossing obstructed by gates or bars is far less convenient to those entitled to use it is fully conceded by the defendant's argument." In this case gates or bars were not erected in the first instance. In the case at bar they were. But I do not understand that this circumstance was regarded as decisive. It was one to be taken into account. *Bakeman v. Talbot*, *supra*, was the case of a way over a farm and wood land, where it was thought that "slip rails" or bars were not an unreasonable obstruction. Chief Justice Denio used this language: "There is nothing inconsistent in holding the present arrangements are suitable and sufficient under existing circumstances; and after these circumstances have changed, and the question shall arise as to what shall then be proper, to determine that a passage, perpetually open, or a system of gates better

adapted to such increased use than the present fences and bars, shall be required of the defendants \* \* \* The doctrine that the facilities for passage where a private right of way exists are to be regulated by the nature of the case and the circumstances of time and place is very well settled by authority."

If a way given for all purposes cease to be used for agricultural purposes and become useful for other purposes it may be adopted to those purposes. It is a well-established rule that "In doing the works that are necessary for the enjoyment of the easement, the owner of the dominant tenement may do everything that is required for the full and free exercise of his right." Gale on Easements (7th ed.) 464. In *Finlinson v. Porter*, L. R., 10 Q. B. 188, the grantee of an easement of drain was allowed to deepen it in order to adapt it to the sewer as altered by the local authority. In *Dand v. Kingscote*, 6 M. & W. 174, the proprietor of an old colliery who had a right of way to it, granted long before the days of railways, was held entitled to make a railway thereover, for the purpose of transmitting his coals. In *Newcomen v. Coulsen*, 5 Ch. Div. 138, Malins, V. C., held that a lane that had been used for agricultural purposes might be converted into a metaled road for the benefit of newly-erected cottages. His judgment was affirmed on appeal. In these cases the cost of the alteration was borne by the owners of the dominant tenement. I see no reason why, if sliding rails, because of the changed use, become a source of danger rather than a means of safety, the owner of the dominant tenement may not become entitled to have substituted cattle guards—such as the law prescribes in the case of country roads—but perhaps, notwithstanding the language of the deed, at his own expense. But whether he should do the work under the supervision of the railway officials, or whether they should do it at his request and at his charge, or whether the company should do it at its own cost, is a matter of no consequence here, for the cost, in any event, would be so small that it would not materially affect the result.

This brings me to the question of the amount of damages to be awarded. The supplemental evidence makes it clear that the land is not to be treated as farm land. Excluding the lots on Mountain avenue and Valley road—the most valuable part of the tract—the highest estimate of the interior land—about nine acres—by any of the complainant's witnesses is \$1,200 per acre, and the lowest estimate of any of defendant's is \$300. The depreciation caused by the destruction of the way is

10 variously estimated by complainant's witnesses at from \$300 to \$700 per acre; that is, from \$2,700 to \$6,300. These witnesses all agree that gates or bars would materially diminish the value of the land. Of the defendant's witnesses, two, Mr. Crane and Mr. Van Duyne, give an estimate of the value of the interior land on the basis of a crossing obstructed by gates or bars. They do not expressly estimate it on the basis of an unobstructed crossing. Of the other estimates for defendant, Hink

20 thinks that the closing of the way has been of benefit to the property, while Holmes thinks it a detriment to the extent of \$50 per acre. He says: "Of course, land that has no interior access is not worth as much ordinarily as land that has." I do not think it can be doubted that an unobstructed passageway from the lots, as they would naturally be laid out, and as shown on complainant's map, to Valley road would be likely to make them more attractive to that class of buyers who would build houses costing from \$3,000 to \$4,000. The neighborhood is being rapidly improved by the erecting of dwellings of

30 that description, and this particular tract appears to be suitable for inexpensive residences. Buyers without carriages of their own would regard a direct way to Valley road, a main thoroughfare with a trolley line on it leading into the heart of Montclair, as a considerable convenience, and as such it could not fail to have its influence upon the price. Such a road would no doubt be regarded as preferable to a more roundabout way over neighboring land if complainant were able to purchase it.

It is necessarily a matter of conjecture as to how much

complainant has been injured. Resort must be had to opinion evidence of a somewhat unsatisfactory kind. But it is the best available, and it has been necessitated by defendant's action in destroying complainant's right in the face of actual notice. Under these circumstances it does not seem to me that all doubts should be resolved in defendant's favor. I think the weight of the evidence fairly warrants a finding that the right destroyed is worth \$3,000.

A true copy.

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VIVIAN M. LEWIS,

*Clerk.*

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**FINAL DECREE.**

[Filed March 28, 1906.]

This cause having been remitted to this court by a decree made therein in the Court of Errors and Appeals, wherein Erie Railroad Company, defendant below, was appellant, and Abram Speer, complainant below, was respondent, which decree is dated the sixth day of March, nineteen hundred and five, whereby said Court of Errors and Appeals ordered that the record and proceedings be remitted to this court with direction that the bill of complaint be dismissed by this court with costs, unless the complainant should elect to submit to this court the question of damages sustained by the complainant by reason of the destruction of the crossing mentioned and described in the bill of complaint, in order that such damages might be ascertained by this court, and that, if he so elected, the said record and proceedings should be by this court retained and proceeded with for the ascertainment of such damages, according to law and the practice of this court, and the direction of said order on remittitur, and this court having by its decree dated March twenty-ninth, nineteen hundred and five, ordered

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that the decree of the said Court of Errors and Appeals be and the same was thereby made the decree of this court, and that the complainant should, within thirty days from the date of service of a copy of said order upon him or his solicitor, file in this cause his election to have damages ascertained as set forth in said decree on remittitur, and in default thereof that the defendant might apply to this court for an order dismissing the said bill of complaint, and the complainant herein having, on April twenty-seventh, nineteen hundred and five, within thirty days from the date of service of a copy of said order upon him or his solicitor, filed in this cause his election to submit to this court the question of damages sustained by reason of the destruction of the crossing mentioned and described in the bill of complaint, in order that such damages may be ascertained by this court, and in compliance with said decree on remittitur, this cause coming on to be heard at the October Term of this court, in the presence of Halsey M. Barrett and Frederick J. Faulks, of counsel with the complainant, and Messrs. Cortlandt & Wayne Parker, of counsel with defendant, and further proofs and testimony having been taken for the purpose of ascertaining the amount of damages sustained by the complainant by reason of the destruction of the crossing mentioned and described in his bill of complaint, and the court having duly considered the pleadings and proofs and arguments of counsel herein, and being of the opinion that the damage suffered by the complainant by reason of the destruction of the crossing mentioned and described in the bill of complaint, amounts to the sum of three thousand dollars:

It is, on this twenty-eighth day of March, one thousand nine hundred and six, by William J. Magie, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor, by virtue of the power and authority of this court, doth hereby order, adjudge and decree that the complainant has sustained damage by reason of the destruction of the said crossing, to the

amount of three thousand dollars. And it is further ordered, adjudged and decreed that the defendant, said Erie Railroad Company, pay to the complainant, his executors, administrators or assigns, the sum of three thousand dollars, in full payment and compensation for the damages so sustained by him as aforesaid.

And it is further ordered that the said defendant shall pay to the complainant his costs of this suit.

Respectfully advised,

FREDERIC W. STEVENS,

V. C.

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**NOTICE OF APPEAL.**

[Filed April 4, 1906.]

The defendant hereby appeals from the final decree made in this cause on the twenty-eighth day of March, nineteen hundred and six, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated March 29th, 1906.

CORTLANDT & WAYNE PARKER,

*Solicitors of Defendant.*

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CORTLANDT PARKER, JR.,

*Of Counsel.*

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

CORTLANDT PARKER, JR.,

*Of Counsel with Defendant.*

Service of the within notice of appeal acknowledged this 6th day of April, 1906.

HALSEY M. BARRETT,

*Solicitor for Complainant.*

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## PETITION OF APPEAL.

*To the Honorable the Court of Errors and Appeals in the  
Last Resort in all Causes:*

The petition of the Erie Railroad Company, the appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor William J. Magie, Chancellor of the State of New Jersey, bearing date the twenty-eighth day of March, in the year nine-  
10 teen hundred and six, in a cause wherein the said Abram Speer was complainant and the said Erie Railroad Company was defendant, in this respect, to wit, that the said decree adjudges that the said complainant had sustained damage by reason of the destruction of the crossing mentioned in said decree to the amount of three thousand dollars, and that the said defendant, the Erie Railroad Company, should pay to the complainant, his executors, administrators or assigns, the sum of three  
20 thousand dollars in full payment and compensation for the damages so sustained by him as aforesaid; and your petitioner humbly appeals from the said decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous for that said complainant was not entitled to more than nominal damages for the destruction of said crossing, or, if he were entitled to any substantial damages, the damages so awarded were greatly in excess of any damages rightfully due to him.

Your petitioner, therefore, prays that the said decree of said Chancellor may be, in the particulars aforesaid,  
30 reversed, set aside and for nothing holden, and that it be decreed that the said complainant was only entitled to nominal damages, or that, if it should be held that he were entitled to substantial damages, then, that the sum so awarded be reduced to the true amount of such damages; and that your petitioner may have such other and further

relief in the premises as to this honorable court shall seem meet.

CORTLANDT & WAYNE PARKER,  
*Solicitors of Appellant.*

CORTLANDT PARKER, JR.,  
*Of Counsel with Appellant.*

CORTLANDT PARKER,  
*Of Counsel.*

Service of within petition of appeal is hereby acknowledged April 22d, 1906.

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HALSEY M. BARRETT,  
*Sol'r for Complainant.*

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**ANSWER TO PETITION OF APPEAL.**

The answer of the above-named respondent to the petition of appeal of the above-named appellant.

This respondent, not acknowledging all or any of the matters which in said petition are contained to be true, for answer thereto, nevertheless, says and admits that a final decree was, on the twenty-eighth day of March, one thousand nine hundred and six, made and entered in the Court of Chancery by his Honor William J. Magie, Chancellor of New Jersey, in the case for that purpose mentioned in said petition as therein stated; that as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said final decree is in all respects agreeable to equity, and prays that the same may be confirmed, with costs to be adjudged to this respondent.

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HALSEY M. BARRETT,  
*Sol'r for and of Counsel with Respondent.*

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