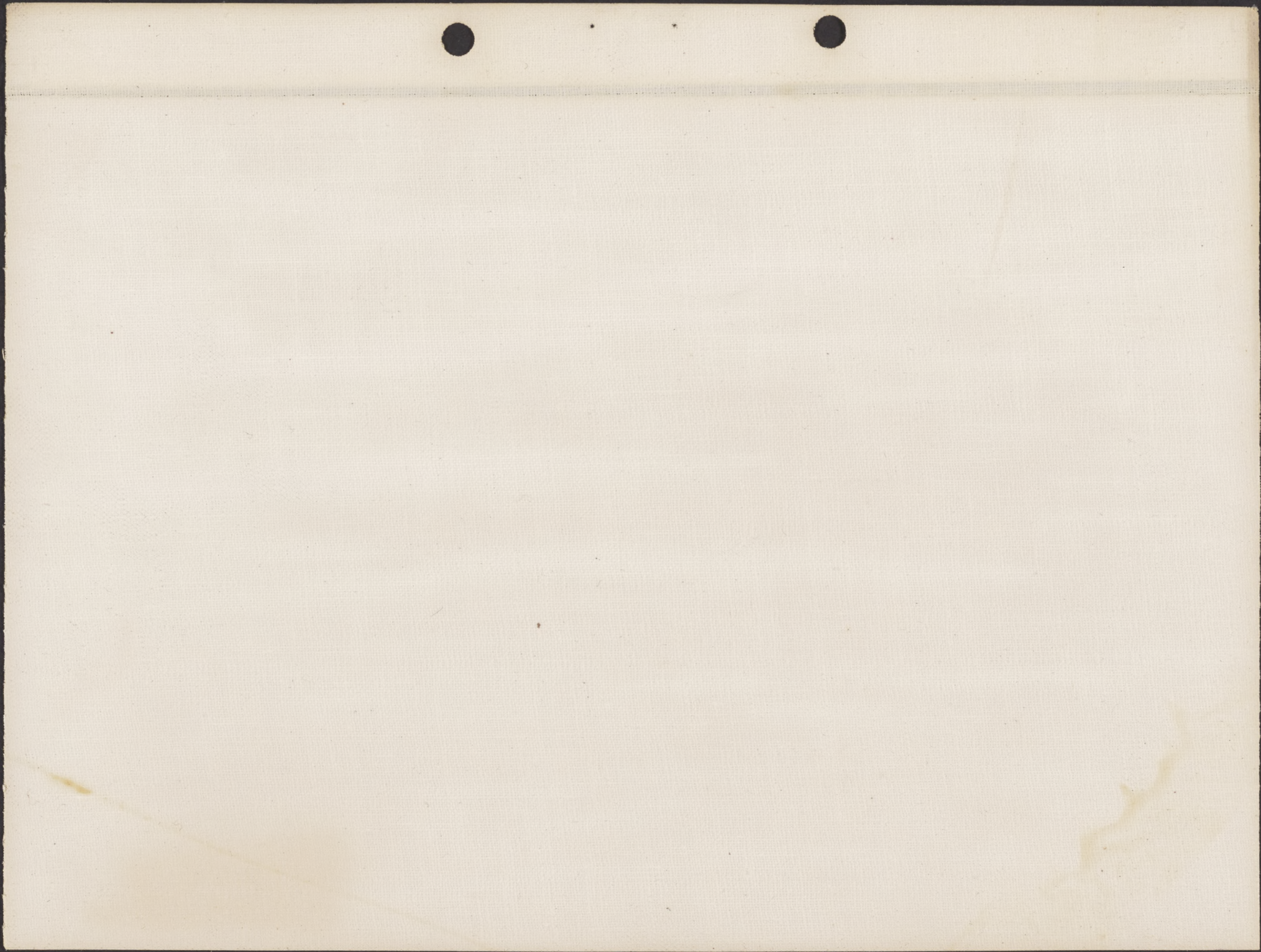


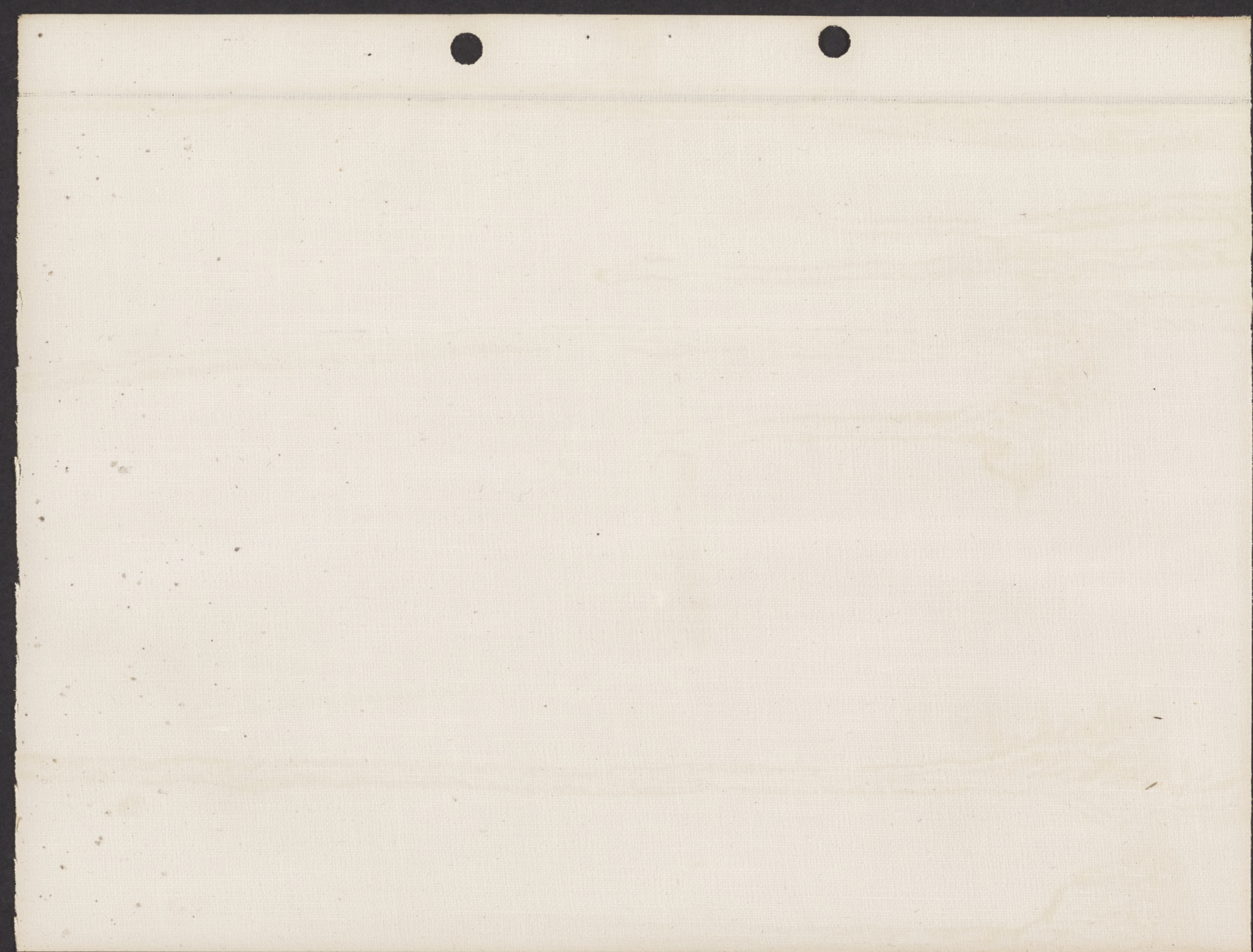


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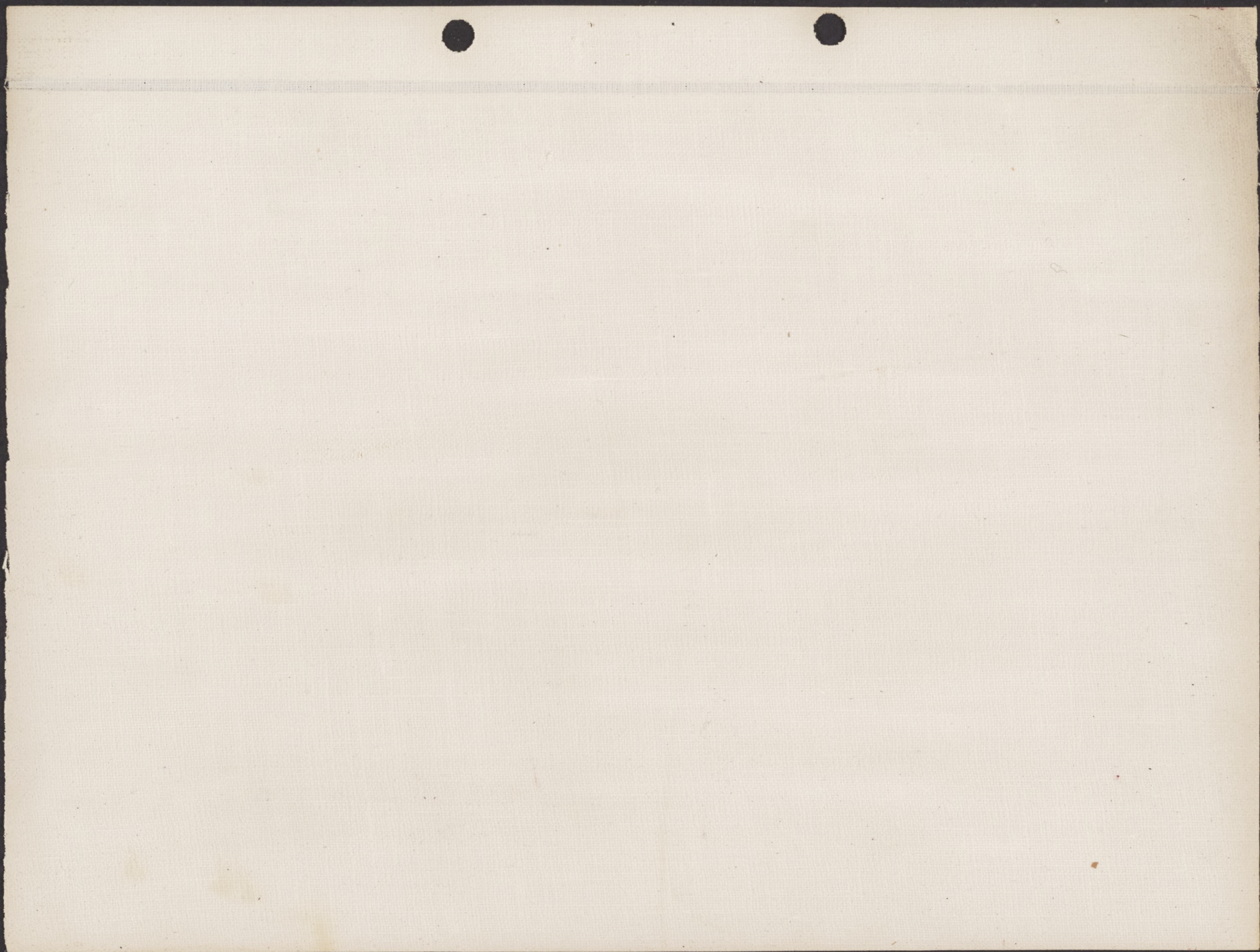


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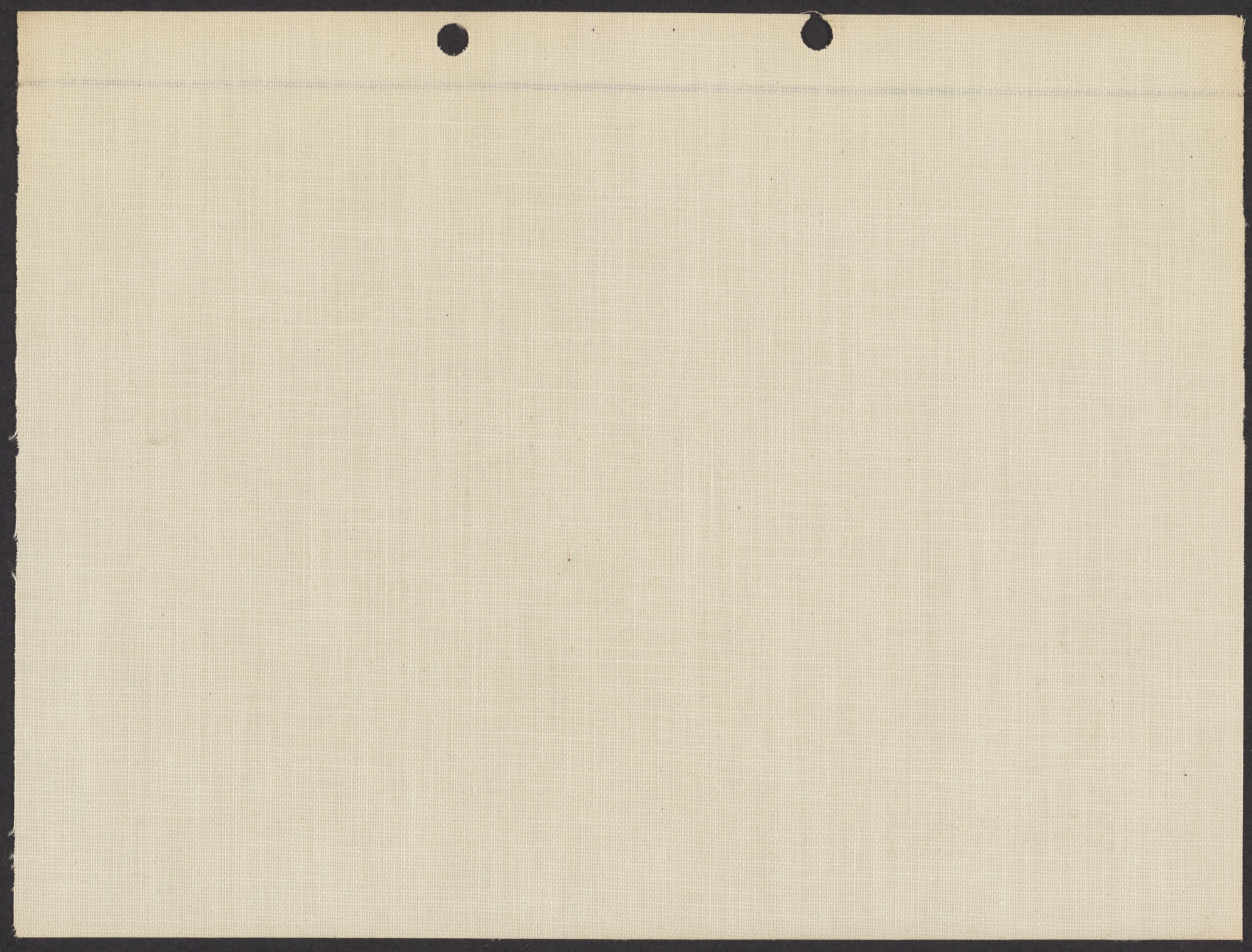


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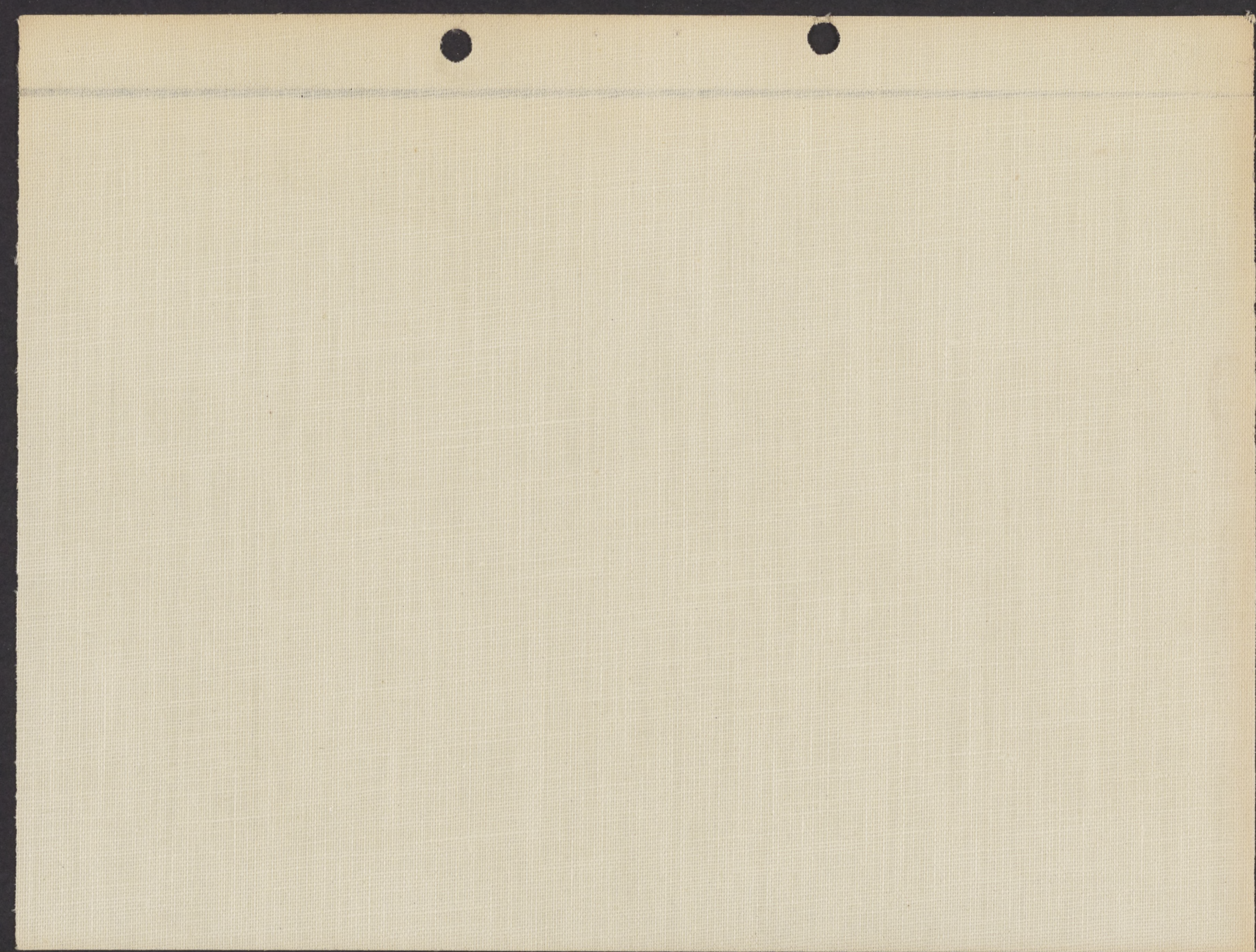


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H.G. POTTER





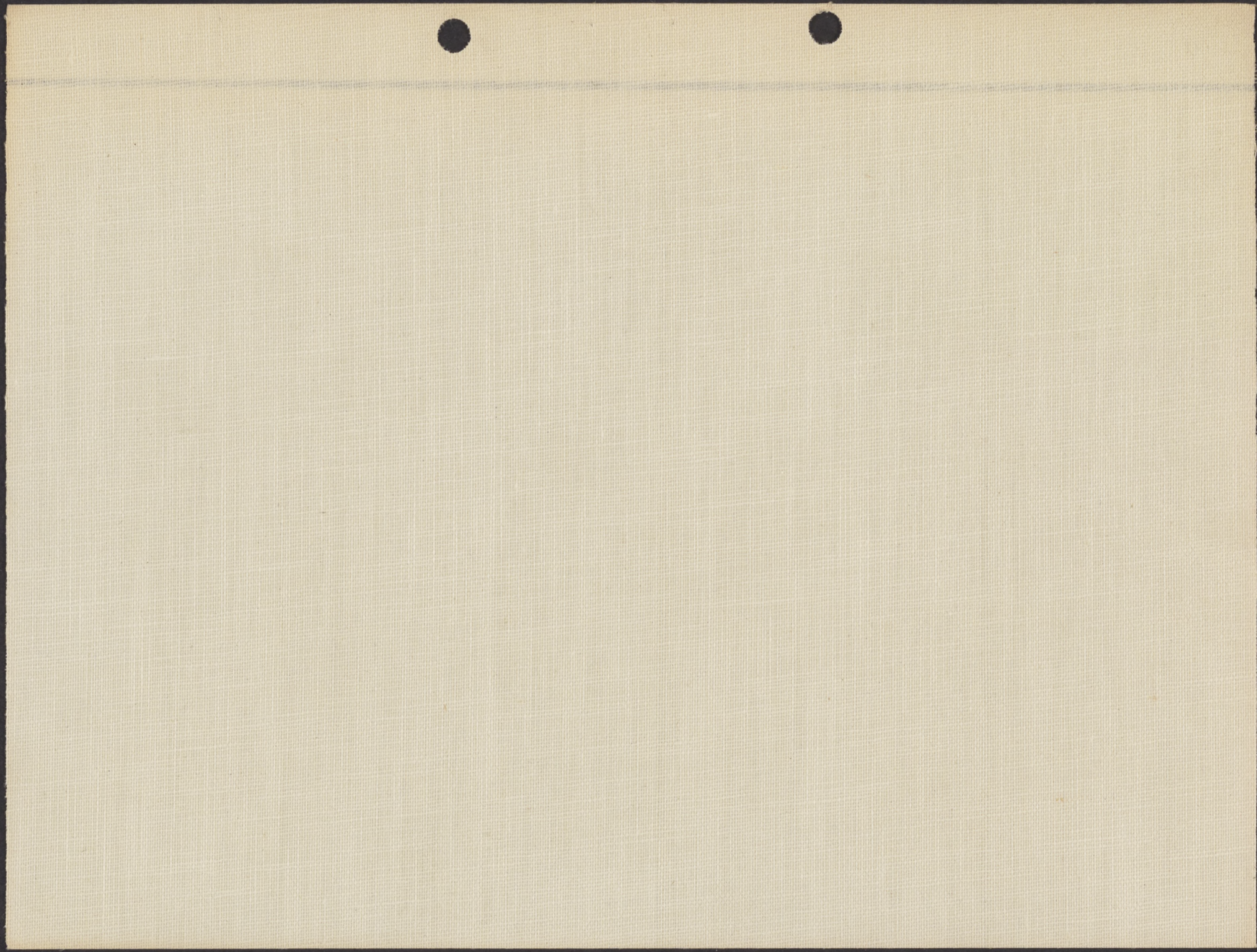
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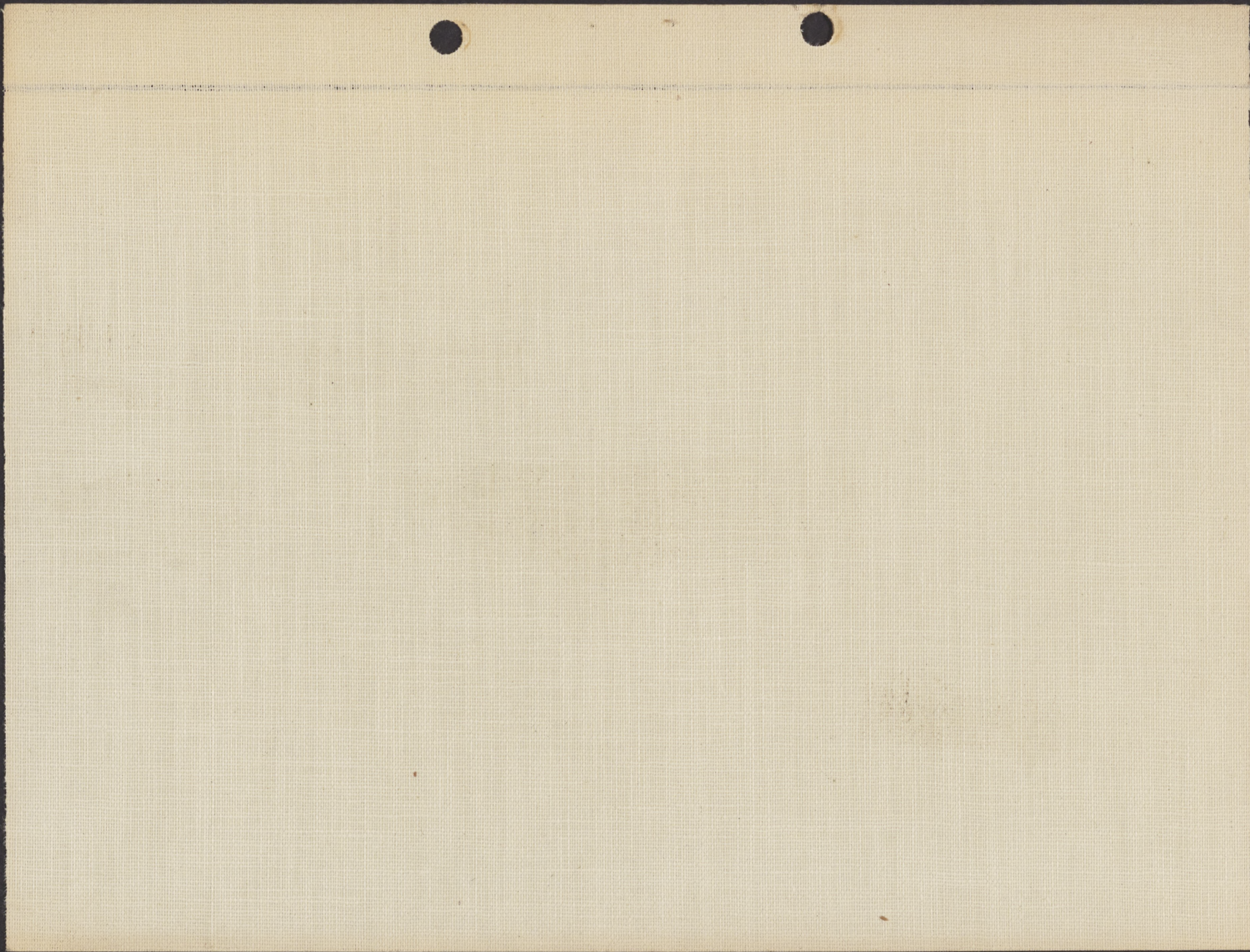
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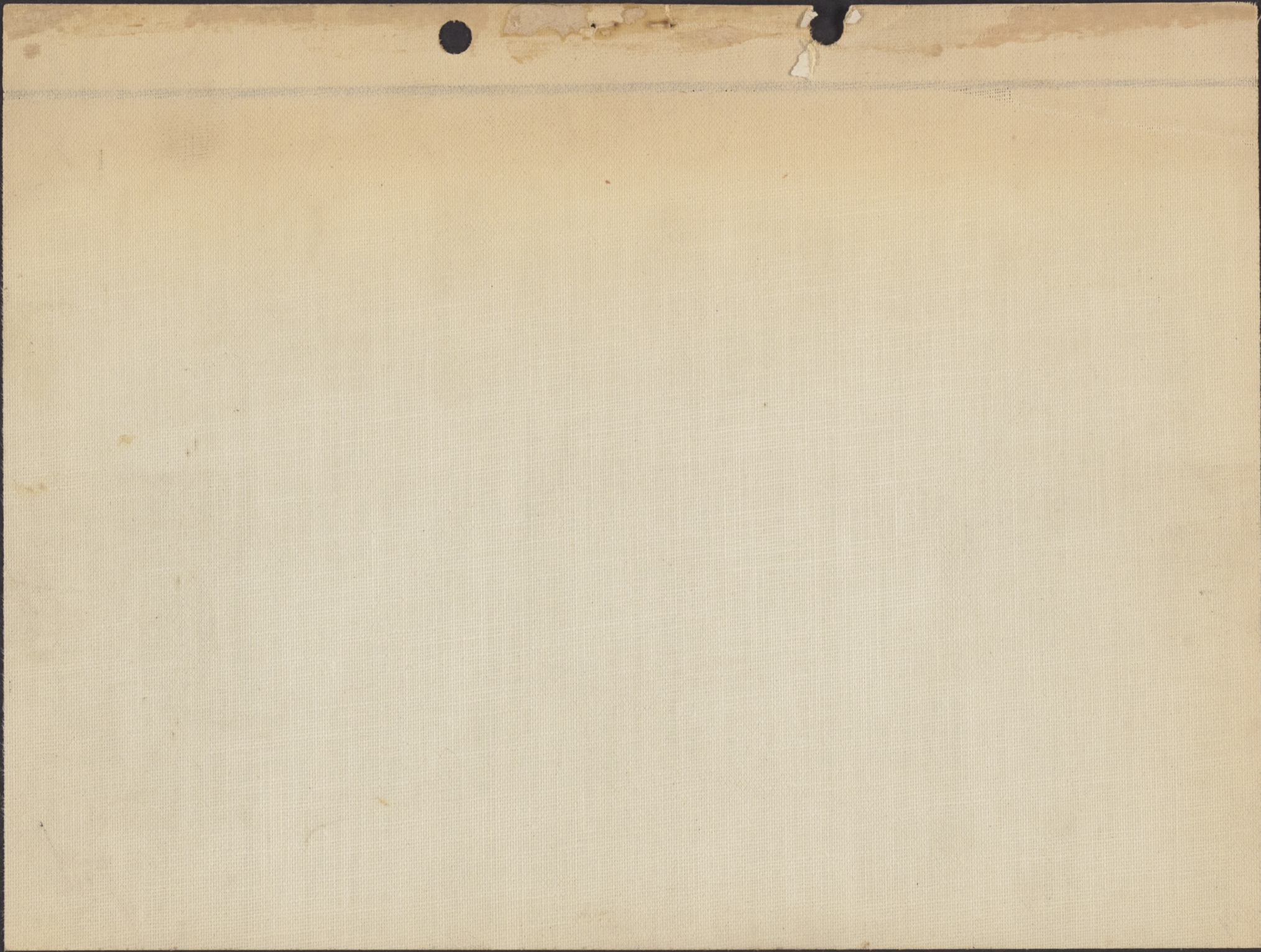




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Amended Bill of Complaint.

AMENDED BILL OF COMPLAINT.

Filed.

In Chancery of New Jersey

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey. 10

Complainant, Vincenzo De Luca, of the Town of Montclair, County of Essex and State of New Jersey, respectfully shows:

1. That on May 15th, 1902, the complainant by deed became possessed of a certain messuage of land, which deed was recorded in Book M 35 of Deeds for Essex County on pages 284 and 285, more particularly described as follows:

BEGINNING at a point in the east side of Grove Street in the Southerly line of land of Elizabeth Inness, which point is distant measuring North thirty-one degrees forty-three minutes East one hundred and sixty-eight feet from an angle in the East side of Grove Street; thence running along the East side of Grove Street south thirty-one degrees forty-three minutes West One hundred feet; thence south sixty-one degrees forty-two minutes East Two hundred feet; thence North thirty-one degrees forty-three minutes East One Hundred and forty feet to said southerly line of lands of Elizabeth Inness, and thence along said line of said lands North seventy-two degrees fifty-two minutes West Two hundred and six feet three inches to the place of BEGINNING; that said premises were deeded to him by Josephine L. Hanna, widow, and that the said premises on October 1, 1894, which was prior to the conveyance made to the complainant, was deeded 40

Amended Bill of Complaint.

by Christopher A. Hinck, *et ux*, to the grantor in complainant's deed and that the said Christopher A. Hinck owned a large portion of land on Grove Street, Montclair, of which the premises of this complainant was a part.

10 2. Complainant further shows that in the year 1894, the time that the said Christopher A. Hinck conveyed the premises to the said Josephine L. Hanna, there was constructed a road on property belonging to said Christopher A. Hinck, beginning at Grove Street, Montclair, to the South of and adjoining complainant's property, and running East about Two hundred feet and having an average width of about sixty feet, which said road ran the entire depth of complainant's property, all of which may be
20 seen by an inspection of eight photographs of the premises attached hereto and made a part hereof and marked Exhibit A, and a copy of survey attached hereto and made a part hereof and marked Exhibit B; that the road was constructed by Christopher A. Hinck, pursuant to an express agreement between the complainant's predecessor in title and the said Christopher A. Hinck, so that the house which was to be erected
30 on the lot by Josephine L. Hanna and her husband should be a corner property, and the price fixed by the said Christopher A. Hinck for the sale of the lot was based to a great extent upon the lot being a corner lot.

40 3. It was further agreed that this road should forever remain open. That the said Josephine L. Hanna and her husband, in good faith relied upon the representations and promises and agreements made by the said Christopher A. Hinck, and erected at great expense their

Amended Bill of Complaint.

home, the architecture of which conspicuously shows that the house was built as a corner property, and the said Christopher A. Hinck during his life, his death having occurred in 1916, and his entire family saw the house in course of construction and completion. That the house is an expensive one, as will be seen by an inspection of the pictures marked Exhibit A, and the complainant has spent large sums of money in improvements and keeping the house in good repair. That the house stands out prominently on a terrace rising from the road in question, and is an imposing looking home. That if complainant had not been advised of the agreement of Christopher A. Hinck to keep the road open, thus leaving the home a corner property, he would not have purchased the property, as he was not seeking at that time a house in the middle of a block.

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4. That the above road connected with a road on complainant's property which encircled the rear of the same and being part of premises deeded to the complainant by the said Josephine L. Hanna; that the road, after encircling the rear of complainant's house, returned west and ended at Grove street, Montclair; that the entire road running east from Grove street and encircling complainant's property and thence running west back to Grove street, has been used exclusively by complainant's grantor, the complainant and his invitees. That the complainant is informed and believes that the said Christopher A. Hinck, while the owner of most of the property on Grove street and after opening the road in question, caused a map to be made delineating such road, all of which more fully ap-

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Amended Bill of Complaint.

10 appears by an examination of an ordinance of the Town of Montclair, introduced by the Board of Commissioners during May, 1923, and approved June 5th, 1923, a copy of which is attached hereto and made a part hereof and marked Exhibit C. By the same exhibit it will also appear that the road was dedicated for public use, but was never accepted.

5. And complainant further shows that said road is adjacent and abuts the premises of complainant and that from the time his grantor and he became possessed of the property particularly described they had the sole and exclusive right to use said road and did exercise that right.

20 6. And the complainant further shows that they exercised the sole ownership, possession, undisputed, and from the time of the purchase of the property up to the present time; and the complainant has also beautified, improved and maintained said road at great expense.

30 7. And complainant further shows that for more than twenty years last past his and his predecessor's in title possession and exercise of ownership, for at least part of the road has been public, continuous, adverse, notorious and undisputed.

8. And complainant further shows that the defendant has commenced work near the said road by filling in a part of it, and without any right has threatened to enter in and upon said road and erect buildings thereon, and that said complainant has notified said defendant of his rights in the same.

40 9. That if the defendant is permitted to build on the road which runs along the depth on the

Amended Bill of Complaint.

south side of complainant's property, the outlook on that side will be cut off and complainant's occupancy of the house will be in every way uncomfortable, nor can money damages compensate him for the irreparable loss which will flow from the closing up of the road and the erection of buildings thereon.

10

10. That the defendant holds through Christopher A. Hinck, and has taken title with the rights of the complainant in and to the road being perfectly obvious. That if the defendant is permitted to repudiate the actions and representations of his predecessor in title upon which the complainant's predecessor in title and this complainant in good faith relied, this complainant will be greatly prejudiced and will also lose most of the advantages which were guaranteed to his property by the agreement made between Christopher A. Hinck and Mrs. Hanna. And the defendant, irrespective of any other rights the complainant may have should be estopped at this time from in any way interfering with the complainant's complete enjoyment of the entire road and the grass plot made thereon.

20

11. The complainant further shows that if the said defendant or his successor in title is permitted to carry out his threat to build on said road or in any way limit the enjoyment of the same by the complainant, irreparable damage will accrue to the complainant and for which there would be no adequate remedy at law.

30

Complainant is without adequate remedy in the courts of law and therefore prays:

That the defendant may answer this amended bill of complaint and each statement herein

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Amended Bill of Complaint.

made, without oath, and that he may be enjoined by an injunction issued out of this Honorable Court enjoining him, his agents and servants from entering upon or in anywise interfering with the complainant's peaceable use of and possession of said road, or any part thereof.

- 10 That a writ of subpoena may issue commanding the said defendant to answer this amended bill of complaint without oath, and abide by such decree as this Honorable Court may make in the premises.

And the complainant also prays your Honor for such other and further general relief in the premises as shall be equitable and just.

20 KALISCH & KALISCH,
Solicitors for and of Counsel
with the Complainant.

30

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*Amended Bill of Complaint.***Affidavit.**

IN CHANCERY OF NEW JERSEY.

VINCENZO DE LUCA, <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;"><i>and</i></div> BERGER MELIN, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>On Bill, Etc.</i> 10 <i>Affidavit.</i>
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STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

VINCENZO DE LUCA, of full age, being duly sworn according to law, upon his oath deposes and says:

20

I am the complainant in the foregoing amended bill of complaint; that on May 15th, 1902, I, by deed, became possessed of a certain messuage of land, which deed was recorded in Book M 35 of Deeds for Essex County on pages 284 and 285, which premises are particularly described in said amended bill of complaint; that the said premises were deeded to me by Josephine L. Hanna, widow; that the said premises on October 1, 1894, which was prior to the conveyance made to the complainant, was deeded by Christopher A. Hinck, *et ux*, to the grantor in my deed and that the said Christopher A. Hinck owned a large portion of land on Grove street, Montclair, of which the premises belonging to me was a part; that in the year 1894, the time that the said Christopher A. Hinck conveyed the premises to the said Josephine L. Hanna, there was constructed a road beginning at Grove

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Amended Bill of Complaint.

street, Montclair, to the south of and adjoining complainant's property, and running east about two hundred feet and having an average width of about sixty feet, which said road ran the entire depth of my property, all of which may be seen by the exhibits attached to the said amended bill of complaint; that the road was constructed by Christopher A. Hinck, pursuant to an express agreement between my predecessor in title and the said Christopher A. Hinck, so that the house which was to be erected on the lot by Josephine L. Hanna and her husband should be a corner property, and the price fixed by the said Christopher A. Hinck for the sale of the lot was based to a great extent upon the lot being a corner lot, and it was also agreed that this road should forever remain open.

20 That the said Josephine L. Hanna and her husband, in good faith, relied upon the representations and promises and agreements made by the said Christopher A. Hinck and erected at great expense their home, the architecture of which conspicuously shows that the house was built as a corner property. That the house is an expensive one, as will be seen by an inspection of the pictures marked Exhibit A, and I have spent large sums of money in improvements and keeping the house in good repair. That the house stands out prominently on a terrace rising from the road in question and is an imposing looking home. If I had not been advised of the agreement of Christopher A. Hinck to keep the road open, thus leaving the home a corner property, I would not have purchased the property as I was not seeking at that time a house in the middle of a block.

40 That the above road connected with a road on my property which encircled the rear of the same

Amended Bill of Complaint.

and being part of premises deeded to me by the said Josephine L. Hanna; that the road, after encircling the rear of my house, returned west and ended at Grove street, Montclair; that the entire road running east from Grove street and encircling my property and thence running west back to Grove street has been used exclusively by my grantor, by myself and my invitees. That I am informed and believe that the said Christopher A. Hinck while the owner of most of the property on Grove street, and after opening the road in question caused a map to be made delineating such road, all of which more fully appears by an examination of an ordinance of the Town of Montclair, introduced by the Board of Commissioners during May, 1923, and approved June 5th, 1923, a copy of which is attached and marked Exhibit C. That the said road is adjacent and abuts my premises and that from the time my grantor and myself became possessed of the property particularly described in the amended bill of complaint, we had the sole and exclusive right to use said road and did exercise that right, and, further, that we exercised the sole ownership, possession, undisputed, from the time of the purchase of the property up to the present time; that I have beautified, improved and maintained said road at great expense. For more than twenty years my possession and the exercise of ownership of said road has been public, continuous, adverse, notorious and undisputed; that the said defendant has commenced work near said road by filling in a part of the road, and without any right, has threatened to enter upon said road and build thereon buildings and fill in part of the road; that if defendant is permitted to build on the road which runs along

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Amended Bill of Complaint.

the depth on the south side of my property the outlook on that side will be cut off and my occupancy of the house will be in every way uncomfortable, nor can money damages compensate me for the irreparable loss which will flow from the closing up of the road and the erection of buildings thereon. That the defendant holds through Christopher A. Hinck and has taken title with my rights in and to the road being perfectly obvious. That if defendant is permitted to repudiate the action and representations of his predecessor in title upon which my predecessor in title and I relied in good faith, I will be greatly prejudiced and will lose most of the advantages which were guaranteed to my property by the agreement made between Christopher A. Hinck and Mrs. Hanna, and the defendant irrespective of any other rights I may have should be estopped at this time from in any way interfering with my complete enjoyment of the road or the grass plot made thereon. That if the said defendant is allowed to carry out his threat and is allowed to fill in said road or any part thereof, or possess himself of any part of said road, irreparable damages will accrue to me and for which I would not have adequate remedy at law.

30

Sworn and subscribed to before me
this 8th day of March, 1923.

*Answer.***ANSWER.**

Filed.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>VINCENZO DE LUCA, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>BERGER MELIN, <i>Defendant.</i></p>	}	<p>10</p> <p><i>On Bill, Etc.</i></p> <p><i>Answer.</i></p>
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Berger Melin, the above-named defendant, of the Town of Montclair, County of Essex and State of New Jersey, answering defendant's bill of complaint, says: 20

1. He has no knowledge of paragraph one (1).

2. He has no knowledge of paragraph two (2).

3. He denies paragraph three (3).

4. He denies that said road has been exclusively used by complainant's grantor, the complainant and his invitees. As to the balance of the paragraph, he has no knowledge and leaves complainant to his proof. 30

5. He denies paragraph five (5), with the exception of that part thereof which states that the road is adjacent to and abuts the premises of complainant.

6. He denies paragraph six (6). 40

Answer.

7. He denies paragraph seven (7).

8. He admits that he has commenced work near said road, but has not filled in any of said road, but states as a fact that he claims full and complete ownership thereof.

10 9. He denies paragraph nine (9).

10. Answering paragraph ten (10), defendant says that he is advised that Christopher Hinck was one of his predecessors in title. Defendant, however, states that he has never heard of or has never been apprised of the alleged representations of his predecessor in title on which complainant now says reliance was placed at the time of the purchase of complainant's lot. He denies the legal conclusions contained in said paragraph.

11. He denies paragraph eleven (11).

12. And this defendant, by way of answer in lieu of a plea, says that even if the alleged representations were made by the defendant's predecessor in title, they were merely promissory in their nature and do not bind this defendant.

30 13. And this defendant, further answering in lieu of a plea, says that the alleged representations of defendant's predecessor in title, by which complainant seeks to enlarge his present title, were made prior to the making of the deed to complainant's predecessor in title, and are incompetent to in any way enlarge or alter what is contained in said deed.

14. And this defendant, further answering in lieu of a plea, says that the equitable estoppel sought to be shown by complainant's allegations,

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Answer.

resting, as they do, entirely upon parole proof of representations alleged to have been made by defendant's predecessor in title to complainant's predecessor in title is not applicable so as to vary the legal force of the written deed then made and delivered.

15. And defendant, further answering in lieu of a plea, says that complainant seeks to enlarge his title by obtaining what is in effect an easement over defendant's land based on alleged parole representations, instead of by obtaining the same in writing, as interests in land are required to be conveyed under the Statute of Frauds; that interests in land cannot thus be conveyed, and the defendant pleads the Statute of Frauds. 10

16. And this defendant, further answering in lieu of a plea, says that complainant's bill of complaint sets forth a substantial dispute over a private legal right in land and is not cognizable in a court of equity; and for that reason defendant reserves the right to move for the dismissal of complainant's bill for want of jurisdiction. 20

Defendant prays to be hence dismissed with his reasonable costs and charges.

CHARLES JONES, 30
Attorney of Defendant.

Opening.

IN CHANCERY OF NEW JERSEY.

October 23, 1924.

10	<p><i>Between</i></p> <p>VINCENZO DE LUCA, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>BERGER MELIN, <i>Defendant.</i></p>
----	---

20 Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. Kalisch & Kalisch (by Mr. I. Kalisch) for complainant; Charles Jones, Esq., for defendant.

The Court: What is this all about, Mr. Kalisch?

30 Mr. Kalisch: This is a bill filed by the complainant, the owner of some property on Grove street, Montclair, against a man who has purchased from the estate of Christopher A. Hinck certain property to the south of the premises of the complainant, and included in the premises purchased by the defendant here from the estate of Hinck is a road which runs east and west, runs from Grove street two hundred feet along the southerly line of the house of the complainant, or, rather, the land of the complainant, and to the full depth of the complainant's land. The complainant purchased this house and lot from
40 one Hanna. Mrs. Hanna purchased the land

Opening.

from Christopher A. Hinck in 1894, I think it is 1894, and at the time of the purchase the person acting for Mr. Hinck, who was a son of Mr. Hinck, stated that in consideration of her paying \$4,000 for this land, they would build—that is, “they,” the Hincks, would build a road to the south of this property and finally terminate it at Ridgewood avenue, or go right straight through to the next street. They subsequently built the road and during all of that time no one has used it other than Mrs. Hanna, who purchased the lot alongside of the road. The road has been in existence ever since and during some time between 1900 and 1905, I think 1902, to be exact, my client, the complainant, purchased from Mrs. Hanna, who had purchased it from the Hinck estate, this house and at the time of the purchase was told that it was a corner property and would remain so. That was the agreement that Mrs. Hanna had with Mr. Hinck; that she would not have purchased and paid that price for this land being almost—the road, the street not having many houses on at that time, she would not have purchased at that price if that agreement had not been made enumerating that there would be a corner property; that the house was built pursuant to that agreement; it was built, erected for a corner property, the side facing the road being made almost the same as the side of the road so as to make it appear prominently on this portion on which the house was built; that during many years and since this complainant has been the title holder, the road was somewhat wider—it being originally sixty feet—somewhat wider than he required for his purposes, he cultivated by seeding and planting trees about between twenty-five and

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Opening.

thirty-five feet of that road, so that the twenty-five or thirty-five feet of what was originally the road is now connected right along with his grass plot and is part of his lawn. The defendant, as I said before, purchased, I believe in 1923, from the Hinck estate the remaining property to the south of our property and thereupon attempted to fill in this road and stated that his purpose was to build three garages right alongside of the road and facing the house on a street which had been subsequently opened and running parallel to the road which had been put in by the Hincks pursuant to their agreement. Now, while these pictures are not yet in evidence, perhaps your Honor may be better able to get the physical visualization of the situation if I give them to you and introduce them in evidence. You have no objection?

Mr. Jones: No.

The Court: They will be received and marked Exhibit C. 1. It seems to me this case came before me on preliminary application, didn't it? I seem to remember something about it.

Mr. Kalisch: I don't remember whether your Honor granted the original injunction, or Vice-Chancellor Backes. Do you, Mr. Jones?

Mr. Jones: Yes. Vice-Chancellor Church did.

Mr. Kalisch: Now, we have already by stipulation taken the testimony of Mrs. Hanna in New York and the stipulation is to the effect that it is to be received as though she testified in open court by examination and cross examination. I offer the testimony of Mrs. Hanna.

Book of testimony marked Exhibit C. 2.

Mr. Kalisch: I understand there is some question that Mr. Jones intends to object to.

Opening.

Mr. Jones: Are you through with your opening?

Mr. Kalisch: Yes.

Mr. Jones: I think we are entitled at this time to have an expressed opinion from counsel whether he relies on this as a public right of way or public street.

10

Mr. Kalisch: I stand upon what rights I may have obtained by any act of the Hincks plus the agreement which they made with her, or, rather, our predecessor in title.

Mr. Jones: That doesn't mean very much.

In the answer, your Honor, we take the position that in 1894 the property was sold to the plaintiff's predecessor in title; that there was no representation that this was a corner lot. It is a large tract of land; that one of the Hinck boys, who is here, may have discussed with Mrs. Hanna the possible plans for development of the future of this large tract, but that was an indefinite and vague future. They did not intend to put the road there at that time and they undoubtedly spoke to Mrs. Hanna about their intention of putting a road there. The plans were very vague, because they had not acquired the land. Their contention was that this particular plot was bought by Mrs. Hanna because it was a high knoll, and the other parts of their contention are absolutely denied. They also assert that when this road was opened a year or two later that it was opened with the intention of making it a public road going from Grove street right through to Ridgewood avenue; that after they had started it, either due to real estate conditions or because they could not get the title of the other part, that plan was abandoned, pos-

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Opening.

10 sibly to be taken up years later, and it was never taken up; that last year they consulted Mr. Porter, they consulted Judge Porter as to this plot of land, and pursuant to his advice, they went up and had the Town of Montclair vacate any rights that the public had in that street. If the plaintiff had not any right, of course, that would not cut off his private right.

The Court: Is it then conceded that it is not now a public street?

Mr. Kalisch: It is conceded that the Commissioners of the Town of Montclair vacated whatever public rights the town may have had in the street.

The Court: Let that be on the record.

20 Mr. Kalisch: I understand that is the statement of fact as made by Mr. Jones.

Mr. Jones: Yes; that is right.

30 In addition, this appears in the answer, which I think ought to be read at this time: "And this defendant further answering in lieu of a plea, says that the alleged representations of defendant's predecessor in title, by which complainant seeks to enlarge his present title, were made prior to the making of the deed to complainant's predecessor in title, and are incompetent to in any way enlarge or alter what is contained in said deed." There is nothing in their deed about this.

40 "And this defendant further answering in lieu of a plea, says that the equitable estoppel sought to be shown by complainant's allegations, resting, as they do, entirely upon parole proof of representations alleged to have been made by defendant's predecessor in title to complainant's predecessor in title, is not applicable so as to

Opening.

vary the legal force of the written deed then made and delivered.

“And defendant further answering in lieu of a plea, says that complainant seeks to enlarge his title by obtaining what is in effect an easement over defendant’s land based on alleged parole representations, instead of by obtaining the same in writing, as interests are required to be conveyed under the Statute of Frauds; that interests in land cannot thus be conveyed, and the defendant pleads the Statute of Frauds. 10

“And this defendant further answering in lieu of a plea, says that complainant’s bill of complaint sets forth a substantial dispute over a private legal right in land and is not cognizable in a Court of Equity; and for that reason, defendant reserves the right to move for the dismissal of complainant’s bill for want of jurisdiction.” 20

And I want at this time to preserve the legal rights to move for the dismissal of this bill on the opening of counsel and the reading of the bill. I rely on the case of *Hart v. Leonard*, 42 Equity, 416; that continuing in the Court of Errors and Appeals and an opinion by Judge Dixon. This case is almost like the present one and the defense is somewhat like the present one and although it is only a page here, it is very important; if I may read it. It states: “From the foregoing statement”—and also a state of facts very much like the other—“it appears that the claim set up is to a purely legal interest in lands, resting upon a purely legal basis. Before attempting to determine the validity of the claim, it is proper to consider whether the question presented comes within the cognizance of a 30 40

Opening.

10 Court of Equity. No doubt many cases arise in which Courts of Equity may, by decree and injunction, protest and enforce legal rights in real estate. So far as they are exemplified in our Chancery practice, these cases can, I think, be classified under the following heads": and he says afterwards that these are the only ones, first, "where the legal right has been established in a suit at law, and the bill in equity is filed to ascertain the extent of the right and enforce or protect it in a manner not obtainable by legal procedure." Of course, that is out.

"Cases where the legal right is admitted, and the object of the bill is the same as in the class just mentioned." That is out.

20 "Cases where the legal right, though formerly disputed, is yet clear, on facts which are not denied and legal rules which are well settled and the object of the bill is as before stated."

Four. "Cases where one attempts to appropriate the land of another, under color of statutory authority, without complying with the legal conditions precedent." Clearly it is not this.

30 "Cases where the object of the bill is to stay waste."

"Cases where the object of the bill is to prevent an injury which will be destructive of the inheritance, or which Equity deems irreparable, *i. e.*, one for which the damages that may be recovered according to legal rules do not afford adequate compensation."

40 "Cases where the object of the bill is to protect one's dwelling from injuries which render its occupancy insecure or uncomfortable."

Opening.

“Cases where the right to be protected or enforced grows out of the expressed or implied terms of a contract, so that the court can entertain jurisdiction by virtue of its power to compel specific performance.”

“Cases where the object of the bill is to prevent a multiplicity of suit, otherwise rendered necessary by the fact that many persons are interested in the controversy.” 10

Now, he takes up these two cases which I have: “The case in hand does not come within any of these classes. It bears no trace of resemblance to any except those of the third or those of the sixth class. But the third class does not include it, because the evidence shows a substantial dispute over the facts of adverse user, which the defendant is entitled to have settled by the verdict of a jury; and the sixth class does not cover it, because the temporary obstruction of a way to a small wood and pasture lot can be fully paid for by the damages recoverable according to legal rules.” 20

Now, in this case they have a driveway around the north side of the house. Unless they haven't the one on the south side of the house, the damages certainly are not irreparable. That is the reason that it comes within no established equitable rules and that their remedy is at law. 30

Mr. Kalisch: In the first place, the subsequent case to *Hart v. Leonard*, wherein the Court says “I do not construe the omission of the others as at all discrediting them as authority.” That is the case of *Dill v. The Board of Education of Camden*, wherein, in a fully considered opinion, Vice-Chancellor Pitney says that while *Hart vs. Leonard* does state certain classes, the omis-

Mrs. Josephine L. Hanna, direct.

10 sion of others, he feels, does not deprive the court of an equitable jurisdiction. That is one argument. The second argument is that it is irreparable. Here is a house with the architecture a certain way, built by reason of this. A glance at the photograph will indicate clearly the architecture and I am prepared to show by an architect why it was built this way.

I also wish to refer your Honor to the case of *Bechtel v. Carlake*, which is identical with our case, where the Court says: "A purchased a lot from B on an alley actually opened eight feet wide. B, at the time of the purchase, promised to widen the alley to the width of sixteen feet. B widened the alley. A court of equity will enjoin B from narrowing the alley to its original width." There is the case in a nut-shell. They promised to build the road and they built the road. The Court of Chancery, I take it, has the right to say "You shall not eliminate that road."

20

The Court: This is a motion to dismiss the bill?

Mr. Jones: Yes; your Honor.

The Court: I will deny the motion.

30 Mr. Kalisch: With the Court's permission, I will now read the testimony of Mrs. Josephine L. Hanna. "Question: Mrs. Hanna, you are the widow of Captain Robert M. Hanna? Answer: I am.

Q You reside in New York City? A Yes.

Q Did you, on or about October 3, 1894, purchase a lot from Christopher A. Hinck, on Grove street, the Town of Montclair? A Yes. Is that 1904?

40

Mrs. Josephine L. Hanna, direct.

Q No, it was 1894. A No. 1894.

Q That was just a vacant lot at that time?

A Just a vacant lot; yes.

Q After the lot had been purchased did you or your husband cause any building to be erected on it? A A house.

Q A house? A Yes.

10

Q I show you a photograph, and ask you whether the house which appears in the center of that photograph, the large one, is the house which you caused to be erected? A Exactly.

Q That is the house? A Yes. I wish I had a picture of it. I haven't got a picture of it.

Mr. Kalisch: I offer this picture in evidence.

20

(Picture above referred to, entered in evidence and marked Exhibit C. 1, of 10-20-24.)

Q Now, Mrs. Hanna, when, if you can remember approximately, was work started for the purpose of building this house? I mean about how long after you had purchased the lot? A You say this was about October we purchased it?

30

Q This was about October, the early part of October, yes. A I thought we bought the land earlier.

Q I have a copy of your deed. A Oh, you have a copy of the deed. Why, I thought, I remember I thought we bought it in the month of August.

Q You probably drew the agreement to purchase in August? A I suppose so.

40

Mrs. Josephine L. Hanna, direct.

Q The date, according to the records of the court, is October 10, 1894. A Well, we began to build very soon after that.

Q Very soon after that? A Because we moved into it just before Christmas, the following year.

10 Q In other words, fourteen months after?

A Yes.

Q Fourteen months after. Now, this lot you purchased from Mr. Hinck, did that adjoin the property of Elizabeth Inness? A Yes.

Q Now, did you have any negotiations at all with Mr. Hinck before you actually purchased the house?

Mr. Jones: I object to that."

20

Mr. Jones: I withdraw it.

The Court: Do you want that to appear on the record?

Mr. Kalisch: It is withdrawn: Mr. Jones: Withdraw the objection.

"A I purchased the lot; not the house.

Q The lot, not the house. I mentioned the word 'house.' I wish to change that to the word

30 'lot.' A I think it would be better.

Q Because you didn't buy the house, did you? A No; I didn't buy the house.

Q Did you have any negotiations in connection with the price to be paid for the lot? A No; I don't think we did. We didn't haggle about the price, at all.

Q Do you recall anything in connection with a road, do you know whether there was anything said about this road which appears on this picture?

40

Mrs. Josephine L. Hanna, direct.

Mr. Jones: I object to that."

Mr. Jones: That, I think, is very important because if they are going to establish any sort of a case, they have got to establish by legal rules. Now, here are representations which they allege were made before the deed or the deal was entered into, which was in that deed. Now, they are trying to show by testimony outside the record that something was included in that deed which the deed says nothing about.

10

The Court: No; I do not understand that. What I understand the idea is, is this: That because of these conversations they were willing to take the deed.

The answer will be admitted over objection.

20

"Q Just answer yes or no.

Mr. Jones: Wait a minute. I object to that on the ground that any conversation or negotiation should be merged in the deed that was subsequently given.

(Question repeated by the stenographer.)

(Continuing.) Do you know which road I mean?

30

A The road on the side.

Q The road on the south of your lot? A This one here. (Indicating road on photograph.)

Q Yes. A Mr. Hinek said at the time, they were going to put a street through there.

Q The answer is yes? A Yes.

Q What did Mr. Hinek say in regard to this road on the south of this lot?

40

Mrs. Josephine L. Hanna, direct.

10 Mr. Jones: I object, on the ground that any conversation should be merged in the deed that was subsequently given. I object further, on the principle set forth in the case of *Naumberg vs. Young*, where the conversation was for the purpose of offering a written instrument. I object further on the ground that the conversation is to enlarge interest in the land, contrary to the statute of frauds, which I have pleaded."

Mr. Jones: The same objection.

The Court: The same ruling.

"A It should be a corner lot, 'We will make it a corner lot.' That is what he said.

20 Q What did he say about the road? A You started to say something about the road.

Mr. Jones: Same objection."

Mr. Jones: That will be the same ruling, I presume.

"A I said, 'I will call it Waverly avenue.'

Q What will you call Waverly avenue? A That street they were going to put through.

30 Q You haven't mentioned the street. You said he would make it a corner lot. What did he say about the street? A The corner lot. He said he would put through a street, I would call Waverly avenue.

Mr. Jones: Note the same objection."

Mr. Jones: I suppose the same ruling?

The Court: Yes.

40 "Q Now, Mrs. Hanna, when you mention Mr. Hinck, what was his first name, Christopher?

Mrs. Josephine L. Hanna, direct.

Was it Christopher A. Hinck? A We dealt with Ernest. We saw Ernest all the time.

Q You saw Ernest all the time? A Yes.

Q Did Ernest handle Mr. Hinck's property?
A Yes; he did.

Q Was Ernest Hinck related to Christopher A. Hinck? A Yes, a son. 10

Q He was a son? A Yes.

Q The money was actually turned over to—
A Ernest. We gave him the check.

Q This conversation that you speak about, was that before you got the deed or after? A About Waverly avenue?

Q Yes. Was that before you paid the money for the place, or after? A I think, before. I think, before.

Q You think before. Can you tell us whether the conversation you had was with Mr. Ernest Hinck? A With Ernest 20

Q Do you know, of your own knowledge, whether Ernest Hinck took care of his father's real estate? A I think so.

Q The rest of his real estate, also? A I think so.

Q Will you please tell us whether your house was started first, or the road, which was spoken about between you and Mr. Hinck, was started first? A I can't tell you. I don't know. 30

Q Have you any recollection at all? A I think the house was started first.

Q But you are not clear on that? A I am not absolutely sure.

Q As a matter of fact the road was dug? A It was dug, yes.

Q Was there a driveway to the rear of your house, after it was built? A No, no. 40

Mrs. Josephine L. Hanna, direct.

Q Was there an entrance way on the north side of your house, up in here? (Indicating on Exhibit C. 1.) A Yes; a driveway was there. That was the driveway.

10 Q There was a driveway there. Was there anything in the rear of your house to connect with this road? A No.

Q You never connected the two ends? A No. Shall I tell you why?

Mr. Jones: No. Just answer the questions.

Q No. A There wasn't

20 Q During the time that you occupied this house, will you tell us whether you, or your relatives, or your friends, used this Waverly avenue, that you described?

Mr. Jones: I object."

The Court: Why?

Mr. Jones: On the use of Waverly avenue?

The Court: Yes. What is the force of that objection? I don't quite get that.

30 Mr. Jones: I don't think I got the previous question.

The Court: Read it over again.

Mr. Kalisch: "Question: During the time that you occupied this house, will you tell us whether you or your relatives, or your friends, used this Waverly avenue, that you described."

40 Mr. Jones: I do not see now. I must have had a bright thought then that I do not have now.

Mrs. Josephine L. Hanna, direct.

The Court: Then you do not wish to press it?

Mr. Jones: No.

The Court: Objection withdrawn.

“Q Now, Mrs. Hanna, are you certain that when Mr. De Luca took this house, that road didn't continue on and connect in the back? A There was no road. 10

Q The driveway or pathway? A We didn't have any carriage. We didn't have any automobile. We didn't need it.

Q There was an open way in back so that two roads could connect? A Oh, yes; this was all fields.

Q In the back? A The whole business. Everywhere. 20

Q Mr. Hinck owned all that? A I think he did.

Q How far did the driveway on the north of your house, run?

Mr. Jones: I object. She said there wasn't any.”

Mr. Jones: This is drive on the north, is that it? 30

Mr. Kalisch: That is on our property.

Mr. Jones: The driveway on the north has nothing to do with this.

The Court: No; I do not see it has anything to do with it.

Mr. Kalisch: It is objected to but you withdrew the objection.

The Court: As to materiality, probably.

Mr. Jones: Yes; that is the reason. 40

Mrs. Josephine L. Hanna, direct.

Mr. Kalisch: My point was I wanted to show that they were about even on both sides, so as to indicate why we continued on with the driveway in the rear and connected the two.

The Court: I will sustain the objection.

10

Mr. Kalisch: He didn't object because it was immaterial. He says: "I object. She said there wasn't any" roadway on the north.

The Court: It seems to me, we should confine ourselves to the driveway on the south and Mr. Jones has the right—
(interrupted)

Mr. Kalisch: It is withdrawn anyway, I find out, later on.

20

The Court: If it is withdrawn, that is all there is to it.

Mr. Jones: I press it.

The Court: What do you say to that?

Mr. Kalisch: I do not see how he can object now after he has let it go on.

The Court: Never mind. Let it go in.

30

"A The one between Inness and your house?"

Mr. Jones: Withdraw the objection.

A The full length of the lot.

Q The full length of the lot. How far around did it extend?

Mr. Jones: I object to that. She said it didn't."

40

Mr. Jones: I do not care whether it is in or not.

Mrs. Josephine L. Hanna, direct.

The Court: I will sustain the objection.

“Q Have you anything to say in regard to that driveway in back? You started to tell us about it.

Mr. Jones: I object to that form of question. That is too broad.” 10

Mr. Kalisch: I will withdraw the question.

“Q You say you don't know how deep the road to the north of the house, ran? A No.

Q What circumstances were there, or are there in your mind, which makes certain the manner in which this roadway was dug, to the south of your land, and the roadway on the north of your land was continued on along the depth of your property? What facts are there? 20

Mr. Jones: I object to that.”

Mr. Kalisch: Well, the question was withdrawn.

“Q What was said about your house remaining corner property? 30

Mr. Jones: I object to that. She never said it. That is a leading question.”

Mr. Jones: I objected to that.

Mr. Kalisch: In this case he limits his objection to the statement of the previous objection.

Mr. Jones: I reply on the statute of frauds, the case of *Naumberg vs. Young*.

The Court: I will overrule the objection. 40

Mrs. Josephine L. Hanna, direct.

“Q What was said? A What was said?

Q Yes. Mr. Hinck told me if we bought that piece of land, he would make it a corner lot.

Q If you bought it? A Because they were going to put a street through.

Q You did, actually, afterwards buy it? A We bought it; yes.

Q After you had bought it, can you tell us whether the road which I show you on the south of your house, on Exhibit C. 1, was actually dug, and put through? A It was dug; yes.

Q Do you know whether he had it dug? A He must have had it dug. Mr. Hinck must have had it dug. We didn't.”

The Court: That seems to be a curious conclusion; they didn't have it—(interrupted)

Mr. Kalisch: It was on Hinck's land; nobody else had any control of it.

Mr. Jones: There is not any question in the case about it.

“Q Do you know whether Mr. Hinck had it dug? A We didn't have it dug.

Q That isn't the point. Do you know whether Mr. Hinck had it dug? A I think so.

Q Did you ever see him around while it was being dug, or any of the family? A No.

Q Who owned the property to the south, of your southerly line? A Mr. Hinck owned it.

Q Do you know whether the building of that road took any length of time? A I don't know that. The road was there when we went into the house.

Q The road on the south of your house, which appears on Exhibit C. 1, was there when

Mrs. Josephine L. Hanna, direct.

you entered the house, which appears on this picture, C. 1? A Yes.

Mr. Jones: That was about fourteen months later.

A Yes; it was there before that, though, because people took that road to bring up supplies. 10

Q To you? A I mean supplies to build the house with.

Q Would you have purchased this lot for the price you paid, if Mr. Hinck hadn't agreed to put this road through?

Mr. Jones: I object to that on the ground, first it is leading, and on the ground it is an attempt to enlarge on a written instrument." 20

The Court: I will overrule the objection.

"A I don't think so.

Q As you recall it, can you remember whether the agreement to put the road through, was part of the agreement, or not?

Mr. Jones: I object to the question on the grounds I have given preceding." 30

The Court: The same ruling. 30

"A I think it was.

Q After the men in building the house, had used this road for the purpose of bringing things in—strike that out. Between the time that this road was finished, and the time you sold the property to Mr. De Luca, will you please tell us who used this road to the south of your property? A Tradespeople. 40

Mrs. Josephine L. Hanna, direct.

Q To you? A For me.

Q Did your friends use it? A No; they used the driveway.

Q They used the driveway on the north? A Yes.

10 Q You sold this property to Mr. De Luca, did you not? A I did.

Q In 1909 the deed says, May. Do you recall whether you mentioned or not, this road to the south of the property?

20 Mr. Jones: That is clearly incompetent; that is clearly objectionable, 'did you recall;' this woman had bought it; it had nothing to do with it; ten years later did she mention to the prospective purchaser about this road?"

The Court: I think the circumstances surrounding the first deed are what we are interested in.

Mr. Jones: There might be a question in fact.

30 The Court: And if I should decide this deed was given on account of these representations, why, it would go down to all successors in title. I think it is immaterial. I will sustain the objection.

Mr. Kalisch: The answer is "I think I did." Does that go in the record?

The Court: No; it does not go in.

"Q Do you recall what you told him about this road on the south? A It was to be a corner lot.

40 Mr. Jones: Same objection."

Mrs. Josephine L. Hanna, direct.

The Court: The same objection and the same ruling.

“Q You told Mr. De Luca that.” Well, that is that, too.

“Q Can you state whether Mr. Hinck, at the time he agreed to put this road in, suggested how long the road would remain? A No. 10

Q He didn't limit the time? A No.

Q Was Ridgewood avenue to the rear of your house? A Yes, sir.

Q Can you tell us whether the road was cut through as far as Ridgewood avenue, or not?

A It was not.

Q Do you recall any conversation in connection with how long it was to be cut? A No.

Q During the time that you were building your house, and before it was finished, can you tell us whether you had some conversations with Christopher A. Hinck? A None whatever. 20

Q You don't remember any? A No.

Q Will you say that you didn't have, or that you can't recall? A I did not have.

Q Were there any other houses built upon that street anywhere near where your house was erected? A No; none. 30

Q You paid \$4,000 for the lot? A I suppose so. It was a good price.

Q Will you tell us whether after this road was built, you ever had any other conversation about it, with either of the Mr. Hincks, or with Miss Hinck? A Never saw him.

Q Or Ernest Hinck? A No.

Q Or Louise Hinck? A No; never said anything more about the land.

Q Never said any more? A Nothing at all. 40

Mrs. Josephine L. Hanna, direct.

Q Do you recall the manner in which your house was built, the particular style of the house?

Mr. Jones: I object to that. It appears in the picture."

10 The Court: The same ruling.

"Q I mean to say do you recall the general layout of the house? A Yes.

Q Do you recall the particular style in which the house was built, either by reason of the facing on Grove street, or because of the fact it was at the corner of this Waverly avenue that you described?

20 Mr. Jones: I object to that."
The Court: The same ruling.

"A We put the entrance on Grove street, because that was next door to Inness'.

Q What about the porch which seems to face on this Waverly avenue, or whatever street you call it. Waverly avenue. Is there any porch there facing on Waverly avenue? A Yes; two.

30 Q Two porches? A Well, we call this a little breakfast room. That was put on this part because it was sunny.

Q Sunny? A The architect put it there because it was sunny. This is the north side of the house. It was cold.

Q Where, if you can remember, were your bedrooms? Most of your bedrooms?

40 Mr. Jones: I object as immaterial."
The Court: Objection overruled.

Mrs. Josephine L. Hanna, cross.

“A One on the north side. One here. One here, and one here. We had four bedrooms, and the servants’ quarters.

Q Did your husband have to do mostly with the arrangements with the architect? A No; had nothing to do with it.

Q Nothing? A I had a Boston architect. 10
A Mr. Lewis. I am a Bostonian and I had a Boston architect.

Q You continued the porch in front around the southerly side of the house, did you not? A Yes; I did.

Q Was there a tradesmen’s entrance in the rear somewhere? A Well, there was. There was the kitchen, of course. It was off the kitchen.

Q Here was the kitchen? (Indicating on Exhibit C. 1.) A Here is the dining room. There is the kitchen. 20

Q Pointing to the southeasterly?

Mr. Jones: Pointing to the southeasterly section? A Yes.

Q There is an entrance back there? A Yes.

Q Is there another carriage entrance on this side? A Only on the north side. 30

Q There is a carriage entrance into the building? A The front door.

Q The front door. I see. That is all.” And here is the cross examination.

(Mr. Jones reads cross examination from this point.)

“Q Mrs. Hanna, when you built this house, before you built this house, you contemplated the 40

Mrs. Josephine L. Hanna, cross.

kind of house you were going to have, for quite some time before that, of course? A Yes.

Q This house was about the house that you would build irrespective of where you built it, isn't it? A Yes.

10 Q This was only the lot. Had you selected the lot elsewhere you would probably have built the same house?

Mr. Kalisch: I object to that."

Mr. Kalisch: Oh, I will withdraw the objection.

20 "A Probably. Of course, a house is always built a little bit in keeping with the surroundings, and the neighborhood. The class of people.

Q That is what you refer to, the neighborhood? A Yes, the neighborhood.

Q That is what you meant, the neighborhood? A Yes; the neighborhood, the class of people.

Q This porch and the breakfast room were put on this southerly side to get the southerly warm exposure, I suppose? A Yes.

30 Q There was sufficient room between that and this, what you thought to be the road, so as to be ample space? A Oh, yes.

Q The back of your house was like the back of any other house, the kitchen was about the same location, wasn't it? A Exactly. The laundry—

40 Q The kitchen there isn't exactly on the southeasterly corner. You have to go around the southeasterly corner to get in? A The house is built on an 'L.' It has an 'L' in it. Square house with an 'L.'

Mrs. Josephine L. Hanna, cross.

Q Now, as I understood you to say, your negotiations were with Ernest Hinck? A Entirely.

Q He sold the lot for his father? A Yes.

Q Whatever negotiations or conversation that you had, were with Ernest A. Hinck? A Yes; Ernest.

Q Now, as I understand it, he showed you a lot on the east side of Grove street, which is the lot in question, and I understand you to say he promised you some time in the future, he would put a road next to it, on the south? A Yes, a street through it.

10

Q He would put a street through it? A Yes.

Q That street, he told you, would some time in the future go through— A To Ridgewood avenue.

20

Q From Grove street to Ridgewood avenue. Is that right? A Yes.

Q It was? A I was to name the street.

Q You were to name the street? A I named it at once; Waverly avenue.

Q You took his word as a gentleman that street was going to go through? A I certainly did. That road was wide enough for any vehicle to pass through. We had a cinder path on the side.

30

Q That road wasn't there at the time you first negotiated to purchase the lot? A No.

Q As a matter of fact, wasn't there a track of the road, which you say was used by the people building the house. Wasn't that road there merely made by men driving in with lumber to build the house? A I can't say that.

Q You can't say that. You wouldn't want to say that there was a sort of a track made by

40

Mrs. Josephine L. Hanna, cross.

the men and teamsters coming in with material for your house, and then that place was subsequently widened and made into the proposed road? A I think so. I couldn't think they would make a road first. It was natural for things to come in there. Things came in, boilers, bricks and so forth. They used that road

10

Q Isn't that your recollection, when they started to bring lumber and bricks and material, there was no road there? They drove over this level grass into your yard, thus making tracks which subsequently were made into a road? A Yes.

Q And that those tracks, which had been made by the teams and so forth, are approximately the place where they afterwards put the proposed road, or started the proposed road?

20

A Exactly.

Q Now, when you took your deed, you still did your negotiating with Ernest Hinck, didn't you? A I never had anything to do with the father. All with Ernest.

Q When the son brought along the proposed deed to you, to close the title, were you represented by a lawyer? A No.

30

Q He simply brought it to the house? A Now, I am not positive about that.

Q Didn't you have some lawyer search the title? A It may have possibly been Mr. Godell of Montclair. It must have been Mr. Godell. Mr. Godell did the work when Mr. De Luca bought the house.

40

Q At the time you took the deed, you say that you had this agreement with Mr. Hinck that either then, or some time in the future, he was to put through this road? A Yes.

Mrs. Josephine L. Hanna, cross.

Q Why didn't you have that incorporated in your deed? A I didn't know. I had had no experience. I thought people were honest.

Q Did you have any conversation with Mr. Godell, or Mr. Hinck, in Mr. Godell's presence, in reference to it? A I don't think so. I can't be positive about that.

10

Q This road, or proposed road, at that time was not built, of course? A No.

Q Didn't you think it necessary to have a contract with this gentleman to perform this rather big undertaking in the future?

Mr. Kalisch: I object to that on the ground it is immaterial, particularly in view of the fact the road was actually subsequently built, and is there."

20

Mr. Kalisch: Oh, I will withdraw the objection.

"Q I understood you to say you had most of the negotiations? A It was my house; my land.

Q Now, to go back to the question, subject to Mr. Kalisch's objection, didn't you think it was wise, prudent, or necessary to have a contract with Mr. Hinck, inasmuch as he hadn't built the road, to build the road in the future?

30

Mr. Kalisch: Same objection."

Mr. Kalisch: I will withdraw it.

The Court: Now withdrawn.

"A I didn't think anything about it.

Q Now, how wide was this road to be, under your agreement with Mr. Hinck? A How wide?

40

Mrs. Josephine L. Hanna, cross.

Q Yes. A I don't know.

Q There was no agreement as to width? A There was no agreement as to width.

Q There was no agreement as to how long it should be there? A It was going to be a street.

10 Q I am asking you the width of it. No agreement about grading it. No agreement about the nature of the paving? Was there any agree-

ment it should go through to Ridgewood avenue? A It was said it would go through. He said it would go through.

Q You knew Hincks didn't own back of it. You knew the Lindemeyers owned all back of that, between Ridgewood avenue and where the Hincks' property ended? A I didn't know it.

Q During your years there? A I wasn't there very long.

20 Q I thought you were there ten years?

Mr. Kalisch: I object, unless the question is at that time. What she knew at the time the arrangements were made. Not what she subsequently learned, after the purchase was effected.

Mr. Jones: I will withdraw that. I think that is a proper objection.

30 Q Do you know whether at the time that Mr. Hinck was telling you about this, that they didn't own all the property through to Ridgewood avenue? A I didn't know that.

Q Now, after your house was built, did you or did you not say to Mr. Ernest Hinck, 'How about that road you were going to put through there?' A I never said anything about it.

40 Q How long did you live in that house? Up to the time you sold to De Luca? A Yes.

Mrs. Josephine L. Hanna, cross.

Q That was, approximately, from '94 or '95 rather, to 1902. 1902 is the time you sold it?

A Yes; I sold it.

Q During all of that time, approximately seven or eight years, you, of course, saw the Hincks frequently? A I lived in New York a good part of the time, after my husband died. 10

Q You saw the Hincks frequently? They lived in your neighborhood? A Yes; once in a while. I saw the sister once in a while.

Q Louise? A The oldest one. I suppose her name is Louise.

Q Louise is also interested in the real estate? A I think so.

Q In fact she studied law and was in the real estate business? A I don't think Louise. I think that was the other sister. There were two girls. 20

Q It was Louise studied law, as a matter of fact? A I saw the oldest sister.

Q Didn't you at any time, say to Louise, or Christopher, or Ernest, 'How about this road that you promised to put through?' A No.

Q Never mentioned it? A Never mentioned it.

Q There were no transient persons coming on through would use this road, coming to your back yard? A Only to the servants' quarters, the kitchen. 30

Q As you understood it, your understanding was Mr. Hinck was to lay a public street from Grove street to Ridgewood avenue. Is that right? A Yes.

Q And then, was subsequently this portion of the street which was laid, that was the beginning of that public street? A Exactly. 40

Mrs. Josephine L. Hanna, cross.

Q And that you, together with any members of the public would have the right to that street? A Exactly.

Q So that your rights on that road were common with any other member of the public?

10 Mr. Kalisch: I object to that because it calls for a conclusion of law on the part of the witness, and is therefore improper."

The Court: Sustain the objection. Read that question again and let me think a minute.

"Q So that your rights on that road were common with any other members of the public?"

20 The Court: That is right. That is a conclusion of law.

"Q That is true, isn't it?"

Mr. Kalisch: The same objection.

Mr. Jones: The answer won't hurt you. She said it was a street.

30 The Court: It all ought to go out. It is a matter of argument.

"Q That was your understanding at the time? A Yes; it was to be a street. A common simple passageway to the house by the street.

Q That was the understanding you made known to your friends and neighbors, and anybody you had occasion to talk to about it? A Why, yes.

Mrs. Josephine L. Hanna, cross.

Q Now, as a matter of fact, you had your negotiations with Ernest, and had agreed upon the price of the lot— A Yes.

Q —before there was anything said about this street? A Yes.

Q And that subsequently Ernest told you about their plans for developing that property, and that those plans included putting through a public street, didn't they? A Yes. 10

Q That was all that was said about it? A He said at the time we bought this, he would make it a corner lot. That is why we paid \$4,000. For this corner lot. We wouldn't have paid as much as that if it hadn't been a corner lot.

Q I want to know whether, in talking to Ernest, you had not purchased the lot first, and then subsequently he told you about his plans for developing the property? A No. 20

Q So that one had nothing to do with the other? A No; at the time, it was to be a corner lot, if we paid him \$4,000.

Q At the time he had no map of this property prepared? A No.

Q The exact location of this street hadn't been determined? A No.

Q Or the course of the street hadn't been determined? A No. 30

Q Except in a general way: it was to run to Ridgewood avenue? A That's all.

Q I understand you to say, during the period you were there you didn't make any use of this road at all? A None whatever.

Q Yes. Your friends, of course, used the one on the north? A Yes.

Q At that time they used horses and carriages, I suppose? A Yes. 40

Mrs. Josephine L. Hanna, re-direct.

Q In this conversation with Ernest Hinck, besides speaking of the proposal to build this road, he spoke also about the development of the other lots to the south, didn't he? A Yes.

Q All this was something in the future? A In the future.

10 Q Do you recall making this affidavit before, in this suit? You made a written affidavit some time ago, in this same suit, Mrs. Hanna. Do you recall doing that? A I signed some paper for Mr. Bowman.

Q To be specific, the 5th day of February, 1924, you took affidavit before Harry B. Bowman? A Yes.

Q You recall that, don't you? A Yes; I do.

20 Q In that affidavit, as I read it, you state negotiations were with Christopher A. Hinck? A That is a mistake.

Q So that wherever you say, in that affidavit, Christopher A. Hinck, you really mean Ernest Hinck? A Yes.

Q It is simply a confusion of the names? A Because Ernest Hinck always did business for the father.

30 Q As a matter of fact, Christopher A. Hinck was a rather timid old man, and didn't handle his property at all, did he? A Yes. I always dealt with Ernest. We hired a house on Christopher street, while we were building."

(Mr. Kalisch read re-direct examination from this point.)

40 "Q The road which they afterwards put down south of your property, ran about how near your rear line? How far back; equal to

Mrs. Josephine L. Hanna, re-direct.

your rear line, was it? A I think so. Beyond the kitchen, anyway.

Q Beyond the kitchen, anyway? A Beyond the kitchen, anyway.

Q Did Mr. Hinck say to you in any way, that any development of lots to the south of this road, would, in anyway, interfere with the road itself? A No. 10

Mr. Jones: I object to that."

Mr. Jones: Well, I do not think it is material on this.

The Court: Do you object?

Mr. Jones: Yes, sir.

The Court: I will overrule the objection.

"Q Your house is up on a bank, isn't it? On a terrace? A Yes. 20

Q And a terrace on the other side of the road, that no doubt, on this side of the road, is about as high as the terrace on which your house stands? A Yes; perfectly flat.

Q Two terraces, about even? A Yes; perfectly flat.

Q Was that so when you put your house up? A Yes. We needed an awful lot of grading. Needed a tremendous lot of grading. 30

Q Did you ever have any dealings with Ernest Hinck? A Yes; we hired a house on Christopher street.

Q Before you made arrangements for the purchase of this lot? A After.

Q While your house was being erected? A Yes.

Q You answered, in regard to whether you wouldn't have built this house elsewhere, exact- 40

Harold H. Bowman, direct.

ly the same as you built it here. You said, 'Most likely,' or something of that kind. A We generally build a house in keeping with the surroundings.

Q When you say surroundings, have you any reference to this road to the south? A No.

10 Q What do you mean? A I mean the neighborhood; the class of people around there. The class of houses around there.

Q There were no houses around there? A The Innesses were there, and the Parkers.

Q That was to your north? A Yes; that was to our north.

Q Why, for example, did you have the porches, with a number of windows, on the south of the house? A On account of the sun.

20 Q On account of the sun? A On account of the sun. My husband being a seafaring man, he built his house to have that regular arrangement, put the house to catch as much of the warmth of the sun as it possibly can. I left that for him.

Q You left that to him? A Yes; and the architect. The architect asked for it. The architect never saw the house. Never saw the place.

Mr. Kalisch: That's all, Mrs. Hanna."

30 Mr. Kalisch: That completes the testimony.

HAROLD H. BOWMAN, sworn for the complainant.

Direct examination by Mr. Kalisch.

40 Q You are a resident of New York City? A No; I live in Ossining, New York.

Harold H. Bowman, direct.

Q And you are practicing law in the City of New York? A Yes, sir.

Q Did you at any time about 1894 reside on Grove street, Montclair, New Jersey? A Yes; we started to live there on the 1st of May, 1894.

Q And you continued to live there until about when? A On Grove street until the 1st of May, 1908. 10

Q 1908? A In the same neighborhood, yes.

Q And how old are you? A 48.

The Court: What is the object?

Mr. Kalisch: I want to show he recalls about the building of this—(interrupted)

Mr. Jones: This is thirty years ago.

The Court: Oh, yes. 20

Q Mr. Bowman, how old were you, about, the time this house was being built? A About 18, about 18 years old.

Q And you resided to the north or south of this property that was put up? A South.

Q And between 1903 and 1908 you resided nowhere near this property? A Yes; we lived in the Inness house which was directly adjoining this property on the north. 30

Q Did you know Captain Hanna and Josephine E. Hanna? A Yes; very well.

Q About how old a woman is Mrs. Hanna now? A Oh, I should say, between 65 and 70; possibly over 70.

Q Do you know Mr. De Luca? A Yes, sir.

Q Do you know about when this road to the south of the Hanna property was constructed? A Why, the construction of it started before 40

Harold H. Bowman, direct.

the beginning of the house started. They had to start a cut there before they could begin to build the house.

Q Now, the house is erected on a bank; I mean, is it raised from the street level? A Yes; it was at that time a perpendicular terrace about six feet or more high.

10 Q Yes. And the land to the south of this street, is that terraced? A Why, it was then.

Q Some of these pictures will show it now. And what have you to say, as well as you can recollect, as to the difference in the height of the terrace upon which the house stood, as distinguished from the terrace to the south of the road? A They are substantially the same.

Q Substantially the same. Now, do you recall the digging of this road? A Why, I recall when they started to make the cut in the terrace so they could drive teams up there, very well.

Q And after the building had been completed, do you recall the digging of the road itself? A Yes. They widened the road and levelled it and carried it back to about the end of the lot.

Q Of the Hanna lot? A Of the Hanna lot, yes.

30 Q And can you tell us whether during your residence in Montclair the width of that street varied at all? A Not that I remember, after it was finally widened?

Q Yes. I mean, after it actually became a street? A Yes.

Q Do you remember whether when these wagons were going over for the purpose of bringing materials in, it was necessary to cut down that? A Yes; they had to make a cut-

40

Harold H. Bowman, direct.

down practically to the level of the street. There was no sidewalk there at the time.

Q It was afterwards made into a road? A Yes.

Q And widened? A Yes.

Q After the house was built, Mr. Bowman, can you recall whether there was any connection made between the driveway to the north of the land and the road which was put down to the south of the land? A There was eventually.

Q Yes, eventually? A Yes.

Q But you don't know whether it was done—well, you know it was eventually? A Eventually it was made, yes.

Q Do you know of any relation which Ernest C. Hinck had in the excavation of the cellar of that house? A Why, if my memory is correct, Mr. Kalisch, he either had an independent contract to build the cellar, excavate the cellar, or else he acted as a sub-contractor for the general contractor in excavating the cellar. I remember very distinctly his telling me he was doing the work, and I know he was there every day and superintended the doing of the work.

Q Do you recall ever having any conversation with Ernest C. Hinck in connection with this street or road? A I do.

Mr. Jones: I object to that.

Q Will you please tell us what it was?

Mr. Jones: I object to that.

The Court: Why?

Mr. Jones: A conversation with Ernest Hinck with this man—Ernest C. Hinck is not the grantor.

Harold H. Bowman, cross.

The Court: Mr. Kalisch seems to have established a *prima facie* case of agency, as far as I can see. I will allow the question.

A I did.

10 Q And what, if anything, were the conversations you had with him in connection with this road? A Why, I saw him very frequently, practically every day, while the cellar was being constructed because I was there every day. On a number of occasions he spoke to me about this road and told me, "I have promised Mrs. Hanna and Captain Hanna that the road would be dug there and the lot should be made a corner lot and remain so," that they had obtained an exceedingly high price for the lot and were very much pleased with that, because they would have
20 to dig a road there anyway in order to bring the materials up and the additional cost of completing the road was trivial, compared with the enhanced price they received for the lot.

Q I want that understood. Was there anything said, any connection made by Mr. Hinck between the enhanced price for the lot and the making the lot a corner lot? A I so stated.

30 The Court: He so stated.

Cross examination by Mr. Jones.

Q Did I understand you, Mr. Bowman, that you lived to the south of this in 1894? A Yes; after the 1st of May, 1894.

40 Q And how far to the south of this? A Well, it was just south of the corner, Chestnut street, I should think it was six or seven hundred feet, something like that.

Harold H. Bowman, cross.

Q Do you feel sure enough of your memory, going back 30 years, to give conversations as accurately as you have given them today? A I most certainly do or I should not have given them.

Q And do you recall other conversations on other similar subjects outside of this one? A I most certainly do, further back than that. 10

Q You had no interest in this particular thing, had you? A I don't know just what you mean. I was very much interested in the operation; the whole neighborhood was.

Q You were interested in having a street through there? A Not in the slightest.

Q In what way were you interested, just curiosity? A I say, it was a matter of general neighborhood interest. At that time the only houses near this were the Inness house and the Hartley house to the north of it, and a place called the Pines. 20

Q You mean you were interested in—(interrupted) A We had heard great stories about this house, which was going to be the most pretentious house in the neighborhood, and was going to be made by a Boston architect and we were very much interested in it. That was George Inness, Sr. 30

Q While you were there didn't you know that this place was excavated, that is, this road that you now speak of was excavated by Captain Hanna in order to get his teams in there? A No; I didn't know he did the excavating.

Q You don't know, either, one way or the other, do you? A I simply know the road was put through.

Q Yes. Simply know that before they started to actually construct the house, which was some time after the house was bought— A Yes. 40

Harold H. Bowman, cross.

Q —you saw teams going in there and that they, in order to get up there, they had to cut down the terrace; that is all you know? A That is all I know.

Q You don't know who paid for it or who constructed it? A Not the slightest idea.

10 Q Now, your memory at the time you made this preliminary affidavit on February 1, 1924, was about as good as it is now, I suppose? A I presume so.

Q At that time you said that, to the best of your recollection, this road was either about to be built or was being built, 1895 or 1896? A 1895, I think.

20 Q That would be about right, yes. That was while the house was going up? A It started in the spring of '95, if I remember correctly.

Q That is, the fall? A The fall of 1894, yes.

Q Was Mrs. Hanna a client of yours? I notice these depositions are taken in your office. A Why, she has been a client in our office some years ago. We haven't done any work for her in ten or twelve years, I think.

30 Q Was this Mr. De Luca also a client? A I don't think I have ever done anything for Mr. De Luca except in this matter. I knew Mrs. Hanna and he asked me if I would get her affidavit for him.

Q Did you live at the De Luca house at all? A Never.

Q You were their next-door neighbor at the time? A Yes.

40 Q For how long? A Well, we moved there the 1st of May, 1903; I think they were there at

Gertrude Miller, direct.

that time. We lived there until the 1st of May, 1908.

Mr. Jones: That is all.

(Short recess.)

Mr. Kalisch: It is stipulated between counsel that the estate of Hinck since the death of Christopher A. Hinck, has been paying taxes on the road in question involved in this suit to the Town of Montclair. 10

The Court: As long as the stipulation is in, it is not necessary to have it marked.

Mr. Kalisch: No.

GERTRUDE MILLER, sworn for the complainant. 20

Direct examination by Mr. Kalisch.

Q Miss Miller, in 1894 did you live on Grove street, Montclair? A No.

Q Where did you live? A I lived on Claremont avenue at that date.

Q Did your father live on Grove street? A Not at that date. 30

Q When did he? A In 1898.

Q You moved to Grove street? A We did.

Q And with reference to this road, which is to the south of the De Luca property, where did you reside when you moved to Grove street? A Almost directly opposite the end of this road.

Q As it empties out on Grove street? A Yes, sir.

Q While you lived on Grove street, did you notice whether tradespeople, going to the house 40

Gertrude Miller, direct.

in question to the north of that road, used the road? A They constantly used it.

Q Do you recall whether in 1902 or 1903 your father purchased any property of the Hincks?

A He did.

Q Additional property? A Yes.

10 Q And in which direction, with reference to the house which you occupied? A Both north and south.

Q Do you remember what the purpose of the enlargement of the holdings was?

Mr. Jones: I object.

The Court: I will sustain the objection. The facts we want.

Mr. Kalisch: Yes.

20 Q Do you remember before your father purchased the additional property whether there was any investigation as to this road across the way? A Yes; there was.

Q Did your father purchase until the investigation in connection with this road was completed?

30 Mr. Jones: I object to that; unless it was her own knowledge. From the affidavits she made, she heard somebody else say it.

The Court: If it is of her own knowledge, all right. Otherwise it is incompetent.

Mr. Kalisch: Strike out the question.

Q Do you know whether your father ordered an investigation, to your own knowledge?

Mr. Jones: I object to that.

40

Gertrude Miller, direct.

Q (Continuing.) In connection with this street before he made his purchase of the additional property?

Mr. Jones: I object to that.

The Court: That is perfectly competent.

10

A I think he did.

Q (By the Court.) Well, do you know of your own knowledge?

Q Do you know whether he ordered an investigation of the street? A His saying so would be my own knowledge, wouldn't it, my own father's telling me so would be my own knowledge?

The Court: No.

20

Q Miss Miller, do you mean by that he told you he had, or did you ever hear him order someone to investigate as to the road? If you did not, of course, we cannot take your testimony. A I can hardly answer yes or no. I can only tell you that at that time we discussed it practically every evening at the dinner table and in that way—

Mr. Jones: No.

30

The Court: No. Hearsay.

Q The road, during your residence there, was open continuously? A Always; and is still.

Q You still reside there? A Oh, yes.

Q Across the street? A Yes.

Q Your father subsequently bought that additional property? A He did.

40

Gertrude Miller, cross.

Cross examination by Mr. Jones.

Q Anybody can use the road, can't they? A Oh, yes.

10 Mr. Kalisch: One minute. I object to that as calling for a conclusion as to what the legal rights are.

The Court: I will sustain the objection.

Q I will put it this way. Everybody used that road, didn't they, as a matter of fact? A So far as I know.

Q Well, you were there and saw them, didn't you? A Yes; but just what do you mean by "everybody"?

20 Q Anybody that saw fit to. A Therefore I have to repeat as I did, "so far as I know."

Q While you were there you felt free to use it, didn't you? A I don't remember whether I have ever used it or not.

Q You saw a lot of people using it, didn't you? A Oh, yes.

30 Q People who were not connected with the De Luca family and people that were? A I have no idea who the people were who went up that road.

Q Well, a lot of people? A A lot of people.

Q A lot of the public; the public used it, didn't they, the people in the neighborhood used it? A I imagine so.

Q Well, you know so, don't you, if you lived there? A Yes; but I don't see—watch the people that come up that road.

40 Q For a good many years the people in the neighborhood used this street, didn't they? A It leads only to the De Lucas—or, rather, around

Christiana Wainwright, direct.

the De Lucas to their driveway so I suppose most of the people who used it had dealings with the De Lucas.

Q You don't know whether the members of the public outside of the neighborhood used it or not? A I haven't the slightest idea.

Q Didn't you use it? A Never, so far as I can remember. 10

Q And the Millers used it, didn't they? A I am a Miller.

Q Pardon me. I mean your father—I knew your father—Colonel Miller used it, didn't he?

A I hardly think so.

Q He was rather a militant gentleman?

The Court: No, no. Strike that out.

Mr. Jones: That is all, Miss Miller. 20

The Court: That is all.

CHRISTIANA WAINWRIGHT, sworn for complainant.

Direct examination by Mr. Kalisch.

Q Miss Wainwright, you are the sister-in-law of the late Colonel George Miller? A Yes, sir. 30

Q And did you reside with him on Grove street, or in the house with him? A Yes.

Q Since what year, do you remember? A It was April, 1898, that we moved there.

Q And during your residence there did you act in any secretarial capacity to Colonel Miller?

A Yes; I was in the same office.

Q You were in his office? A Yes, sir. 40

Christiana Wainwright, direct.

Q While you lived on Grove street, do you recall whether there was a road opposite your property and to the south of what is now the De Luca property? A There was. I think I have a picture here.

Q And will you—(interrupted) A I—

10 Q When you say there was a road, will you tell us whether—I am showing you the first picture of this Exhibit C. 1, and ask you whether that is the road, pointing to the one road that leads—(interrupted) A Yes; leads east from Grove street.

Q From Grove street? A Yes.

Mr. Kalisch: I failed, your Honor, to ask the last witness that question. I would like to reserve that right.

20 Mr. Jones: That is admitted.

Q Do you recall whether during your residence with Colonel Miller, there were any negotiations for the purpose of increasing his holdings on Grove street? A Yes; there was.

Q Did you take any part in them? A No; I didn't have anything to do with it.

30 Q Were you present at any conversations between the Hincks and Mr. Miller's representative in connection with the purchase? A No; I think not.

Q Did you ever have any talk with any one of the Hincks in connection with it? A No; I never had anything to do with it.

40 Q Do you know, of your own knowledge, whether Colonel Miller ordered an investigation in connection with this road before he actually made the purchase? A Well, I did not hear him order the investigation.

Christiana Wainwright, direct.

Q Well, you don't know, then, of your own knowledge? A But I know that—no; I do not.

Q Do you recall with whom his negotiations were in connection with the increased holdings?

A They were with—(interrupted)

The Court: Do you know this of your own knowledge? 10

Q Of your own knowledge? A Yes, sir.

The Court: All right. How do you know it, then?

Q How do you know? A Why, through his talking with me about it.

The Court: No. 20

Q You never heard any one of the Hincks or saw any letters from any of the Hincks in connection with the increased holdings on Grove street? A I cannot remember that, no.

Q You cannot remember. Do you recall seeing the Millers or any one of the Millers in conference with the Hincks before the purchase of these increased holdings? 30

Mr. Jones: I object to that question. They might be in conference on anything.

Mr. Kalisch: It may be a circumstance.

The Court: What is your objection?

Mr. Jones: "See them in conference." How does she know what they were in conference about?

The Court: I will allow the question. That is innocuous unless it is followed up. 40

Christiana Wainwright, direct.

Mr. Kalisch: I will follow it with another witness.

A No; I don't remember.

Mr. Kalisch: I guess it is all hearsay then.

10

Q Do you recall an incident in 1907 or 1908 when some trees were being cut down on the curb line of that road? A Were being cut down?

Q Or were being planted? A Yes; I do.

Q And they were being planted where with reference to the De Luca house? A Along that south side.

20

Q Along the southerly side, and that is parallel to the road? A Parallel to the road, yes.

Q Were they on the road? A Well, how do you mean "on the road"?

Q Were they on Mr. De Luca's terrace or were they out down there where the road originally was cut through the trees? A No; they were not down on the terrace; they were down on the road.

30 Q During your residence do you recall whether Mr. De Luca planted grass or, rather, whether there was grass grown on part of this road and running along the depth of the De Luca lot? A Yes; there was grass.

Q And where, with reference to this grass, the continuation of the lawn, were these trees placed on them or on the dirt part? A Why, I do not—I am not sure. I think on the grass.

Q On the grass? A That is my recollection.

40 Q Do you recall Colonel Miller saying anything—do not answer it—that is all.

Christiana Wainwright, cross—re-direct.

Cross examination by Mr. Jones.

Q Miss Wainwright, you didn't know exactly where the boundaries of the De Luca lot were, did you? A No; I have not said so.

Q I didn't think you intended to. So that when you say the grass was planted down this way or that a little further than a certain point, you are guessing, aren't you? 10

The Court: I understand what Miss Wainwright means. She simply means that at the end of the terrace there was grass and in the grass trees.

Witness: Exactly.

Mr. Jones: Yes.

The Court: That is the fact and now we will discuss as to the—(interrupted) 20

Mr. Jones: Yes, I see.

Q You don't know who planted the trees, do you? A Mr. De Luca planted the trees.

Q Mr. De Luca himself? A No; not Mr. De Luca. I wasn't acquainted with the men doing the work. As far as I knew, it was being done by Mr. De Luca.

Q How do you know who was planting the trees, the De Lucas of the Hincks? A I can't say that, but the general impression was that it was De Luca's trees. 30

Re-direct examination by Mr. Kalisch.

Q Did you notice whether the person who planted only planted there or did he plant on the lawn also, on the terrace? A On the terrace also. 40

Christiana Wainwright, re-direct.

Q At or about the same time? A Yes; at the same time.

Q And this grass plot upon which the trees were planted, has that grass been grown over what had been any part of the road or not?

10 The Court: No.

Mr. Jones: I object to that.

The Court: No; we cannot admit that.

Mr. Kalisch: Strike it out.

Q Was the road completely dirt all the way past the width of the lot—the depth of the lot?

Mr. Jones: I object to that. She doesn't know.

20 The Court: What is your reason?

Mr. Jones: My reason is this: She doesn't know the boundaries of this lot; she doesn't know whether it was the length or the width or where it began or anything whatever. That would be a very difficult thing.

30 The Court: Now, let me see if I cannot ask a question which will eliminate any legal conclusion. (To witness.) Where the grass and trees now are was there formerly dirt?

A Not that I remember.

Q You don't remember that. That is all.

The Court: Now, can these ladies go?

Mr. Kalisch: As far as I am concerned. I will call Mr. Miller.

George A. Miller, direct.

GEORGE A. MILLER, sworn for the complainant.

Direct examination by Mr. Kalisch.

Q Mr. Miller, where is your home? A Centerville, Mass.

10

Q And have you at any time since 1898 resided on Grove street, Montclair? A I resided with my father from the time he purchased that property in 1898 until my own marriage in 1905.

Q And you have lived at other times at 45 South Clinton street, in East Orange? A Yes, sir; I have lived at a great many places.

Q Are you familiar with the house which is occupied by Mr. De Luca? A Well, very.

Q And I show you Exhibit C. 1, consisting of several pictures, and ask you whether the main house appearing on the first picture is the De Luca house? A It is.

20

Q Did you at any time while you lived with Colonel Miller, your father, reside anywhere near this road which is to the south and appears to the south of the De Luca house on Exhibit C. 1? A Yes; almost immediately across. In fact, I think that picture is taken from our property.

30

Q Now, at any time around 1902 or 1903 can you recall your father increasing his holdings on Grove street? A In 1903 my father bought from Christopher A. Hinck 25 feet road frontage to the north of our property and 75 feet road frontage to the south of our property.

Q Were you present at any of the conferences in connection with the sale of the—(interrupted)

A I was.

40

George A. Miller, direct.

Q Now, with whom were the negotiations, that is, for the Hincks? A Miss Louise A. Hinck representing Christopher A. Hinck, her father.

10 Q Were you long in coming to an agreement as to price? A There was, as I remember it, no question about the price at all. I think Miss Hinck asked \$30 a foot and my father was willing to pay it—either twenty-five or thirty.

Q Were there any differences at all in connection with the purchase of this property? A Yes, sir.

Q Now, please tell us what they are, very briefly. A One of the difficulties—(interrupted)

20 Q (By Mr. Jones.) Differences that were discussed in your presence? A Yes, sir.

30 Q Oh, yes, confine yourself entirely to what occurred in this or these meetings. A I understand. There were only two questions outside of the price, which was quickly agreed upon. My father contemplated building an addition to the house and spending considerable money for landscape gardening there and he wanted to make sure that that road would exist as a road always, as it was of real value to our property.

40 Q Which road is that? A The little road to the south of the De Luca property that we have discussed today. He asked Miss Hinck whether it was true, as neighborhood gossip had it, that that road was to remain a road, and she said, "Yes; my father, Christopher Hinck, has promised Captain and Mrs. Hanna that that would always remain a road, and my father's word is as good as his bond." There was another point discussed that I cannot explain

George A. Miller, direct.

very briefly because it involves history before that. We had—(interrupted)

The Court: We are only concerned with the road.

Q We are only concerned with the road. A Well, these two things rather hitch. 10

Mr. Kalisch: Well. I think you have covered that.

Q (By Mr. Jones.) You mean about the electric light? A Yes.

Mr. Kalisch: Electric light pole.

Q Do you know, Mr. Miller, of your own knowledge, whether Mr. Hinck at that time owned the property to the south of the road and running to what I think is now called Ardsley road? A I never examined the tax plans, but I commonly understood they did own it. I think they owned all of that property. 20

Q You don't know, of your own knowledge, or from anything they told you? A How could I? 30

Q Or from anything they told you? A Why, yes; I knew the Hincks very well, was with them a great deal, and I know they told me they had owned all that property.

Q Now, Mr. Miller, do you know anything about the building of this road or not, the original building of it? A No, sir; I do not. It was built before I moved there.

Q Do you recall whether, while you lived on Grove street, the surface of the lots to the south 40

George A. Miller, cross.

of the road was any lower or higher, apparently, than the surface of the bank upon which Mr. De Luca's house stands? A The contour of that property has not changed since my acquaintance with it; it remains practically the same now as it did in 1898 when I moved there; the two
10 banks are approximately the same height and the road is depressed to the level of Grove street.

Q Do you know about what the apparent depth or depression is?

Mr. Jones: You are apparently spending time on something which is practically admitted.

Mr. Kalisch: Will you admit it is six
20 feet?

Mr. Jones: I can't say that.

Q Do you know about— A I was going to say it is about as tall as I am. I am not quite six feet.

Cross examination by Mr. Jones.

Q You said, I think, on your direct, that this
30 road would be a real benefit to your father, according to your father's talk? A Yes; he did not want to put the extra investment into that property unless he was assured that that was going to remain there. He didn't like to have the neighbors too close, and that left a vista across the street and showed the neighbors on either side.

Q And he understood that the street was
40 going—I mean, it was intended that that street

Adolph Mertin, direct.

was going to be continued through to Ridgewood avenue? A I don't think that point interested him. He wanted that open space in front of the house.

Q What was said? A Just about what I told you. That is the reason I wanted to tell about the light pole because those things were discussed together. 10

Q And he was not interested in using that as a street? A No, sir.

Re-direct examination by Mr. Kalisch.

Q Mr. Miller, do you recall the planting of any trees alongside of the De Luca house? A They were planted after I left my residence there. Of course, after I came back I saw them, but I know nothing about the planting of them. 20

Q Do you recall about the way the road looked when you left Montclair, I mean, as to its apparent width, the open space? A It was approximately as it is now; a little planting may be different, but the open space is approximately the way it was in 1905.

Q Is there any grass running back toward Ridgewood avenue where formerly it was a continuation of dirt road, or don't you remember? 30
A I don't know. No; I do not.

ADOLPH MERTIN, sworn for the complainant.

Direct examination by Mr. Kalisch.

Q Are you Mr. Merkle? A Mr. Mertin, M-e-r-t-i-n. 40

Adolph Mertin, direct.

Q And you are an architect having an office where? A 34 W. 28th street, New York City.

Q Have you ever inspected the house of Mr. De Luca? A I did.

10 Q I show you Exhibit C. 1, indicating a house in front—in the foreground of the picture, and ask you whether that is the house that you inspected? A I did.

Q Will you—

Mr. Jones: Will you give a declaration of what you want to use this witness for?

Mr. Kalisch: I want to show the architecture of the house to indicate what kind of a building it is.

20 Mr. Jones: I shall object to it as clearly irrelevant.

(Argument.)

The Court: I will allow the testimony for what it is worth. I cannot exactly see the relevancy. It is admitted over objection.

30 Q Mr. Mertin, have you examined to note the similarity of material of the southerly side as compared with the front of that house? A I did.

Q And what have you to say as to similarity? A The design and the material used on both elevations is practically the same—exactly the same.

Q Did you note the porches, certain porches on the southerly side? A Yes.

40 Q And looking at that picture, does the architecture appear to be what is normally that of a corner house?

Adolph Mertin, direct.

Mr. Jones: I object.

Q (Continuing.) Or one which is in the middle of a block?

Mr. Jones: I object to that.

The Court: Why?

10

Mr. Jones: I do not think that this man now can testify to something which contradicts the lady who ordered the thing. She said she put that side so there would be a southerly exposure.

The Court: I understand the rule to be that you can contradict your own witness but not impeach him. Assuming that this is a contradiction of another witness, that is not a ground of objection. I will admit the question.

20

Q Will you answer the question? A It is designed as a corner house.

Mr. Jones: No questions.

(Cross examination waived.)

The Court: Have you qualified this gentleman, as an architect?

30

Mr. Kalisch: I did not ask him and I assume it was because of no cross examination.

Q How long have you been an architect? A Twenty-two years, practicing.

Q In New York? A In New York City.

Q Design homes? A Yes; small and large homes.

40

Harry P. Kreiner, direct.

Q Small and large homes? A Are you in business for yourself? A Yes; I am.

Q Have been all these years? A Yes.

Cross examination by Mr. Jones.

10 Q These homes are mostly in the city? A Country homes and city homes.

HARRY P. KREINER, sworn for the complainant.

Direct examination by Mr. Kalisch.

20 Mr. Kalisch: Do you admit Mr. Kreiner's qualifications?

Mr. Jones: Yes.

Q Mr. Kreiner, I show you a survey bearing your name, dated February 2, 1924, and ask you if you made this. A I made this survey myself.

30 Q And I show you Exhibit C. 1 and ask you whether the survey which you made had to do with the property which appears in the foreground of that picture? A It had.

Q Will you please state—tell us the frontage of the land upon which the house was built from the north side to the most southerly point of the road which runs east from Grove street. A As I understand the question, it would mean from the most northerly portion of the property to the southerly side of it, sixty-foot street—

40 Q To the southerly side of it? A To the southerly side of it, sixty-foot street, that is it—one hundred feet.

Harry P. Kreiner, direct.

The Court: Is this the sixty-foot street?
(Indicating.)

The Witness: Yes, sir.

The Court: But apparently they have not used the sixty feet of that.

Mr. Kalisch: I am coming into that.

10

Q Now, Mr. Kreiner, will you tell us, as it meets Grove street, how wide the dirt road is?

A That is the driveway?

Q The driveway itself on the southerly side of the building. A 11 feet.

Q 11 feet. And from the northerly side point of the dirt to the southerly line of Mr. De Luca's property is about how many feet? A I don't quite understand that question.

Q From the most northerly side of the mouth of the road? A The driveway? 20

Q Yes; the driveway, to the most southerly line of Mr. De Luca's property is how many feet? A About 24.8 feet.

Q And of that 24 feet will you please tell us how many feet and running north is there grass? Do I make myself clear? A You make yourself clear, but this was made in February.

Q Was there grass in February, 1924? A There was some grass there. 30

Q Doesn't it show? A Oh, yes; limit of lawn and grass. That is my own figures so I can testify on that. The limit of the lawn and grass is shown as the northerly side of the driveway. As the northerly side of the driveway is 24.8 feet from Mr. De Luca's southerly corner, it would be evident that the grass extended 24.8 feet southerly from Mr. De Luca's southerly corner to the edge of the driveway.

40

Harry P. Kreiner, direct.

Q So there is running south and from the southerly line of Mr. De Luca's corner grass for how many feet? A 24.8 feet.

10 Q And how far back does the grass—I mean, that is in the depth of the property—how far back does that grass approximately 24 feet wide run? It continues back how far? A I do not feel able to answer that right now, as I have not indicated on the driveway further back than a notation about thirty or forty feet back.

Q Then you can testify to only forty feet back? A Yes. I am going up there again.

20 Q I see. Now, on the southerly side, or, rather, the bank on the southerly side, will you tell us whether you discovered any drain pipes or anything of that kind? A I discovered two drain pipes on the southerly side of Mr. De Luca's property, leading from his property onto this sixty-foot strip adjoining on the south.

Q And on the sixty-foot strip adjoining on the south, as I understand you, twenty-four of it is now taken up with grass? A Yes.

Q In front and running back forty feet; is that correct? A Yes.

30 Q Is there any cut there in connection with these leaders on the road? A Someone connected with Mr. De Luca's property uncovered them for me so that I could see them.

Q And where are they? A As to location?

Q Yes. A One drain is 46.5 feet eastwardly from the easterly line of Grove street, and the second drain is about forty feet east of the first drain.

40 Q Could you tell from an examination of that drain whether it was built in order to connect with the roads and out on the roads? A They lead onto the road and seem to end there.

Harry P. Kreiner, direct.

Q It led onto the road and ended there. Is there any difference in level between the drain and road itself where the drain starts and the road itself? A The road is—I can testify, is lower than the lawn of Mr. De Luca's within his own property lines, as I show a terrace, the foot of which is on the sixty-foot strip and the top of it is on Mr. De Luca's lawn, within his own property, so that the drain, being below the lower level, would be lower, of course, than the lawn of Mr. De Luca.

10

Q How deep is Mr. De Luca's lot? A Two hundred feet, average depth of two hundred feet.

Q Now, did you notice any trees when you went there and did you delineate them on the drawing? A I have.

20

Q And will you tell us whether those trees are on Mr. De Luca's land or whether they are on what you described as the sixty-foot road? A They are on the sixty-foot road.

Q And are they planted on the dirt part or are they planted along on that twenty-four-foot strip of grass plot? A About the middle of the twenty-four-foot grass plot.

Q And about how far back do they run, these trees, on grass? A All that remains of the first tree is a stump, which is about 6.2 feet back from Grove street about the middle of this 24.8 lawn. The next tree is a living tree 40.3 feet further east than the stump aforesaid; the next tree is 38.6 feet east of the second tree and there is another tree about forty feet further east than the last tree.

30

Q All on grass? A Well, on this 24.8-foot lawn.

40

Harry P. Kreiner, direct.

Q So that the trees are planted on this 24-foot strip of grass within how many feet, approximately, of the depth of the whole lot? A About two-thirds.

10 Q Are the trees planted beyond the depth of the southerly side of the house itself? A There is one tree about forty-six feet beyond the last tree mentioned, which I did not testify to a moment ago.

Q Yes. And that tree is almost at the very end of the lot, isn't it? A Yes.

Q In the rear? A Yes.

Q Now, does the sixty-foot road, as has been described as cut off by the grass plot, connect with anything in the rear? A Not that I could discover.

20 Q Does it connect with any continuation of another road, driveway? A Not that I can recollect; I can't recollect at this time.

Q I show you on the picture, or, on your sketch you have delineated driveway and driveway in the rear. A Well, I misunderstood you. That driveway, of course, does enter this strip of land and proceeds to Grove street.

30 Q And continues on to a driveway which enters the DeLuca property to the north; is that correct? A To the north; correct.

Q So there is a continuous drive from a southerly point around the house and back again to Grove street on the north side of the house? A Yes, sir.

Q Does the road on the southerly side appear to be kept up—did it appear to be kept up, rather? A Well, I think it has been left very much as it was first created.

40 Q It has been—it was surfaced, wasn't it? A Yes; there was a terrace on the south side,

Harry P. Kreiner, direct.

showing there had been excavation work done there at some former time.

Q And the surface of the road and the continuation of the road back to Grove street on the north appears to be about the same? A Very much the same.

Q As to the levels, Mr. Kreiner, can you tell us whether the level of the bank on De Luca's property is approximately the same as the level to the north of the road—to the south of the road, I mean, or didn't you take the levels? A I took no levels, and it would be better for me, perhaps, not to attempt to answer it. 10

Q I don't want to ask you anything that you did not investigate. How does the land run, is it level in the front, higher in the rear or vice versa? A I didn't take any levels. 20

Q And where does this road end, this road that you have described as sixty feet wide and with a grass plot of twenty-four feet?

The Court: Isn't this in evidence, this map?

Mr. Kalisch: I was going to offer it.

The Court: That will show where it was. 30

A As far as I could discover, at the end of Mr. De Luca's property.

Mr. Kalisch: I offer the map, the drawing of Mr. Kreiner.

Q Have you got the scale? A Twenty feet to one inch.

Map marked Exhibit C. 2. 40

Harry P. Kreiner, cross—re-direct.

Cross examination by Mr. Jones.

Q Mr. Kreiner, those are young trees? A Yes.

Q Saplings, aren't they? A Well, I wouldn't qualify as to their age.

10 Q Do I understand your testimony correctly that the De Luca lot, one hundred feet front, and that they have actually taken possession of one hundred and twenty-four feet for their lawn; is that right? A That is right.

Q And that is what you said? A Yes.

Q So they apparently have run over into this land to the south, into the middle of that twenty-four feet which they do not own? A Yes, sir.

20 Q They run up this line of trees? A Yes, sir.

Q These drain pipes you speak of is where they get rid of their leader pipes, isn't it? A Possibly.

30 Q I mean, that is what it is, when you say drain pipes, you mean water, rain? A Yes; I think that would be probably what they should be construed as carrying off, because my recollection is that they discharge right there and it would be unsanitary to put anything else in them than rain water.

Q Nothing very permanent in that? A No; only I located them for what they were worth.

Re-direct examination by Mr. Kalisch.

40 Q Didn't they throw a bucket of water through and didn't it come out? A Yes; I asked them to do that to prove there was a

Vincenzo De Luca, direct.

continual passage over from the De Luca property through these pipes.

Mr. Kalisch: I offer the deed of Mrs. Hanna to Vincent De Luca. I will prove it by Mr. De Luca.

Mr. Jones: Oh, you don't need to prove it. 10

Mr. Kalisch: And I also offer certified copy of the deed.

The Court: You offer the deed?

Paper marked Exhibit C. 3.

Mr. Kalisch: I also offer in evidence the deed of—certified copy of the deed of Christopher A. Hinck to Josephine Louisa Hanna.

Paper marked Exhibit C. 4. 20

Mr. Kalisch: It is admitted Christopher A. Hinck, and his estate since, own to the south of this road in question running along the east side of Grove street to at least a depth of two hundred feet.

VINCENZO DE LUCA, sworn in his own behalf. 30

Direct examination by Mr. Kalisch.

Q Mr. De Luca, you are the owner of the house in question, in regard to which this suit is brought? A Yes, sir.

Q Which is affected, rather, by this road? A Yes, sir.

Q And you are the Vincent De Luca who purchased from Josephine L. Hanna, widow? A Yes, sir. 40

Vincenzo De Luca, direct.

Q How much did you pay for the property?

Mr. Jones: I object; immaterial.

The Court: I will sustain the objection.

10 Q You know this road from the south of your property; from what year are you familiar with it? A 1902, since I bought, but I knew the road long before that, because I was four years buying the property; before I purchased I used to take trips around to see and then make an offer and then next year make another offer, and finally I got it, the fourth year.

Q This road south of your property, since you first purchased it has been maintained by whom? A By me.

20 Q And did you spend any money on it? A Certainly I had to spend money; I kept it in repairs all the time and surfaced the road and seeded it and planted the trees.

Q Now, the road is not—the dirt road is not now sixty feet, is it? A Yes; the road is sixty feet but—(interrupted)

Q The dirt part of it is not sixty feet? A No; the dirt part is about twenty-four feet.

30 Q There is grass from the beginning of your bank running toward the southerly side of that road, is there not? Who put the road there? A Well, it was there first; Mrs. Hanna put it there and then I continued.

Q What was your answer? A I found it, seeded and I continued.

40 Q And how far back does the strip of grass run toward the rear of your house? A Why, it runs—the strip of grass runs all the way across the rear.

Vincenzo De Luca, direct.

Q Across the rear? A Yes; away.

Q Or across the depth? A From west to east.

Q Oh, it runs from across the street to the rear and runs to the end of your property? A Of my property, yes.

Q And have you continued to seed this? A At times, yes, when it was needed. 10

Q Whenever it was necessary? A Yes, sir.

Q And who put the trees there? A I did.

Q When? A In 1907, October, 1907, or the latter part of September.

Q Any of the Hincks ever see you during the time that you were either seeding or during the time that you were taking care of these trees?

Mr. Jones: I object to it.

Mr. Kalisch: Strike it out. 20

Q Do you know whether any of the Hincks, either Christopher A. Hinck or Ernest Hinck or Louise Hinck saw you at any time when you were taking care of these trees? A The only time I talked to Mr. Christopher Hinck or her, I was planting trees and he stopped at the corner on account of the gas lines had killed some of the trees in front; he said, "I am very glad you are planting these trees on account of those killed by the gas company." 30

Q Did he ever say you should not? A No, sir.

Q Did you ever ask his permission to do it? A No; I didn't ask nobody.

Q Now, this road to the south runs down how far, about?

The Court: That is on the map. 40

Vincenzo De Luca, direct.

Mr. Kalisch: It is on the map. I think it is also a continuation on the map.

The Court: The map is in evidence.

Mr. Kalisch: Yes, sir.

The Witness: I might say—

10 The Court: No. Do not say a thing.

Mr. Kalisch: No. Do not offer any information. Is there any denial of the fact that you are contemplating and had contemplated putting up this road and putting garages there?

Mr. Jones: If there was, I don't know of it.

20 Q Was there any material deposited on this road by anyone without your consent within the last year? A Yes, sir. About forty foot of the rear lot has been filled in—about last January, I think it was—then I stopped them and asked for an injunction.

Q Do you know who the man was? A I was told Mr. Melin, which I never met and I never met until this day.

30 Mr. Jones: Whatever operations were done we admit were done by Mr. Mellin—what was said was done by him.

Q Since you have been there who has used that road that is to the south? A I did; that is, my family, all the family.

Q Tradespeople? A Yes; they come to the back.

40 Q Your kitchen door is on the same side? A I think it is on the map thirteen or fifteen feet from the road.

Vincenzo De Luca, direct.

Q Your actual automobile entrance is around on the northerly road? A Oh, no; we enter on the south and go out on the north because the north is steeper.

Q Now, did you have any conversation with Christopher A. Hinck, Louise Hinck or Ernest Hinck in connection with this road? A Yes; in October. 10

Q Will you please tell the Court what it was, and the substance of the conversation and when you had it? A In October, 1922, Miss Hinck called me on the 'phone and wanted to know if I wanted to buy the piece of land on the south of my house, and I made an appointment and I went up to see her; with me was Mr. Sessa; when I got up to Miss Hinck's house Mr. Otto Hinck was there, and she said to me, "It isn't nice for the seller to get the purchaser to come to it, but," she said—she apologized for it. I said, "It is all right." 20

Q Just tell us— A Then she said to me—asked me if I wanted to buy the strip of land and I told her I would buy if it would be a reasonable price—the strip of land plus one lot to the back. 30

Mr. Jones: I want this taken under my objection, if he is going to tell of the negotiations.

Mr. Kalisch: I will withdraw so much of the answer that has been given that was not responsive.

Q What was said by them in connection with your claim in regard to this road? 40

Vincenzo De Luca, direct.

Mr. Jones: I object to that, because, no matter what was said at that time, it would not either help, assist or hinder us.

The Court: What Mr. Hinck understood the situation to be six or seven years after is all right. I will admit it. (To witness)
 10 What did he say to you about the road?

Q What was said to you about your claim of that road? A The road came in—Mr. Otto Hinck then said to me, “If you take \$2,500 for halfway of the road and we take the other half, or, otherwise,” he says, “you buy this piece of land of ours for \$6,000.”

Q What piece of land? A The one on the south, the south of the road.

20 Q Oh, south of the road? A There were sixty or seventy feet south of the road and this lot in the back and he wanted \$6,000 for it.

Q The \$2,500 that you were to get had to do with what? A Half of the road, one-half of the road.

Q But you didn't consummate that agreement? A No.

30 The Court: I do not think that sheds much light on it.

Mr. Kalisch: I understood him to say he offered \$2,500.

The Witness: Mr. Hinck offered me \$2,500.

Q Which Mr. Hinck? A Mr. Otto Hinck, in the presence of Miss Louise Hinck and Mr. Sessa.
 40

Vincenzo De Luca, cross.

Cross examination by Mr. Jones.

Q When you came there, there were already trees along the southerly boundary of your property, weren't there? A No, sir; not a tree.

Q At the time you—I understood you to say that you had a conversation with Mr. Christopher Hinck? A Yes, sir. 10

Q And he said the gas had killed the other trees? A On Grove street. You see, they are killed yet, they never was replaced.

Q On Grove street? A Yes, sir.

Q But you don't think there were any trees on the northerly boundary? A I know there wasn't any. Mrs. Hanna said she was going to buy big trees and plant them there. That is why she didn't have them. 20

Q So you state that pretty positively? A Very positively; there was not a tree there, or a shrub.

Q As a matter of fact, you don't need this road on the south particularly, do you, for entrance to your house; you have one on the north? A I can't get up to my house—

Mr. Kalisch: I object. 30

A I can't get up to my house in the winter-time unless I have that road.

Mr. Kalisch: I withdraw my objection.

A (Continuing.) Because this wall is perpendicular on the north side it is almost perpendicular to get up there.

Q The Hincks lived in that general locality, didn't they? A They did. 40

Vincenzo De Luca, re-direct.

Q For a good many years? A Oh, yes, many years.

Re-direct examination by Mr. Kalisch.

10 Q Mr. De Luca, have you spent any money on this house and on the land in beautifying it since you purchased it?

Mr. Jones: I will object.

A Yes.

The Court: I will sustain the question. Strike out the answer.

20 Q Would you have paid the price for the house, for your house, if this road had not been there? A I would not.

Mr. Jones: I object.

The Witness: I wouldn't have paid it.

The Court: State your objections.

30 Mr. Jones: I object on the ground that by his answer he is attempting to enlarge his deed. The deed he had there and it certainly would have been mentioned in his deed. He certainly could not—any representation that was made to him was not bound up with the Hincks in any way. He bought from the Hannas.

The Court: I think you are right. He took whatever title the Hannas had and if the Hannas had the title to this street, why, he has it, and if they didn't, he has not. I will sustain the objection.

Thomas G. Sessa, direct.

THOMAS G. SESSA, sworn for the complainant.

Direct examination by Mr. Kalisch.

Q Mr. Sessa, you are related to Mr. De Luca?

A Nephew.

10

Q Nephew? And do you recall ever having a conversation with Mr. Melin in connection with this road? A Yes.

Q When did you have it? A On January 24th of this year.

Q And where did you have it? A At Mr. Melin's house, 26 Grove street.

Q And what did he say to you in connection with this—with his contemplated doings in and about this road and to the south of the property? A He told me he had already started to fill the road in and I went there to object on behalf of Mr. De Luca, told him Mr. De Luca claimed that land, told him the circumstances—(interrupted)

20

The Court: I do not think this is essential, Mr. Kalisch. Mr. Jones has admitted whatever was done to destroy the continuity of the road was done by this defendant.

30

Mr. Kalisch: I want to show what Mr. Melin says he is going to do.

The Court: He is not going to do anything until we get through with him.

Mr. Kalisch: I want to show what he wants to use this road for. I have a claim also for light and air.

The Court: All right. Go ahead.

40

Thomas G. Sessa, direct.

A (Continuing.) He said he was going to fill in the entire road and would construct three garages in that road and with the backs toward Mr. De Luca's house, the entrance would be from Ardsley Road.

10 Q Ardsley Road is the road parallel to the road in question here and running parallel with it? A That is it.

Q So the road would face Ardsley Road and the garages— A Would be back towards Mr. De Luca.

Q Would be back towards Mr. De Luca and covering this road? A Yes.

Q Did you ever reside with Mr. De Luca? A Yes; I lived there all the time I was going to High School, lived in that house, and part of
20 the time I was going to college.

Q Do you recall whether Mr. De Luca ever seeded any part of this road? A Yes; he seeded and re-seeded many a time from the top of his terrace all the way to what might be called the driveway in that road. I helped him to do it, and cut the grass there myself.

Q Are there trees there planted by him? A Yes; 1907 I think they were planted.

30 Q Do you know who used this road? A All of the family and tradesmen, people that came to visit him and so on. I wouldn't say the public used it.

Q Do you know who kept up the road? A Mr. De Luca did. He resurfaced the road with screenings whenever he resurfaced the rest of the road, the rest of the driveway around the house; he cut shrubbery—not shrubbery, but scrub and stuff that grew there on the other
40 side, kept this looking neat.

Thomas G. Sessa, direct.

Q Were you ever present at any conversation between Louise Hinck or Ernest Hinck, or both of them, and Mr. De Luca wherein—I meant Otto Hinck—I want to add Otto Hinck—wherein some reference of the payment of \$2,500 was mentioned? A Yes.

Q And just confine yourself to that. Do not talk about any other property. 10

Mr. Jones: I object to that.

The Court: State your objections.

Mr. Jones: The same reason, that whatever rights there were at that time would not be influenced by any conversation that could be had.

The Court: As I see it, this may be an admission of Hinck at a later date of what his attitude was when he sold to the Hannas, or whatever the name is. I will allow it for what it is worth. As I said before, I do not think it is worth much, but I will allow the question and overrule the objection. 20

Q (Question read.) A They offered to give him half a road or pay him \$2,500. Mr. De Luca refused them both. 30

Q The banks to the north and south of this road are approximately the same, or are they different in height? A They are about the same.

Q About the same. Do you know where the bedrooms are in this house? A They are all—(interrupted)

Mr. Jones: I object. 40

Thomas G. Sessa, direct.

A (Continuing.) Along that road with the exception of one.

Mr. Kalisch: Do not answer when counsel objects.

The Court: Let me hear your objection.

10

Mr. Jones: Suppose he said, "The bedrooms are here or there," how can that possibly affect the right of this—

The Court: I think it has already been testified to where the bedrooms are. The architect testified to that. Of course, the general idea, Mr. Jones, he wants to bring out is that—(interrupted)

20

Mr. Jones: I see what he wants to bring out.

The Court: —that it was a corner house. I think the architect's testimony is sufficient on that.

Mr. Kalisch: You did. All right.

Q This so-called—the thing herein described as a road, is it a road; does it look like a road?

30

Mr. Jones: I object to that as a conclusion.

Q Does it look like a road?

The Court: If you will state your objection in the proper form, I will rule on it.

Mr. Jones: I think that is a conclusion. What is a road, is a legal question.

The Court: It seems so to me. I will sustain the objection. We have pictures of

40

Thomas G. Sessa, cross—re-direct.

it and we have descriptions of it and we can determine it.

Cross examination by Mr. Jones.

Q Mr. Sessa, you are a lawyer, aren't you?

A Yes, sir.

Q Practicing in this State? No; I do not.

Q Where do you practice? A Pennsylvania, Pittsburgh.

Q And do you represent Mr. De Luca in this case? A I do not. Mr. Kalisch does.

Q Now, this conversation that you speak of at which you were present, you were the one, you and Mr. De Luca were the ones that sought out the Hincks, weren't you, went down to their house? A No; Miss Louise Hinck called Mr. De Luca on the telephone.

Q And you went down to the house pursuant to her request? A Pursuant to her request, yes.

Q Now, wasn't that proposition of your purchasing all of the property to the south of the De Luca house running down to Ardsley Road at a certain price—that was offered to Mr. De Luca? A Yes; by the Hincks.

Q And that offer, he gave you the market price of the land and then deducted a certain amount for filling in that road, didn't he? A No.

Q Which was \$2,000. That is not your understanding? A No.

Re-direct examination by Mr. Kalisch.

Q You say you practice in Pennsylvania? You are not practicing law now, are you? A Why, once in a while.

Thomas G. Sessa, re-direct.

Q You are engaged in what? A In banking.

10 Mr. Kalisch: That closes our case. There may be something I have overlooked technically. If I find that is so may I offer it at two o'clock?

Mr. Jones: I think possibly you were going to introduce that ordinance.

Mr. Kalisch: There is a stipulation between counsel to the effect that some time between May and June, 1923, the Commissioners—

The Court: Passed an ordinance vacating whatever rights the public had in it and that is offered. Any objection to it?

20 Mr. Kalisch: The public rights.

The Court: Vacating public rights.

Mr. Jones: I introduce the ordinance.

Mr. Kalisch: Here is the ordinance.

The Court: Is there any objection?

Mr. Jones: No. No; I consent.

The Court: We will admit it.

RECESS.

30

Mr. Kalisch: I introduce certified copy of deed from Louise C. Hinck, an executor, to Berger Melin.

Paper marked Exhibit C. 5.

40

Ernest C. Hinck, direct.

ERNEST C. HINCK, sworn for the defendant.

Direct examination by Mr. Jones.

Q Mr. Hinck, you are a son of Mr. Ray Hinck? A Yes, sir.

Q And how long have you lived in Montclair? A I should judge about 39 years.

10

Q And you are a little over 50? A I am 52.

Q You were formerly mayor of Montclair? A Yes.

Q Were the one that—Christopher Hinck owned in 1894 what property in this Grove street neighborhood? A He owned the property on the east side of Grove street from Grove street to Ridgewood avenue and also on the west side of Grove street, in that vicinity, in that neighborhood.

20

Q Considerable property? A Yes, quite considerable property.

Q And did you act as broker on this property? A Which property do you mean?

Q This Hanna property. A Yes; I was the broker in the matter.

Q Will you tell the Court—will you tell us the dealings you had with Mr. and Mrs. Hanna?

30

A Mr. and Mrs. Hanna came out to my office in the broker's business and wanted to rent a house, and I rented them a house on Christopher street. After that I took them over—the same day—I took them over and showed them property on Grove street because they stated they were going to build a house, and I showed them this property on Grove street that they bought, eventually bought.

40

Ernest C. Hinck, direct.

Q What conversation, if any, did you have in reference to the inducing cause to purchase the property?

10 Mr. Kalisch: I object to any testimony with Mr. Hanna. I think it should be limited to Mrs. Hanna.

Q They were together, weren't they? A They were together, yes.

(Question read.)

Mr. Jones: Withdraw that question.

20 Q Was any conversation had with him, or did they have any conversation with you as to why you wished to sell them this property or they wished to buy this property? A Captain Hanna and Mrs. Hanna were looking for a well-drained piece of property and, instead of taking them up to the mountainside, I showed them the property on the west side of Grove street, which is a knoll; it is a stretch of property of about four or five hundred feet, which was the cream of the property in that neighborhood, and the view of New York, the view of the mountain induced them to buy the property.

30 Q Was that the conversation? A Those are the facts; the conversation, word for word.

Mr. Kalisch: I move to strike out that part.

The Court: Strike it out. What was the conversation?

40 Q What was the conversation that led you to believe that? You can only learn somebody's

Ernest C. Hinck, direct.

intentions from words that they said. A I told them that I had a knoll and took them to the knoll and then sold them the property on the strength of that.

Q It was testified by Mrs. Hanna that you said, "This will be a corner lot," and that she purchased that lot, paid the price, because you said it was to be a corner lot. Did you have such a conversation? A I positively did not have a conversation of that kind with her before she got the deed to the property or before she made a contract for the property. 10

Q Did you have any conversation with her at any time about your plans for a street? A The property grew out of the general—(interrupted)

Mr. Kalisch: I object to an answer except yes or no. 20

A Yes.

Q What was the conversation? A The property in general, the layout and the plan of the property in general, was discussed with Mrs. Hanna and in that conversation I stated to her—it was our intention of laying the street between Grove street and Ridgewood avenue. 30

Q Did you tell her where? A No.

Q Was this before she bought or after? A This was after she bought.

Q At the time you talked to her were you in a position to put a street through from Grove street to Ridgewood avenue? Did you own the land, in other words?

Mr. Kalisch: One minute. That part in regard to his authority I object to on the 40

Ernest C. Hinck, direct.

ground that we were not informed of any limited authority of the agent and he cannot at this time limit the authority by his own testimony.

10 The Court: That is not the purpose of the question, as I understand it. What is the question?

(Question read.)

The Court: That is all right. I will admit it.

Mr. Kalisch: You mean Christopher?

20 Q Christopher, did he own all the land between Grove street and Ridgewood avenue? A Not in the section where this property is located.

Q When you talked to her, had you been authorized by your father to make any provisions whatsoever?

30 Mr. Kalisch: One minute. I object to that on the ground that unless an agency is shown to the person to be limited, we have a right to deal with him assuming that he had complete agency.

The Court: I will sustain the objection.

Q When was the road begun at the south of the De Luca property, south of the present De Luca property? A I should judge a year or a year and a half after the Hannas started work on the house.

40 Q And that was in pursuance of this plan of putting a public street through to Ridgewood avenue? A It was.

Ernest C. Hinck, direct.

Q Some years later that plan was abandoned, apparently, subsequently abandoned? A It was.

Q Do you know the reason for that?

Mr. Kalisch: Answer yes or no, please.

Q Do you know the reason that plan was abandoned? A Yes. 10

Q What?

Mr. Kalisch: I object.

The Court: Why?

Mr. Kalisch: On the ground that the abandonment of the plan has in no way any legal binding—I will start again. I object to it on the ground that the reason for the abandonment cannot limit our rights, having once built it, under that case in 11 Equity I mentioned this morning. 20

(Argument.)

The Court: I will allow the question.

A The plan turned out impossible on account of not owning the entire properties that would be affected by the vague plan which father had intended to carry through at the time when he had this road dug out. 30

Q There is testimony by Mr. Bowman to the effect that about in the year 1895 or in 1896 that he was present while you were assisting in either erecting a cellar for the Hannas or working around the house at the time, speaking with reference to this road, and that you said to him, Mr. Bowman, that you had promised Captain Hanna that this would be a corner lot. 40

Ernest C. Hinck, direct.

Did you have such a conversation? A Indeed I did not.

Q It was testified that this road, which subsequently became this portion of the public road, excavation was started on that and the men used it when they were building the house. Did you excavate it at that time? A No.

Q Who did? A One of the contractors must have.

Q Was he working for you or for Mr. Hanna? A No; he was not working for me.

Q That was one of the contractors for Hanna? A Yes.

Mr. Kalisch: I move that that calls for the construction of the witness, conclusion of the witness, "It must have been something."

The Court: Strike it out. All he can say is that it was not his.

Q For Christopher? A No.

Mr. Kalisch: I object to that on the ground that it calls for a conclusion. He says somebody else did not order this done.

The Court: No; he says he did not order it.

Mr. Kalisch: And he says Mr. Hinck did not order it.

Mr. Jones: He said it was done either for him or his father.

Mr. Kalisch: It necessarily is based on hearsay, this second part.

The Court: This witness is admitted to be the agent of his father, a general agent for his father.

Ernest C. Hinck, direct.

Mr. Kalisch: Now he is attempting to say, "My father did not order anything to be done."

Mr. Jones: You want to use him for your agent where it is agreeable and where it is not agreeable you do not want to.

The Court: I will allow the answer to stand. 10

Q There is testimony by Mr. De Luca—by Mr. Sessa that there were a row of trees planted by them and that there were no trees on that street south of that property prior to that time. Is that, to your knowledge, a fact? A I know there were trees there before the time that Mr. De Luca testified that he placed his in there.

Q And who put them there? A Father had them put there. 20

Q You have lived around that neighborhood for a good many years? A Yes.

Q Has that street been used right along during that period? A Yes.

Q From the time of the sale of the property to Mrs. Hanna right down to date, or, right down to date was there any request made of you or to your father, to your knowledge, to complete the street, Grove street to Ridgewood avenue? A No. 30

Q Anything more said about that street than the conversation that you have related? A No.

Q Was it ever referred to? A No.

Q Are you positive that that was after the deed had gone through? A That—I don't know what you mean, whether I am positive.

Q Well, you are sure? A You mean the conversation? 40

Ernest C. Hinck, cross.

Q Yes. A Yes.

Cross examination by Mr. Kalisch.

10 Q Was there any objection made by you or your father when the road was started to the south of Mr. De Luca's place? A When the road was started?

Q Yes. A Father started the road.

Q Oh, your father did? A My father had the work done.

Q Now, was there any grass running from the southerly line of where the De Luca property now is, running over part of the dirt road which your father had started to build at the time he planted these trees? A No.

20 Q There was not? A No.

Q So after your father planted the trees, the place—the grass was grown running into the sixty feet and running from the front, or Grove street side, back almost the depth of the whole property, wasn't it? A No; that I couldn't say.

Q You couldn't say? A No.

30 Q Did you put any trees on the other side of the street? A The trees were generally—they were placed on Grove street on this opening there and also throughout the property in general; I suppose we placed about two thousand trees at the time.

Q And your father, to your knowledge, had this street dug along the southerly side of the De Luca property, in accordance with what you were told by Mrs. Hanna? A No.

40 Q You told her that you intended to do it, didn't you? A Put a street through? No.

Ernest C. Hinck, cross.

Q Can you explain how it was that before her house was finished your father had his road started? A Before the house was finished?

Q Yes. A You mean dug the excavation?

Q Started to dig the road, yes. A Yes; it was started, as I say, a year or a year and a half after that land was sold to the Hannas. 10

Q Will you answer the question. Do you know how it was that the road was started to be dug by your father before the Hanna house was completed? A No; I couldn't say that I do.

Q You sold some property to the Millers across the street, didn't you? A I? No.

Q Who did it, your sister? A I don't know.

Q You only know from hearsay? A I only know from hearsay. 20

Q Now, you say that the Hannas asked you for a well-drained lot? A A high lot, yes.

Q And, to your knowledge, the drains were put in to the southerly side of the house and emptied on this road that your father had started to build before the house was completed; isn't that correct? A To my knowledge, Captain Hanna laid the drains over the ground; laid the leaders over the ground; he had stones going to the bottom of the leaders and ran it over the surface of the ground; Captain Hanna had no drains. 30

Q You mean to say that Captain Hanna or Mrs. Hanna when that house was built put no drains to that house? A I mean to say just exactly what I said before, they put stones there and led the water over the top of the ground.

Q Over the grass? A Over the grass. 40

Ernest C. Hinck, cross.

Q Weren't there drains on the southerly side of their line, which drains emptied the water at or about the place where the road was dug by your father? A No.

Q You know there is a drain there now, don't you? A No, I do not.

10 Q Do you know how it was that if you were not going to build a road there—do you know whether there was any conversation why Mrs. Hanna should take an irregular shaped lot? A Yes; because it was square—it was at right-angles with Grove street.

Q Was the width in the rear the same as in the front? A I am quite positive it was not. I mean, she got the benefit of that because it was squared off with Grove street so she could build

20 Q And the road which you started to dig was right at the point where the southerly line—where their most southerly line ended; is that correct? A Well, that I couldn't say.

Q You sold the property, didn't you? A I sold the lot, yes.

Q Don't you know, as a fact, that you started—that the contractor for your father and under his instructions, started a road at the most

30 southerly line of their property and running at least as far as the depth of their property? A I know it is there.

Q Well, you know it was put there, don't you? A I know it is there, so I know it was put there.

Q And you know it was put there by your father? A Oh, sure.

The Court: That is enough of that. He has testified to that; this makes the second

40 time.

Ernest C. Hinck, re-direct—re-cross.

Q Do you know why it was not put further out? A No, I do not.

Q Wasn't it because you—(interrupted)

The Court: No; he says he doesn't know.

Mr. Kalisch: That is all.

10

Re-direct examination by Mr. Jones.

Q Where was your father's northerly boundary of this property? A The northerly boundary was along the Inness line.

Q And the Inness property is where? A The Inness property is north of this Hanna property.

Q Right next north? A Next north, yes.

Q So the lot in question was your father's most northerly property? A Yes, sir.

20

Q The Inness property was not sold, was it? A No.

Q Innesses owned that property, didn't they? A Yes; always, before we did ourselves.

Re-cross examination by Mr. Kalisch.

Q But you did own all the front lots south of the southerly line of that road that was dug and running as far as where Ardsley Road is now cut through? A Oh, yes.

30

Q You are one of the executors? A No; I am not.

Q Of the last will of Christopher A. Hinck? A No; I am not.

40

Louise C. Hinck, direct.

LOUISE C. HINCK, sworn for the defendant.

Direct examination by Mr. Jones.

Q You are a sister of the last witness? A I am.

10 Q Of course, a daughter of Christopher Hinck? A I am.

Q And one of the executors of the estate? A I am.

Q Who is the other? A Otto H. Hinck.

Q That is your brother who is sitting there? A Yes, sir.

Q Did you have anything to do with selling this property to Mrs. Hanna? A No; I did not.

20 Q And had no conversations with her in reference to it? A None at all.

Q That street was laid out by whom? A I don't know.

Q The street in question was laid out by whom? A I don't know.

30 Q It was testified by Mr. Miller that in 1903 or thereabouts he purchased property on the other side of Grove street, Colonel Miller had a conversation with you in his presence? A Colonel Miller had the conversation with me.

Q He testified that in that conversation— (interrupted)

A Mr. Miller was not present.

40 Q Wait until I get through the question. He testifies that he, George Miller, was present at a conversation between you and Colonel Miller in which, in response to a question by Colonel Miller as to whether this little road was to remain open, you said, "Yes; because my father promised Captain Hanna that his lot would be

Louise C. Hinck, direct.

a corner lot." A Mr. George Miller was never present when Colonel Miller discussed the purchase of that lot with me. I never mentioned the opening next to the Hanna property to Colonel Miller. Colonel Miller said he wanted additional land on the north side of his house to build a library and on the south side of his house for planting trees.

10

Q And did you at any time either to Mr. Miller or to—(interrupted) A Never.

Q —George Miller say anything about this being a corner lot or any promise made by your father to you— A I did not.

Q Did you know of such a promise? A I did not.

Q Mr. Sessa and Mr. De Luca testified that some time, October, 1922, pursuant to a telephone conversation from you, they came to your house; is that right? A They did.

20

Q And that a conversation ensued in which you offered them \$2,500 for one-half of the lot—one-half of that road next adjoining them on the south. You did take the other half? A I did not.

Q Was there a meeting at that time? A There was a meeting. Mr. De Luca and Mr. Sessa and Otto H. Hinck and I were present. I told Mr. De Luca that I was cutting through this street, Ardsley Road; that I would sell him the land south of his house to Ardsley Road at a depth of two hundred feet on Ardsley Road for \$6,000, that I could sell it for him at \$8,000, thinking that he might need \$2,000 for filling in of that opening. Mr. De Luca said he would give \$7,500. My brother, Otto H. Hinck said, "Well, let us split the difference; sell it to him for \$2,500, then we will really—let us sell it to

30

40

Lowise C. Hinck, cross.

him for \$5,500; then we are giving you \$2,500," because we knew we could sell the land for \$8,000.

Q Ardsley Road is a new road that you built at right angles to—(interrupted) A It is a new road.

10 Q (Continuing). —at right angles to Grove street and further south than this little—interrupted) A Exactly. It is south of Ardsley Road. I don't know whether it is exactly right angles; I mean, it is south of the opening.

Q Was that the entire conversation at that time? A That was the—(interrupted)

Q With reference to this street? A Exactly.

20 Q Mr. Sessa says he was present at that conversation and that you made an outright offer of \$2,500 for half the road? A I did not.

Q Or anything approaching that? A I did not.

Cross examination by Mr. Kalisch.

Q Did you ever have a title policy on your property there?

30 Mr. Jones: I object to that.

The Court: What is the object?

Mr. Kalisch: I will withdraw the question.

Q Didn't you make an attempt, after Mr. De Luca told you that he claimed that road and wouldn't pay you anything, to have one of your Montclair Title Companies guarantee your title and weren't you refused the title?

Louise C. Hinck, cross.

Mr. Jones: I object to that.

The Court: What is the object, Mr. Kalisch?

Mr. Kalisch: To indicate clearly that what we testified to of our claim that that road was the subject of conversation, topic of conversation that prompted them to make application to see if they could prorate those. 10

The Court: I will allow the question.

A No; nothing of that kind was mentioned at the meeting. Newton H. Porter suggested a— (interrupted)

The Court: Just answer questions. 20

Q Didn't you make application to some title company for a title guarantee? A I did not.

Q And weren't you refused, either you or one of the other executors? A I did not.

Q Haven't you now got an application pending? A I have not.

Q (By the Court.) Has the other executor?

Q Has the other executor? A He has not.

Q Didn't you make one on behalf of Mr. Melin who purchased from you? A Mr. Melin made it himself. 30

Q Oh, he did make it himself? And was that by reason of the fact—(interrupted)

The Court: No, no.

Mr. Jones: I object to that.

The Court: Mr. Melin made it, that is enough. 40

Louise C. Hinck, cross.

Q Did you not, before Mr. Melin made application, tell him of Mr. De Luca's claim on that road?

Mr. Jones: I object to that.

10 A I did not.

Mr. Jones: I object to that.

The Court: Well, it is useless now.

Q Do you know why a price was fixed at forty dollars a front foot for Mrs. Hanna's property in 1894 as against thirty dollars a foot some years later for Mr. Miller's property across the street?

20 Mr. Jones: I object to that. She testified she had nothing to do with it.

Mr. Kalisch: I asked whether she knew why it was done.

The Court: If you want to make your objection, make it in the proper form.

30 Mr. Jones: I object to it on the ground that she has said that she had nothing to do with the Hannas—yes—nothing to do with the negotiations at any time.

The Court: I will allow the question.

(Question read.)

The Court: Now, you can say yes or no.

A No.

40 Q The offer to sell, as made by you or by your principal, had reference merely, did it not, to the balance of property south of this road running back to the rear and a part of the prop-

Louise C. Hinck, cross.

erty in the back, and had no reference to the road; is that correct? A It had a reference to two hundred feet on Ardsley Road.

Q But your offer to sell had nothing to do with the road to the south of Mr. De Luca's property, did it? A You mean the opening?

Q Yes. A Nothing.

10

Q (By Mr. Jones.) Do you understand that last question? A He said whether the opening had anything to do—if the opening was considered as land, I considered it.

Q Did you make a suggested plan to Mr. De Luca when you made him the offer of the property? A Probably drew the lines.

Q Yes. And didn't you file such a plan with the Building Department? A I intended to have the opening vacated.

20

Q (By the Court.) Did you file it? A File the plan? Why should I file it?

Q (By the Court.) The answer is no. A No. Filed, what do you mean, "file" where?

Q Didn't Mr. Crane make such a plan for you? A Oh, he made several plans.

Q Didn't he make such a plan for you? A He did. He made plans.

Q He did. And didn't you start to say that you intended at that time to have the road vacated? A Exactly. Newton H. Porter said—

30

The Court: No, no.

Q I am not interested in that. A Exactly.

Q And you did thereupon make application to the Board of Commissioners to vacate that road, or you or one of the other executors? A Exactly.

40

Louise C. Hinck, re-direct—re-cross.

Q To vacate the public rights in that road?

A Yes; exactly.

Re-direct examination by Mr. Jones.

10 Q Miss Hinck, in that conversation you had with Mr. De Luca, at which I think Mr. Sessa was present, the proposition was to sell from Ardsley Road along Grove street, northerly up to what point? A Well, as far as Mr. De Luca's land.

Q Up to Mr. De Luca's land? A Up to De Luca's land.

Q So you included this road? A Exactly.

Q In it? A (No answer.)

20 *Re-cross examination by Mr. Kalisch.*

Q How could you have sold that if Mr. De Luca—(interrupted).

The Court: No, no, no.

Q The street had not been vacated yet, had it? A We always paid taxes on it. It was never considered as a street.

30 Q And yet you applied to have the City vacate? A We were advised by Newton Porter—(interrupted)

The Court: No, no, no. Do not tell us. Just answer the questions.

40 Q Didn't you draw for Mr. De Luca a diagram showing the land beginning at Grove street on Ardsley Road, on the northerly side of Grove street, running back two hundred feet and then

Otto Hinck, direct.

some lots running north and south in the rear and also indicate on that plan that the road was an open road? A I had a general plan.

Q Didn't you? A I showed him the map.

Q Where is that map? A Oh, I don't know where; the map is probably similar to this, I mean, I made a drawing. 10

Q What did you do with Crane's drawing? A I have Crane's drawing.

Q Have you got it here? A No; I didn't bring it here. It is similar to that and I offered to sell him two hundred feet.

Q It is similar to this? A I have my own map similar to that. It is because it is a general development and I offered him two hundred feet here for \$8,000—for \$6,000 because he would use some money to fill in that opening. 20

OTTO HINCK, sworn for the defendant.

Direct examination by Mr. Jones.

Q You are a son and one of the executors of Christopher Hinck? A I am a son of Christopher A. Hinck. 30

Q And you are one of the executors? A I am one of the executors.

Q It was testified to by Mr. De Luca and Mr. Sessa that October, 1922, in pursuance to a conversation, they came down to your house or Louise's house and that at that time there was a conversation about this road. Is that true? A They did.

Q And that— A About the property. 40

Otto Hinck, direct.

Q About the property, and that time—and Mr. Sessa testified that at that time you or Mr. Hinck made an offer of \$2,500 for one-half of that road. Is that true? A No.

Q Mr. De Luca testified that you offered a certain sum for them to release their rights to the road; is that right? A No.

10 Q What conversation did you have, if any?

A Mr. De Luca and Mr. Sessa were there on two occasions at the house and we offered them a piece of property with two hundred feet front on Ardsley Road, running back to their line, both on Grove street and on the rear of the lot, and we told him that we could sell that property at forty dollars a foot, which would make the property worth \$8,000, and the first evening we had a long discussion about it and we wouldn't
20 sell for less than \$6,000; so after some time, and thinking it over, we decided we would sell it for \$5,500 and then Mr. Sessa and Mr. De Luca came over to the house again and at that time they offered us \$5,000 for the property, but we told them we wouldn't sell it for less than \$5,500.

Examined by the Court.

Q Has property increased by the front foot
30 up there in the last twenty years or thirty years, do you think? A Well, the property lay idle there for about thirty-six years.

Q Well, what do you think it has increased in value in the last thirty years? A Well, it is so entirely different, judge.

Q Well, just answer my question. Has it increased or hasn't it? A At the time in 1900—
(interrupted)

Q No. Has it increased or has it not in-
40 creased? A Well, it has increased in value.

Otto Hinck, direct.

Q Yes. How much do you think? A Well, that is hard to say. We never tried to sell it so I couldn't say. I mean, her father sold—(interrupted)

Q You have had plenty of experience in real estate, Mr. Hinck. Now, what do you think the average increase is? 10

Mr. Jones: He is not a real estate man.

The Court: That is all right. I am asking these questions.

Q Do you think it has increased ten dollars a front foot? A We sold our property—(interrupted)

Q Do you think it is worth ten dollars a front foot more than it was thirty years ago? A Yes. 20

Q Twenty dollars more A No.

Q Fifteen dollars more? A No.

Q Yes. Just ten dollars more? A Well, about.

Q Now, you offered to sell these people this land for forty dollars? A Forty dollars.

Q Having thirty years ago sold other property for thirty dollars? A Yes. We were closing the estate. 30

The Court: All right. That is all I want to know.

Examined by Mr. Jones.

Q And did you give any reason for that price, or was there any discussion about that price, how it was arrived at? A No; there was no definite—no discussion about how it was ar- 40

Otto Hinck, cross.

rived at. We were willing to allow him \$25 so as to clean up the corner.

Q (By the Court.) What corner? A Well, this is—there is a corner lot that is two hundred feet on Ardsley Road and about one hundred and some odd feet on Grove street.

10 Q (By the Court.) I see. Do you mean this one here? (Indicating on map.) A From here to here, I mean. (Indicating.)

The Court: I see.

Q Was there anything said that evening about this open road? A I don't remember that.

20 Q What is your business? A Cotton goods broker.

Q Always been in that line? A Always.

Q Never been in the real estate business? A Never.

Cross examination by Mr. Kalisch.

30 Q The reason why you suggested that plan was because, by selling him on Ardsley Road and using the direction of north and south as your length, you were selling three lots or four lots whereas if you sold with a Grove street frontage you only had one lot to sell. Wasn't that the reason? A No. We figured we had—all that property belonged to us.

Q You did figure that? A Yes.

Q Then how is it that you went down to a lawyer to find out what claims there were against that road?

40

Mr. Jones: I object to that.

Otto Hinck, cross.

The Court: State your objection.

Mr. Jones: There is no basis for such a question. It would be incompetent even if there were.

The Court: There is not any basis for the question because it has not appeared that he did what you say.

10

Mr. Kalisch: Withdraw the question at this time.

Q Did you or another of the executors, go down to a lawyer with regard to this road? A Yes, sir.

Q You went down there—

The Court: No, no, no. (To witness) Why did you go down there?

20

Witness: We went down there to find out whether we had the title to the property.

Q And it was only after you went down there that this vacation by the Board of Commissioners was accomplished; is that correct? A Yes.

Q Did you sell to Mr. Miller, Sr., Colonel Miller? A No.

Q Who did? A I don't know who did. The testimony is brought out that my sister has. I don't know who sold it. I was at college at that time.

30

Q Did you not make out a plan showing the four lots, I mean at the time Mr. De Luca was there, showing this lot facing on Grove street and Ardsley Road and running north and south in the rear and then have Mr. Crane make a diagram of some kind for you? A I don't know. We had some map there; what the map was I don't remember.

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Otto Hinck, re-direct—re-cross.

Q And didn't the map you had there show this road as an open road and continue as such?

A I don't know; I don't think so.

Q Did you make such an offer of \$2,500 to Mr. De Luca, or was that amount mentioned? A The amount of \$2,500—\$2,500 was mentioned, 10 but I said, "It is like making you a present of \$2,500."

Q How long after this conversation with Mr. De Luca was it that you went down to the attorney? A I don't know.

Q Well, was it a short time after? A It must have been. I couldn't tell you how long it was because I didn't handle it.

Re-direct examination by Mr. Jones.

20 Q Was it before or after? A The original conversation was before we made—(interrupted)

Q Was it before or after you went to see the lawyer? A The conversation with Mr. De Luca? After.

Re-cross examination by Mr. Kalisch.

30 Q Didn't you just testify it was only a short time after Mr. De Luca was there that you went down to see the lawyer? A Well, we saw him the second time then to get the proceedings started, yes.

Q You saw whom a second time? A I didn't see anybody.

Q Well, who was to see someone a second time? A My sister was to see about the vacating.

40 Q Was anything discussed by Mr. De Luca about the vacating of the street? A No.

Louise C. Hinck, further cross.

Q How was it your sister was to come to see somebody about the vacation of it if it was not discussed at your conference with Mr. De Luca, do you know? A Why, no.

Mr. Jones: I object to it.

Witness: No.

10

LOUISE HINCK, recalled for further

Cross examination by Mr. Kalisch.

Q Miss Hinck, do you know how it was—how you or your father or Otto Hinck sold to Millers for thirty dollars, twenty-five or thirty dollars a front foot in 1903 as compared with the price of forty dollars a front foot which you had sold to the Hannas some years before? 20

Mr. Jones: I object to that.

A The land on the east side is higher.

Q Higher? A The land on the east side is more desirable.

Q The land on the east side only had one other house when you sold to the Hannas, hadn't it? A Oh, no, no. 30

Q Eh? A -No; that was developed for the Hartleys and the Innisses.

Q And who else? A We lived there.

Q On what side? A On the east side. The Millers did not live on the west side.

Q You say that—(interrupted) A And Bowmans. 40

Louise C. Hinck, further cross.

Q (Continuing) —when you sold to the Hannas that was developed on the east side of the street? A Why, no. I didn't say that. You asked me—(interrupted)

Q When you sold to the Hannas at forty dollars a front foot, it was not developed? A No; that was a high knoll.

10 Q Yes; but when you sold to the Millers on the opposite side of the street at thirty dollars a front foot, a street had already started to be developed, hadn't it? A Exactly.

The Court: Is that the case?

Mr. Jones: Yes.

(Argument)

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*Opinion.***OPINION.**

IN CHANCERY OF NEW JERSEY.

Between

VINCENZO DE LUCA,

*Complainant,**and*

BERGER MELIN,

*Defendant.**On Bill, Etc.**Memoran-
dum.*

10

*(Not for
print.)*

This memorandum is not to be published in the official or unofficial reports.

Messrs. Kalisch & Kalisch for complainant.

Charles Jones, Esq., for defendant.

20

CHURCH, *V. C.*

This is a case to enjoin the defendant from erecting structures on a certain piece of property, which has been used for some time as a road.

The facts are that in 1894 the lands of the complainant were deeded to Josephine L. Hanna, complainant's grantor, by Christopher A. Hineck, who is now dead. On May 15, 1902, Josephine L. Hanna deeded the same premises to the complainant. The property has a frontage of about one hundred feet on the east side of Grove street and is about two hundred feet in depth.

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The gist of the complainant's case is that at the time the deed was made the grantor represented to the grantee that the property sold was a corner lot and that the so-called street should remain a street or be dedicated as a

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Opinion.

street. It did remain open but never became a public street. There is evidence that the house erected on the property was built in a manner which is usual for residences to be erected on a corner lot.

The evidence as to this is conflicting.

10 And it is admitted that whatever rights the public had acquired were given up by an ordinance passed by the Town of Montclair.

As a matter of law, I cannot find that there is anything in this case in the nature of an equitable estoppel. Moreover, I cannot escape the conclusion that the complainant cannot enlarge his title by parole evidence.

20 The case of *Naumberg v. Young*, 15 Vr. 331, lays this proposition down and has been followed by our courts since the time of its rendition.

Without analyzing the testimony any further and basing my conclusions largely upon the facts presented to me in the rather voluminous testimony, I have concluded to advise a decree dismissing the bill.

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40

Decree Dismissing Bill.

DECREE DISMISSING BILL.

Filed January 31, 1925.

IN CHANCERY OF NEW JERSEY

Between

VINCENZO DE LUCA,

Complainant,

and

BERGER MELIN,

Defendant.

10

*Decree
Dismissing
Bill.*

This matter coming on to be heard on a final hearing, in the presence of Isidor Kalisch, Esquire, of Kalisch & Kalisch, of counsel with complainant, and Charles Jones, Esquire, of counsel with the defendant, upon bill, answer, replication and proofs taken in open Court, and the Court having concluded the evidence and the arguments of respective counsel, and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for in his bill of complaint,

20

It is on this 31st day of January, nineteen hundred and twenty-five, ORDERED, that the bill of complaint herein be and is hereby dismissed with costs.

30

And it is further ORDERED, that complainant do pay to the defendant, a counsel fee of \$250, which amount shall be included in defendant's taxed costs.

40

Decree Dismissing Bill.

And it is further ORDERED, that defendant have execution for said costs, according to the practice of this Court.

E. R. WALKER,
C.

10 Respectfully advised,

ALONZO CHURCH,

V. C.

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Notice of Appeal.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>VINCENZO DE LUCA, Complainant,</p> <p style="text-align: center;"><i>and</i></p> <p>BERGER MELIN, Defendant.</p>	}	<p><i>On Bill, Etc.</i></p> <p><i>Notice of Appeal.</i></p> <p><i>Walker, C.</i></p> <p><i>Church, V.-C</i></p>	<p>10</p>
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The complainant hereby appeals from the final decree made in this Court in the above-stated cause entered on January 31, 1925, and filed February 2nd, 1925, by which it is ORDERED, AD-
JUDGED AND DECREED that the complainant's amended bill of complaint be dismissed with costs and a counsel fee to defendant's attorney, to the Court of Errors and Appeals.

KALISCH & KALISCH,
Solicitors for and of Counsel
with Complainant.

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

ISIDOR KALISCH,
Of Counsel with Complainant.

Petition of Appeal.

PETITION OF APPEAL.

Filed.

New Jersey Court of Errors and Appeals

10	<p><i>Between</i></p> <p>VINCENT DE LUCA, <i>Complainant-Appellant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>BERGER MELIN, <i>Defendant-Appellee.</i></p>	<p><i>On Bill, etc.</i></p> <p><i>Petition of</i></p> <p><i>Appeal.</i></p>
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20 The petition of Vincent De Luca, the appellant in the above-stated cause respectfully shows that your petitioner aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date January 31, 1925, wherein the said Vincent De Luca was complainant and the said Berger Melin was defendant, in this respect, to wit, the said decree adjudges the complainant's bill of complaint herein be dismissed with costs, and further adjudges and directs that complainant pay to the defendant a

30 counsel fee of \$250, said amount to be taxed in defendant's costs, and further adjudges that defendant have execution for said costs according to the practice of this Court.

And your petitioner humbly appeals from the whole of said decree as aforesaid, upon the ground that the same is erroneous, for that:

1. The court below erred in dismissing the bill.

Petition of Appeal.

2. The court below erred in excluding proper evidence offered by complainant, and over complainant's objection erred in admitting improper evidence on the part of the defendant.

3. The court below erred in not finding the facts according to the evidence and the weight thereof. 10

4. The court below erred in not granting the prayer of complainant's bill, to wit,

(a) That the defendant be enjoined by an injunction out of the Court of Chancery, enjoining him, his agents and servants from entering in and upon or in anywise interfering with the complainant's peaceful use of and possession of the road in question in this action, or any part thereof. 20

(b) And that the complainant may have such other and further general relief as shall be equitable and just.

KALISCH & KALISCH,
Solicitors of Complainant-Appellant

Due and legal service of the within petition of appeal acknowledged as within time, and consent is hereby given to the filing thereof as within time. 30

CHARLES JONES,
Solicitor of Defendant-Appellee.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed February 24, 1925.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

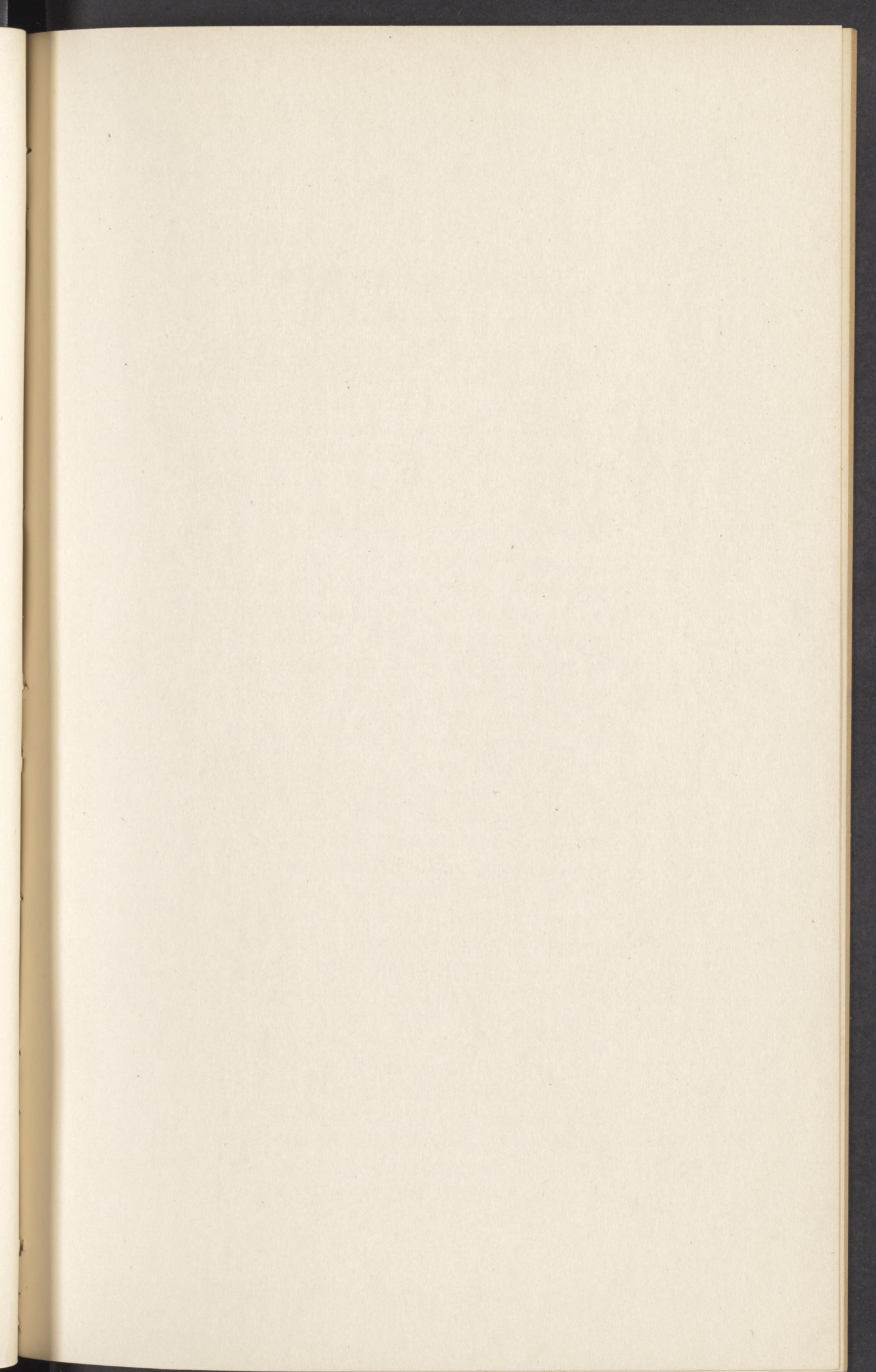
10	<p><i>Between</i></p> <p>VINCENT DE LUCA, <i>Complainant-Appellant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>BERGER MELIN, <i>Defendant-Appellee.</i></p>	<p><i>On Bill, etc.</i></p> <p><i>Answer to</i></p> <p><i>Petition of</i></p> <p><i>Appeal.</i></p>
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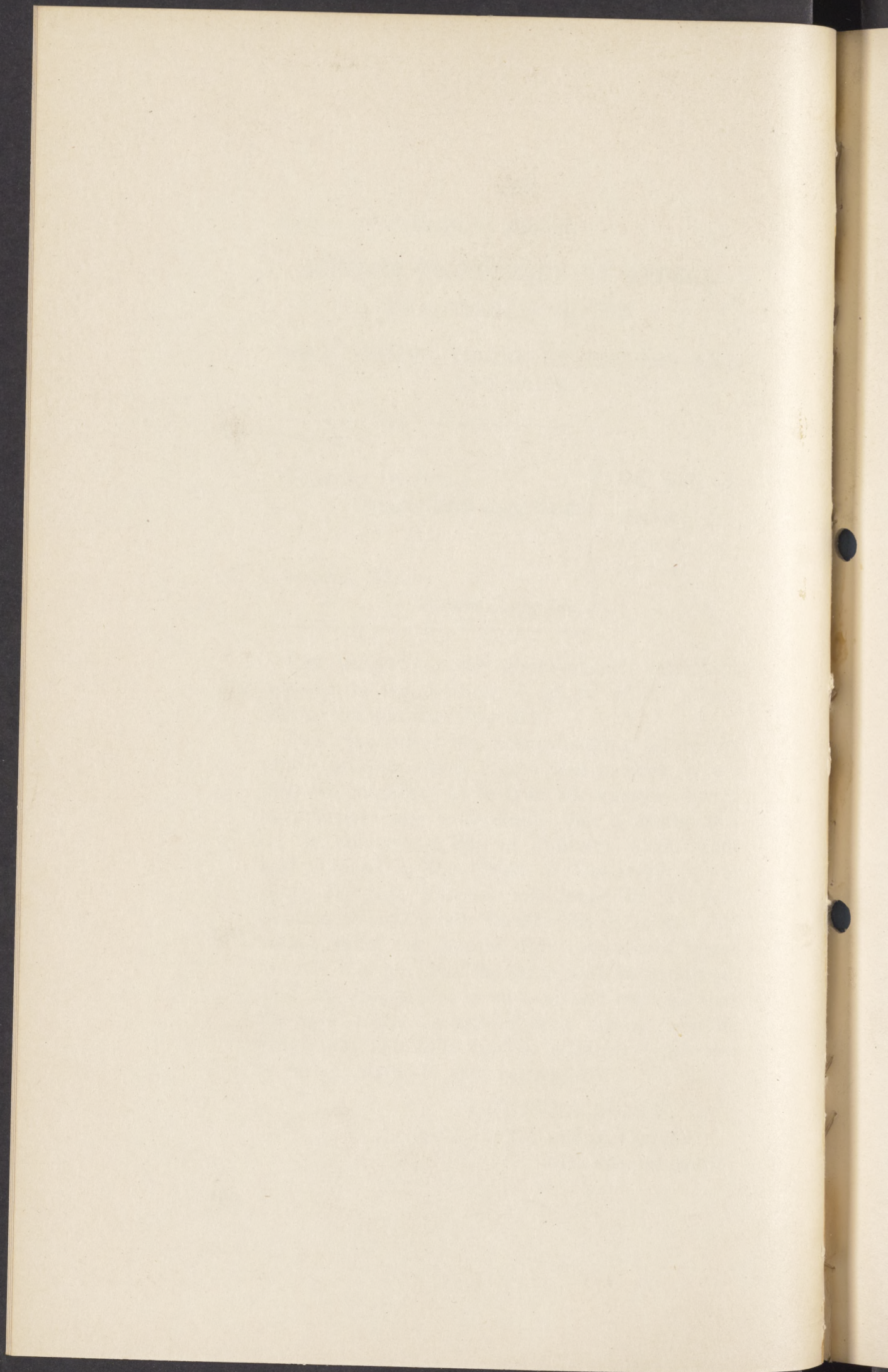
20 The answer to the above-named defendant-appellee to the petition of appeal of the above-named complainant-appellant.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was on the thirty-first day of January, 1925, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the sub-

30 stance 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 decree is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

CHARLES JONES,
Solicitor for and of Counsel
with Respondent.





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Exhibit C. 3.

Exhibit C. 3.

THIS INDENTURE,

MADE the Fifteenth day of May, in the year of Our Lord One Thousand Nine Hundred and Two.

BETWEEN Josephine L. Hanna, widow, of the Borough of Manhattan in the City of New York in the County of New York and State of New York, party of the First Part; 10

AND Vincenzo De Luca of the Township of Little Falls in the County of Passaic and State of New Jersey, party of the Second Part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of One Dollar and other good and valuable consideration, lawful money of the United States of America, to her in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, 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 confirm to the said party of the second part, and to his heirs and assigns forever, ALL that certain 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, bounded and described as follows: 20 30

BEGINNING at a point in the East side of Grove Street in the Southerly line of land of Elizabeth Inness, which point is distant measuring North thirty-one degrees forty-three minutes East One Hundred and Sixty-eight feet from an angle in 40

Exhibit C. 3.

10 the East side of Grove Street; thence running along the East side of Grove Street South thirty-one degrees forty-three minutes West, One Hundred feet; thence South sixty-one degrees forty-two minutes East Two Hundred feet; thence North thirty-one degrees forty-three minutes East One Hundred and Forty feet to said Southerly line of lands of Elizabeth Inness, and thence along said line of said lands North seventy-two degrees fifty-two minutes West Two Hundred and Six feet Three inches to the place of beginning. Being the same premises conveyed to the said Josephine L. Hanna by Christopher A. Hinck and wife by deed dated October 1st., 1894 and recorded in the office of the Register of Essex County in Book Q 28 of Deeds for Essex County on page 299.

20 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,

30 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:

40 AND the said Josephine L. Hanna does for herself, her heirs, executors and administrators covenant and grant to and with the said party of the second part, his heirs and assigns, that she the said Josephine L. Hanna is the true, lawful and right owner of all and singular the

Exhibit C. 3.

above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever. 10

AND ALSO, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid:

AND ALSO, that she, the said Josephine L. Hanna, will WARRANT, secure, and forever defend the said land and premises unto the said Vincenzo De Luca, 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 encumbrance whatsoever. 20

IN WITNESS WHEREOF, the said party of the first part has hereunto set her hand and seal the day and year first above written. 30

JOSEPHINE L. HANNA (L. S.)

Signed, Sealed and Delivered
in the presence of

EDWIN B. GOODELL.

(Revenue stamps attached.)

Exhibit C. 3.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

10 BE IT REMEMBERED, That on this fifteenth day of May in the year of our Lord One Thousand nine hundred and two, before me, a Master in Chancery of New Jersey, personally appeared Josephine L. Hanna (widow) who, I am satisfied, is the grantor mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed:

EDWIN B. GOODELL,
Master in Chancery of New Jersey.

20

DEED.

JOSEPHINE L. HANNA,
WIDOW,
TO
VINCENZO DE LUCA.

Dated, May 15th., 1902.

30 RECEIVED in the Register's Office of the County of Essex, N. J. on the 17th day of May A. D., 1902, at 10:12 o'clock, in the forenoon and recorded in Book M. 35 of DEEDS for said County, on pages 284-285.

GEORGE E. DeCAMP
Register

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*Exhibit C. 4.***Exhibit C. 4.**

CHRISTOPHER A. HINCK
 & UX TO
 JOSEPHINE LOUISA HANNA

THIS INDENTURE,
 Made the First day
 of October in the
 year of Our Lord
 One Thousand Eight
 Hundred and nine-
 ty four Between

Christopher A. Hinck and Johanne M. his wife
 of the Township of Montclair in the County of
 Essex and State of New Jersey of the first part:
 And Josephine Louisa Hanna wife of Robert
 M. Hanna of the Township of Montclair in the
 County of Essex and State of New Jersey of the
 second part: WITNESSETH, That the said party
 of the first part for and in consideration of the
 sum of four thousand dollars (\$4000) lawful
 money of the United States of America, to them
 in hand well and truly paid by the said party
 of the second part, at or before the sealing and
 delivery of these presents, the receipt whereof is
 hereby acknowledged, and the said party of the
 first part therewith fully satisfied, contented and
 paid, have given, granted, bargained, sold,
 aliened, released, enfeoffed, conveyed and con-
 firmed, and by these presents do give, grant,
 bargain, sell, alien, release, enfeoff, convey and
 confirm to the said party of the second part and
 to her heirs and assigns forever, ALL that certain
 tract or parcel of land and premises, hereinafter
 particularly described, situate, lying and being
 in the Township of Montclair in the County of
 Essex and State of New Jersey.

Beginning at a point in the East side of Grove
 street in the Southerly line of land of Elizabeth
 Inness which point is distant measuring North

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Exhibit C. 4.

thirty one degrees forty three minutes East one hundred and sixty eight feet from an angles in the East side of Grove street, thence running along the East side of Grove street South thirty one degrees forty three minutes West one hundred feet, thence South sixty one degrees forty two minutes East two hundred feet, Thence
 10 North thirty one degrees forty three minutes East one hundred and forty feet to said South-erly line of lands of Elizabeth Inness and thence along said line of said lands North seventy two degrees fifty two minutes West two hundred and six feet and three inches to the place of begin-ning.

TOGETHER, with all and singular, the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the
 20 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 de-scribed land and premises, with the appurte-nances, unto the said party of the second part, her heirs and assigns, to the only proper use,
 30 benefit and behoof, of the said party of the second part, her heirs and assigns forever; and the said Christopher A. Hinck does for himself his heirs, executors and administrators, covenant and grant to and with the said party of the second part, her heirs and assigns, that he the said Christopher A. Hinck is the true, lawful and right owner of all and singular the above de-scribed land and premises, and of every part and parcel thereof, with the appurtenances there-
 40 unto belonging, and that the said land and prem-

Exhibit C. 4.

ises 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 said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell, and convey the said land and premises in manner aforesaid, AND ALSO, that the said Christopher A. Hinck will warrant, secure and forever defend the said land and premises unto the said Josephine Louise Hanna her 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.

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IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Christopher A. Hinck L. S.

Johanne M. Hinck L. S.

Signed, Sealed and Delivered
in the presence of

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Henry H. Dawson

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Exhibit C. 4.

STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss.:

BE IT REMEMBERED, That on this Third day of
 October in the year of Our Lord One Thousand
 Eight Hundred and ninety four before me a
 Master in Chancery of New Jersey personally
 10 appeared Christopher A. Hinck and Johanne M.
 his wife who, I am satisfied are the Grantors
 mentioned in the within Indenture and to whom
 I first made known the contents thereof, and
 thereupon they acknowledged that they signed,
 sealed and delivered the same as their voluntary
 act and deed for the uses and purposes therein
 expressed: And the said Johanne M. Hinck being
 by me privately examined, separate and apart
 from her husband, did further acknowledge that
 20 she signed, sealed and delivered the same as her
 voluntary act and deed, Freely, without any fear,
 threats or compulsion of her said husband.

Henry H. Dawson, M. C. C. of N. J.

Received in the Office October 10 A. D. 1894
 at 10:46 A. M.

30

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Exhibit C. 4.

Office of
REGISTER OF DEEDS AND MORTGAGES
Essex County, New Jersey

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.

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I, HOWARD S. DODD, 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 CHRISTOPHER A. HINCK, & UX TO JOSEPHINE LOUISA HANNA UX OF and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book Q 28 of DEEDS for said County on pages 299-300.

IN TESTIMONY WHEREOF, I have
hereunto set my hand and official seal
(SEAL) this 1st day of FEBRUARY, A. D. 1924.

20

HOWARD S. DODD
Register

Compared by 32 & 3

Office of
Register of Deeds and Mortgages
Essex County, New Jersey

30

Certified Copy of
Deed

Christopher A. Hinck, & ux
to

Josephine Louisa Hanna ux of

Recorded October 10th, 1894
In Book Q 28 of Deeds Pages 299-300

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*Exhibit C. 5.***Exhibit C. 5.**

THIS INDENTURE,
 Made the twenty-
 seventh day of
 October in the
 year of Our Lord
 One Thousand
 Nine Hundred
 and twenty-three Between Louise C. Hinck and
 Otto H. Hinck, sole surviving Executors of and
 Trustees under the Last Will and Testament of
 Christopher A. Hinck, deceased, late of the Town
 of Montclair in the County of Essex and State
 of New Jersey party of the first Part; And Ber-
 ger Melin of the Town of Montclair in the
 County of Essex and State of New Jersey party
 of the second part: WITNESSETH, That the said
 party of the first part, by virtue of the power
 and authority to them given, in and by said Last
 Will and Testament, and for and in considera-
 tion of the sum of Eight Thousand Two Hun-
 dred Dollars lawful money of the United States
 of America, to them in hand paid by the said
 party of the second part, at or before the en-
 sealing and delivery of these presents, the re-
 ceipt whereof is hereby acknowledged, have
 granted, bargained, sold and conveyed, and by
 these presents do grant, bargain, sell and convey
 to the said party of the second part, and to his
 heirs and assigns forever, All that tract or par-
 cel of land and premises, hereinafter particu-
 larly described, situate, lying and being in the
 Town of Montclair in the County of Essex and
 State of New Jersey, bounded and described
 as follows:

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LOUISE C. HINCK ET AL EXRS.
 TO BERGER MELIN

(\$8.50)

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Exhibit C. 5.

BEGINNING at the intersection of the northerly line of Ardsley Road with the easterly line of Grove Street; thence along Ardsley Road south fifty-six degrees eleven minutes east two hundred and nineteen feet and seven hundredths of a foot to other land about to be conveyed to said Berger Melin; thence along said land north thirty-three degrees forty-nine minutes east two hundred and ninety-nine feet and twenty-one hundredths of a foot to land formerly owned by Rose Hartley; thence along said land north seventy-three degrees fifty-three minutes west twenty-two feet and twenty-nine hundredths of a foot to the northeast corner of land of Vincent DeLuca; thence along said land south thirty degrees thirty-one minutes west parallel with Grove Street one hundred and forty feet to De Luca's southeast corner; thence further along said land north sixty-two degrees fifty-four minutes west two hundred feet to Grove Street; thence along Grove Street south thirty degrees thirty-one minutes west seventy feet and seventy-three hundredths of a foot to an angle in Grove Street; thence further along Grove Street south forty-four degrees thirty-one minutes west sixty feet and thirty-nine hundredths of a foot to the place of beginning. Subject, however, to the restrictions that said land shall be used for residential purposes only and that there shall be built on said land single family dwelling houses only to be erected so that the front lines thereof shall be at least forty-four feet from Ardsley Road; if the second story room or rooms overhang the front porch, the front line of overhanging second story shall then be considered the front line of the house. Suitable and necessary outbuildings to be used in connection with a pri-

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Exhibit C. 5.

vate residence may be built at any point on the land in the rear of the houses.

10 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, and of the said Testator, of, in and to the above described premises, and every part and parcel thereof, with the appurtenances. To HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns forever to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

20 IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Louise C. Hinck Seal

Otto H. Hinck Seal

30 Executors of and Trustees under the L. W. & T. of Christopher A. Hinck, deceased.

Signed, Sealed and Delivered
in the presence of

Wm. Whitney Ames

Exhibit C. 5.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, That on this twenty-seventh day of October in the year of Our Lord One Thousand Nine Hundred and twenty-three before me, a Master in Chancery of New Jersey personally appeared Louise C. Hinck and Otto H. Hinck, sole surviving Executors of and Trustees under the Last Will and Testament of Christopher A. Hinck, deceased, who, I am satisfied are the grantors in the within Deed of Conveyance named; and I having first made known to them the contents thereof, they did duly acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

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Wm. Whitney Ames, Master in Chancery of New Jersey.

Received in the office November 1st A. D. 1923
 at 9:25 A. M.

No. 8

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Exhibit C. 5.

Office of
Register of Deeds and Mortgages
Essex County, New Jersey

10 STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.

I, HOWARD S. DODD, 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 LOUISE C. HINCK ET AL EXRS. TO BERGER MELIN and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book C 69 of DEEDS for said County on pages 576

20 IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal (SEAL) this 1st day of February, A. D. 1924.

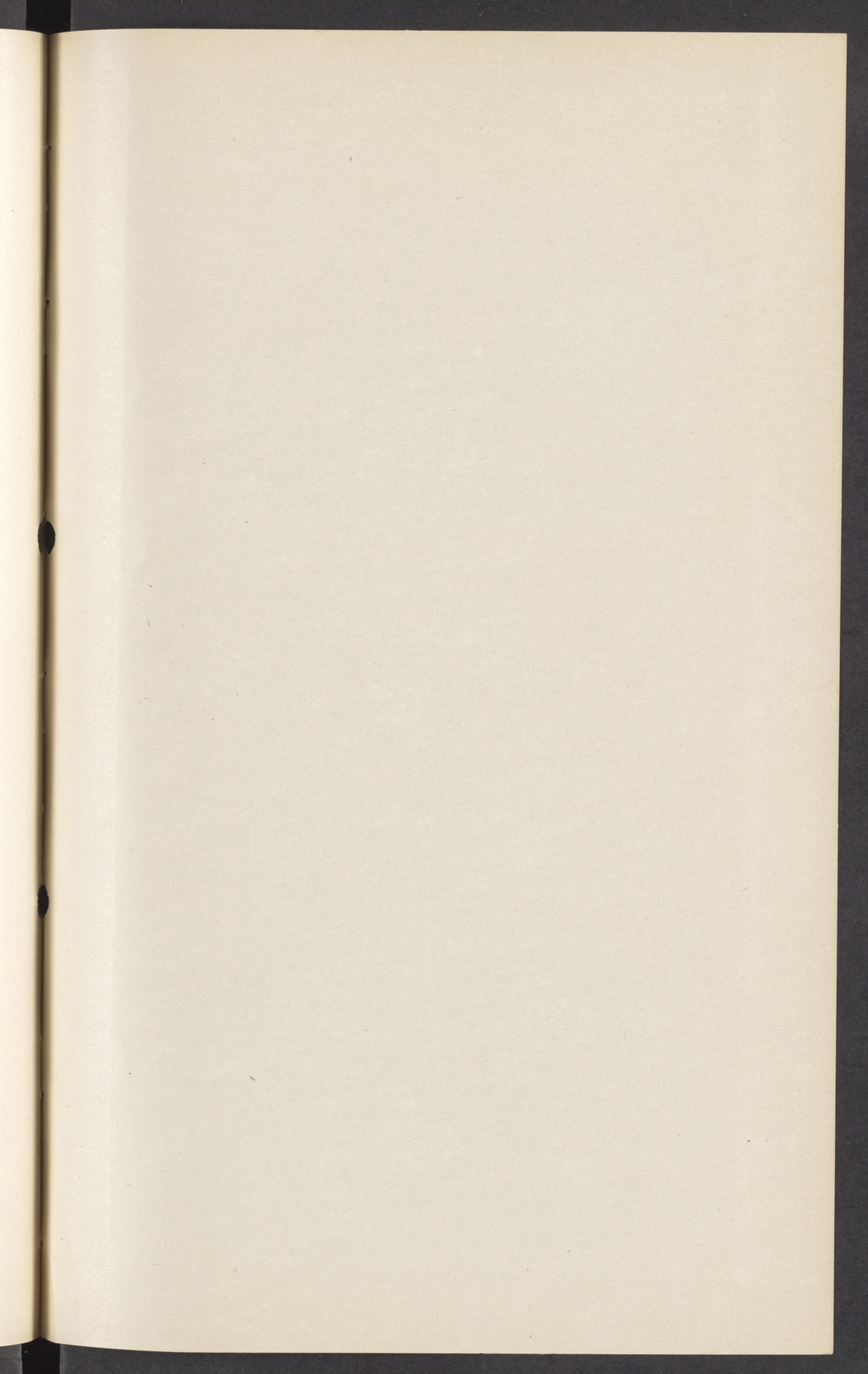
HOWARD S DODD
Register

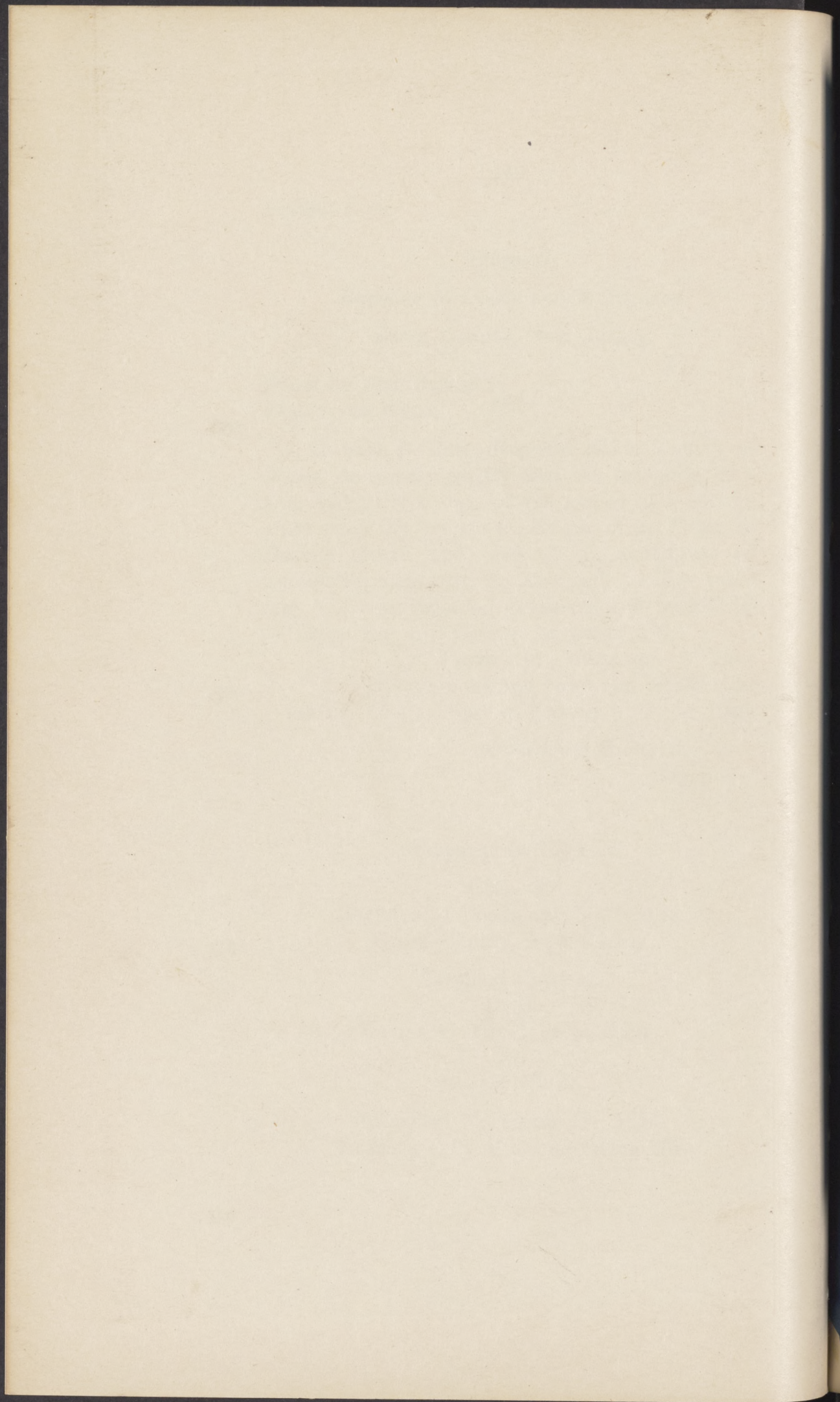
Compared by 32 & 24

30 Office of
Register of Deeds and Mortgages
Essex County, New Jersey

Certified Copy of
Deed
Louise C. Hinck et al Exrs.
to
Berger Melin

Recorded November 1st, 1923
In Book C 69 of Deeds Pages 576





GROVE Hard Surface Pavement

STREET

12 26 12

ARDSLEY ROAD

ROAD

576°17'E 154.64'

N44°23'E 60.39'

N30°31'E 160.1'

Old Survey 168 ft angle
N31°43'E 100'

Vincenzo De Luca 5.15.1902
11.35.1904

Surveyed by F. W. Crane, C. E.
May 14, 1902.

N31°43'E 140'
N33°31'E 140'

N33°49'E 311.73'

Note: Discrepancy exists between Deed and Old Survey figures, and figures used in plat as published of Vacation Proceedings.

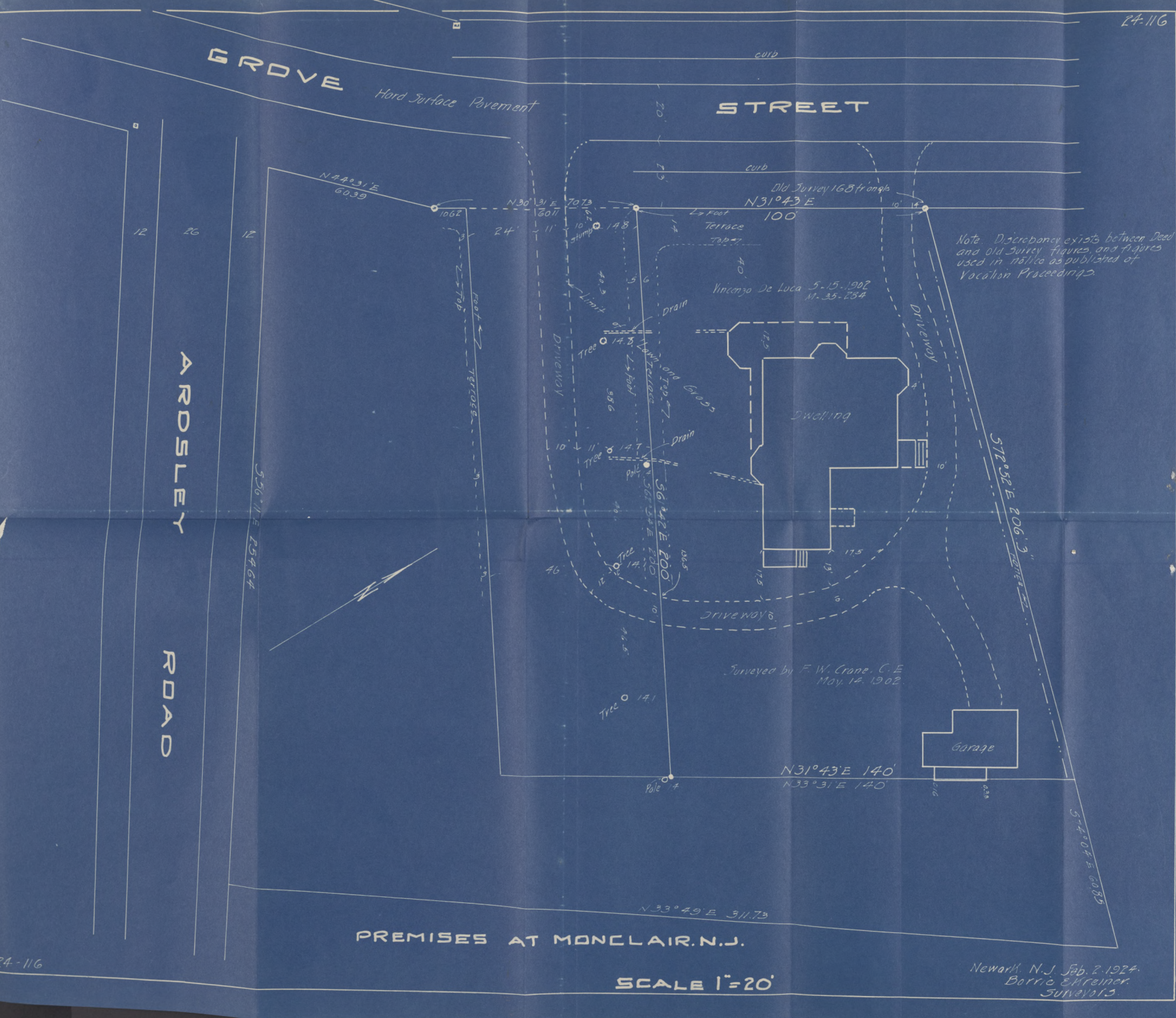
572°52'E 206.3'

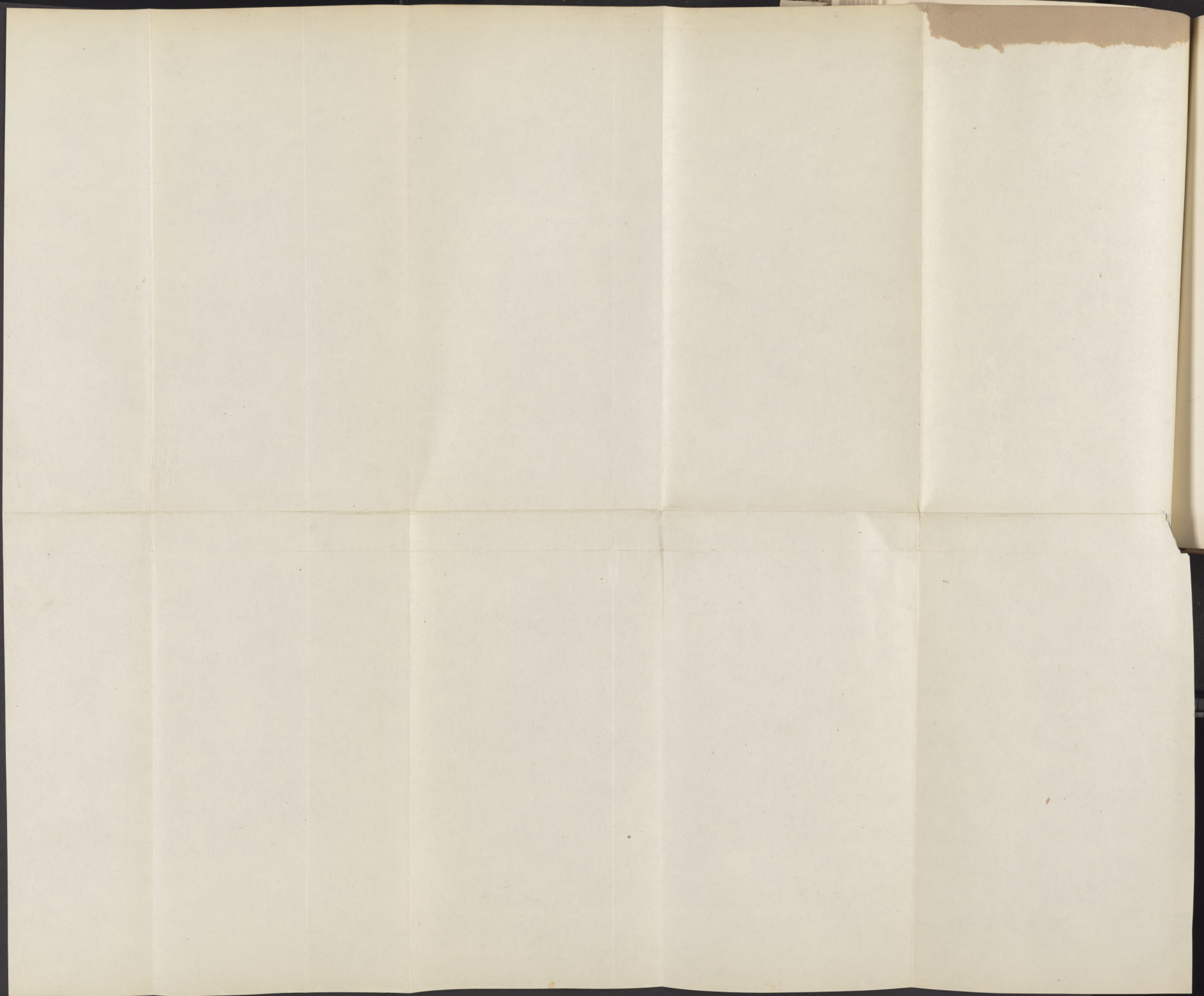
574°04'E 608.5'

PREMISES AT MONCLAIR, N.J.

SCALE 1"=20'

Newark, N.J. Feb. 2, 1924.
Barrio & Kreiner.
SURV 1013





no 66

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

VINCENT DE LUCA, <i>Complainant-Appellant,</i> <i>vs.</i> BERGER MELIN, <i>Defendant-Respondent.</i>	}	<i>On Appeal from Chancery</i>
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BRIEF FOR COMPLAINANT- APPELLANT.

Facts.

The undisputed facts in this case are that in October, 1894, the land and premises of the complainant were deeded to Josephine L. Hanna, the complainant's grantor, by Christopher A. Hinck, now deceased, Exhibit C. 4, page 131, and subsequently on or about May 15, 1902, Josephine L. Hanna, deeded the same premises to this complainant, Exhibit C. 3, page 127.

A short time before the filing of this bill, the estate of Christopher A. Hinck deeded to the defendant herein, the remaining property owned by the estate fronting on Grove street, Montclair, and beginning at the most southerly line of complainant's property running south to a street known as Ardsley road, and then running west on Ardsley road, at least to the depth of complainant's property, viz., 200 feet. The survey, an exhibit, will show that that is the depth of complainant's property and the photograph will show that Ardsley road runs parallel to the road involved in this suit, which road begins at the most southerly line of complainant's property and has a width of sixty feet. In other

words, the mutual grantor of the complainant and defendant has attempted to deed to the defendant here, the road which complainant maintains may not be closed up or encumbered.

It is admitted that the defendant intended to exercise dominion over the road in question to the south of the complainant's property (p. 82, l. 33). Testimony of witness, Sessa, who corroborates *in toto* the testimony of the complainant, showed that the defendant told him on or about January 24, 1924, that he intended to fill in the entire road involved in this suit, and would construct three garages on the road in question, so that the rear of the garages would be at the southerly line of complainant's property (pp. 87 and 88). It also will be disclosed that the defendant had started to fill in the road and that the purpose of Mr. Sessa's visit to the defendant was to object to this work being done.

The Trial Court at the conclusion of the testimony suggested that the most important question involved in the litigation was whether the complainant's predecessor in title purchased the land upon which she (Mrs. Hanna) subsequently built this house, at an enhanced price because of the agreement or promise of the seller to her (which promise or agreement was carried into effect before the house was built), that the lot then purchased by her would be and remain a corner lot through the construction of a road to the south of the property purchased at that time. We agree that this is an important question involved in the litigation, but we also maintain that the testimony which we shall hereinafter refer to discloses that the doctrine of equitable estoppel applies in other respects, that an easement has been created and the doctrine of adverse possession also applies.

It cannot be controverted that the house as built by the complainant's predecessor in title, as will be seen by the photographs which are exhibits, is an imposing looking home, and that the architecture indicates the expenditure of a substantial sum of money in the building of it. There can be no doubt that the side of the house toward the road in question is plainly to be seen from Grove street, and that the family living there necessarily obtained light and air through the numerous windows on this side of the house, and the large windows and French doors which open on the porches on this side of the house and in every respect appears to be a corner house.

ARGUMENT.

In determining where the truth lies in this case it might well be noted that those who testified on behalf of the defendant are members of the family of Christopher A. Hinek, two of whom are executors of his will, and who have executed a warranty deed to the defendant herein of the remainder of complainant's property facing on Grove street, and Ardsley road, and, therefore, their interest in freeing the road in question from any claim of the complainant is great, whereas, for the complainant we have Mrs. Hanna, a lady over seventy years of age, according to the testimony of Mr. Bowman, a witness produced by the complainant, who at this time of life would have no great interest in perjuring herself, and Mr. Bowman, a practicing lawyer of New York City, whose testimony alone would support the claim made by this complainant.

It is worthy to note that the defendant in the cause did not take the stand; it may well be that his reason for so doing was fear of being questioned as to what was told him or what he knew of the complainant's claim in the road now involved in this suit. This is important on the question of equitable estoppel.

As to the original agreement that the road next to the complainant's lot would be built so that the house would be a corner property and so remain, Mrs. Hanna and Mr. Bowman testified clearly. Mrs. Hanna had a distinct recollection and Mr. Bowman in the testimony explained why he so distinctly remembered it. The only defendant's witness produced in connection with this phase of the question was Ernest Hinck.

The architecture of the house was described by Mr. Mertin, an architect, to the effect that it was built as a corner property (p. 70).

That after the road was built and subsequently when her house was finished Mrs. Hanna said that her trades people used the road now in question (p. 33, bottom of page). She also testified regarding the porches facing the road in question indicating the desire of her husband, a former sailor, to obtain for the house, southern exposure (p. 38, ll. 26 to 31). Her negotiations were with Ernest Hinck. On cross examination in referring to her conversation with Ernest Hinck, she said, "He said at the time we bought this he would make it a corner lot. That is why we paid \$4,000 for this corner, we would not have paid as much as that if it had not been a corner lot." That the conversation was before the purchase of the lot and

that if we paid him \$4,000 it would be a corner lot (p. 35, ll. 9 to 24). That \$4,000 was a good price (p. 35, ll. 31-32).

That the road referred to in her conversation with Mr. Hinck was to be opened at least to the depth of her lot (p. 39), and as a matter of fact it was so opened and did run the depth of her lot (p. 77, ll. 31-32). She further testified as to why she did not have Hinck's agreement put in the deed, that she had no experience and that she thought people were honest (pp. 40-41). This also is important on the question of equitable estoppel. As a matter of fact she stated that Mr. Hinck told her that the road would finally go through to Ridgewood avenue (Ridgewood avenue being parallel to Grove street), and that in the meantime she could name the road, and that she did name it Waverly avenue (p. 39). That Mr. Hinck said nothing in connection with the limitation of the use of this road (p. 47). At that time she thought the Hincks owned all the property to the rear of what she was purchasing (p. 42). That after the road was built the land to the south of the road was even with the terrace on which her house was built. In this she is supported by the testimony of Mr. Bowman (p. 50), and Mr. George Miller (p. 67, l. 35, to p. 68, l. 24). That the road was depressed to the extent of about six feet. Mr. Bowman further refers to the building of the road (p. 36, ll. 36 to 38).

It appears that Mrs. Hanna acted upon the agreement of Mr. Hinck subsequently carried into effect by the building of the road, and that the road has been there for over thirty years, and that it was to remain open and clearly the doctrine of equitable estoppel applies, and, of

course, since this defendant takes through the Hincks, so his rights and duties can be no greater or less than would be Hincks, if he were living and still owned the property. (*Central Railroad v. MacCartney*, 68 Law, p. 165 at 175; *Central Railroad v. State*, 32 Law, p. 221; *Sumner v. Seton*, 47 Eq., p. 103.) These cases and several others will be referred to later on in the brief.

Mr. Bowman's testimony showed that he lived near the premises involved here, about 1894, and continued to live there until about 1908. That he is now forty-eight years old and recalls the facts distinctly (p. 49). *That the road was actually started before the house.* That they had to start to cut through before they could begin to build the house (pp. 49 and 50). That after the house was finished the road was widened somewhat and levelled and carried back to the end of complainant's lot, that eventually this road connected by way of the rear of the house with the driveway to the north of complainant's property, which road also empties out into Grove street. That Ernest Hinck was doing the excavating for Mrs. Hanna's house (p. 51). This witness testified of his conversation with Hinck, wherein the latter told Bowman about his promise regarding the road, making the lot a corner one, and that it would remain so, and that Mrs. Hanna had paid an exceedingly high price for the lot, and that Hincks were very much pleased as the expense of digging the road was little additional to what they had to expend anyway to bring up the materials (p. 52). Witness Bowman subsequently stated why his memory was so clear on the subject.

This testimony becomes important in considering the testimony of the Hincks, who some seven years after the sale to Mrs. Hanna sold Colonel Miller property on approximately the same point on the street for \$30 a foot (pp. 65-66), whereas as hereinbefore shown Mrs. Hanna's 100-foot frontage cost her \$40 a foot. This circumstance speaks more loudly than any argument we can make, because it showed that the Hincks charged the premium based upon the fact that Mrs. Hanna's house was erected on a corner lot, and therefore, its value was enhanced.

Mr. Bowman testified that the building of this house created a great deal of interest in the neighborhood, because it was to be the most pretentious there (p. 53, ll. 24 to 31). And it was the interest created by the building of this wonderful home which caused a deeper impression to be made upon him when Mr. Hinck told him it was to be a corner lot, etc. The road was built under the order of Christopher A. Hinck, Ernest A. Hinck's father (p. 102, bot.). That the road was being built in 1895, and before the house was erected (p. 53, ll. 36 to 41). The agency of Ernest Hinck is unquestioned in view of all the negotiations having been conducted by him, and the ratification of all his acts by his father even to the extent of building the road. The Trial Court so concluded (p. 52), when defendant's counsel attempted to limit the authority of Ernest Hinck.

The testimony of Miss Gertrude Miller, a sister of witness George Miller, and daughter of Colonel Miller, who, in 1902, purchased some land from the Hincks and opposite to this road in question, is to the effect that in 1898, the Miller family moved to Grove street, opposite

the road in question, and that the trades people constantly used this road and that it was always open, that these trades people always had business in complainant's house as the road ended there (p. 55, l. 30; p. 57, ll. 32-33; p. 56, top of page; p. 58, bot of page; and p. 59, top).

The testimony as to the road is also corroborated by Miss Wainwright, who resided with Colonel Miller, during some years (pp. 59-60). She also testified to planting of trees in 1907 and 1908 by complainant along the southerly side of this house, and also the grass seeding by him of what was originally part of the road in question; complainant corroborates this.

Witness George Miller testified that he lived with his father from 1898 to 1905 (p. 65, ll. 12 to 15). He testified regarding an agreement in 1903 between the Millers and the Hincks, when the Millers were purchasing from Hincks to increase the frontage of their property, 25 feet to the north and 75 feet to the south, their house being across the street from the road in question, and for which increased holdings Miller paid Hinck \$25 to \$30 a foot (pp. 65-66). Miss Miller and Miss Wainwright corroborated his testimony regarding the additional purchase of land (pp. 56, 60), and he said that Miss Hinck at the time of the deal stated that her father promised that the road opposite to the Miller property would always remain (p. 66). The road was depressed as hereinbefore referred to the level of Grove street, leaving the banks on each side even. He further testified on cross examination that the Millers would not purchase more property unless the road in question would remain (p. 68, l. 29; p. 69, l. 7).

The survey is clear and demonstrates all descriptions referred to in this brief, but we shall refer to a few excerpts of the testimony of Mr. Kreiner, a well-known surveyor of Newark, in connection with certain dimensions on his survey, which is an exhibit. That the roadway is reduced in width somewhat by the planting of trees and grass, running back to the very end of complainant's property (p. 76, ll. 8 to 12). That there are drains from the house into the road in question (p. 75, ll. 10 to 14), and that there is a continuous drive through the road in question around the rear of the house and connecting with the roadway on the north side of the house, which driveway has been kept up (p. 76, ll. 23 to 27). These drains indicate that they were so placed and entered into the road, because the road was to remain.

This complainant testified that he has kept up the road to the south of the property, spent money on it, surfaced the road, seeded it and planted trees (p. 80). That the Hincks never attempted to stop him (p. 81). That an injunction was asked by the complainant when the defendant started to fill in the road (p. 82). That he and his family and their trades people used this road (p. 82). He, thereupon, refers to certain attempts on the part of the Hincks to release his interest in and to this road. He testified of Hinck's offer to sell him land to the south of the land in question (p. 84). An examination of the pictures and the survey will show that from the southerly side of the road Ardsley road, is only about 70 feet. This becomes important for it will explain why the defendant preferred to have his now house face on Ardsley road, where he had 200 feet frontage

and the garages to the rear, instead of only having 70 feet front, the garages then interfering with what he formerly could sell as front lots on Ardsley road. Complainant's testimony was to the effect that he was offered \$2,500 in connection with his interest in this road (p. 84). That this roadway is of great value to him, because as he says, I cannot get up to my house in the winter time unless I have that road, since the road on the north side of the house is so steep (p. 85, ll. 31 to 38).

The first witness produced by the defendant was Ernest Hinck, who admittedly was the only member of the family who negotiated with Mrs. Hanna for the sale of the property in question. This witness did not deny the statement that the road was to be built to the south of the complainant's land, but attempted to avoid legal responsibility by stating that his statement to that effect to Mrs. Hanna was made *after* he gave her the deed (p. 95). In other words, he admits the truth of Mrs. Hanna's testimony to a large extent, but merely differs with her as to the time. When he made the statement he admitted further that the road was actually built (p. 96). We have heretofore shown that Christopher A. Hinck had the road built. As to his testimony on this phase of the case we refer the Court's attention to the evidence of Mr. Bowman, Mrs. Hanna and George Miller, which testimony flatly contradicts his statement; the road was actually built before the house was completed and has remained for over thirty years, and these facts tend to support complainant's witnesses and contradict the testimony of Mr. Hinck. He admitted that the Hincks owned the balance of the property to the south of the road, which was built as far as

the point where Ardsley road was cut through (p. 103, ll. 29 to 33). He is further contradicted when he says that the drains from the Hanna house ran over the surface of the land (p. 101), on the south side because the survey showed that they ran under the ground to the road in question, and manifestly that must have been done before the lawn was completed.

This witness further could not explain how it was that the road was dug before the house was finished (p. 101, top). It is also to be noted that this road was built by the Hincks beginning at the very southerly line of complainant's property (p. 102), and the balance of the property to the south was owned by the Hincks (p. 103).

The Trial Court stated that he was not particularly interested in the meeting wherein Mr. DeLuca and Mr. Sessa testified that the Hincks offered to DeLuca \$2,500 for his interest in the road; Louise Hinck testifying to the contrary. It is, however, noteworthy that the figure of \$2,500 in the testimony of Louise Hinck is mentioned and it accords at least to that extent, with the figure testified to by the complainant and Mr. Sessa, and which they say was offered to DeLuca for his interest in the road in question (p. 106). It is further noted that the price of \$8,000 as testified by Miss Hinck was reduced to the extent of \$2,500, viz.: to \$5,500, and for this price complainant was to receive the balance of Hinck's property to the south of the road, and as far as Ardsley road, and then running along Ardsley road. We do not refer to this as an offer of compromise, but as evidential of the truth of Mrs. Hanna's testimony regarding the building of the road and that its use would never be limited.

Directly after the conversation with Mr. DeLuca, the defendant here, applied for a title policy (p. 107). It may be that the information the defendant obtained from the title company was the reason that the defendant failed to take the stand. Louise Hinck apparently knew nothing of the original transaction between Ernest Hinck and Mrs. Hanna (p. 108). She admitted that when she offered the *balance of the property to Mr. DeLuca for sale, it had nothing to do with the road in which he claimed an interest* (p. 108, bottom of page; p. 109, l. 10), and, therefore, she corroborated the testimony of DeLuca and Sessa that the \$2,500 was mentioned to cover a release of Mr. DeLuca of such claim as he might have to the use of the road.

Defendant's counsel attempted thereafter to avoid the effect of Miss Hinck's testimony of this point (p. 108). This witness further testified that after her conversation she immediately obtained the advise of an attorney as to the vacation of this road by the town (p. 109).

Otto Hinck, another defendant's witness, and son of the original grantor, testified that they fixed a value of \$40 a front foot for the property which they wanted to sell to Mr. DeLuca (p. 112, ll. 10 to 26). The Court thereupon questioned him as to whether the land in the neighborhood had increased in value since the Hincks sold to Mrs. Hanna, and up until the proposed sale to the complainant, and the witness for some time attempted to avoid a positive answer (p. 112, bottom), and he finally said he considered that there had been an increase of about \$10 a foot (p. 113). In other words, they were willing to sell to DeLuca with a deduction of \$2,500, the balance of the property facing on Grove street,

and to the south of the road, and thence running on Ardsley road, at \$40 a foot, and after this street had developed into a wonderfully built-up section, and yet they attempt to argue that when Mrs. Hanna thirty years ago paid \$40 a front foot for her lot, and when there was very little building on the street, she did not pay an increased price, based upon the road that was to be built to the south of her land. Of course, it is advantageous to the defendant to sell with frontage on Ardsley road, where he has 200 feet, rather than on Grove street, where there is only 70 foot frontage south of the road in question (p. 114, top).

This same witness said they went to a lawyer in regard to the title of this road (p. 115, ll. 12 to 22), and it was decided to apply to the Board of Commissioners to vacate the public rights in the street, and that he knew nothing about the arrangement of the sale to Colonel Miller, which increased the latter's holdings on Grove street (p. 115, ll. 27 to 32). This witness and his sister, Louise Hinck, admitted that a plan or map was shown Mr. DeLuca at the time of their conference regarding the additional purchase of land by Mr. DeLuca. This map was not produced at the trial and no doubt the reason was because it showed the road in question an open way (p. 116, top).

Suffice to say that a short time after the conversation with DeLuca, a lawyer was consulted (p. 116, ll. 12 to 18). Louise Hinck upon being recalled for further cross examination did not testify in a very satisfactory manner, when she attempted to explain how it was that Mrs. Hanna paid \$40 a front foot on Grove street, in 1894, and yet seven years later and after the

property had developed in the neighborhood, Millers paid \$30 a front foot (pp. 117-118). All of this is corroborative of Mrs. Hanna's testimony.

At the close of all the testimony it would seem that the complainant had more than satisfied the burden of establishing the facts upon which his equitable right rested. The learned Vice-Chancellor's memorandum (pp. 119-120), states:

“As a matter of law I cannot find that there is anything in this case in the nature of an equitable estoppel. Moreover I cannot escape the conclusion that the complainant cannot enlarge his title by parol evidence.”

In support of the conclusion regarding the enlargement of title is cited *Naumberg v. Young*, 15 Vr. 331. An examination of the cited case does not reveal its application in the manner adopted by the learned Vice-Chancellor. In the first place there is no attempt to enlarge the complainant's title by parol evidence. The deed executed by the defendant's predecessor in title had to do with the land upon which Mrs. Hanna built her house. Complainant has the land and has the house. Complainant says that he has a right to use this road and that the defendant standing in the same legal position as the original grantor has no right to limit that use.

The parol evidence which has to do with the testimony of Mrs. Hanna, Mr. Bowman and Mr. George Miller, relates to an agreement collateral to the purchase of the land as indicated by the deed. The road built by the Hincks was not to be and was not built on the land sold to Mrs. Hanna, but had to do with property to the south and owned by the grantor. Among excep-

tions to the general rule laid down in the cited case appears, are, one, whether fraud or illegality has been set up, and two, whether the party concluding the agreement, which is reduced to writing, have, at the same time and on the same consideration, made by parol another agreement which is collateral to a subject distinct from that to which the written contract relates; if exception is present, evidence of such agreement is held to be competent. The agreement to build the road on other property of the defendant's predecessor in title, was collateral to the main agreement.

To permit the defendant because he stands in the shoes of his predecessor in title to successfully object to the introduction of this parol testimony would be a fraud on the rights of this complainant, particularly in view of the fact that we are not now asking that the road be built, *but are merely asking that the road having been built, should remain.* The cited case refers to several opinions which apparently have the approval of the Court rendering the opinion, and it would serve no useful purpose to quote at length from these exceptions to the general rule as they are fully set out in the opinion beginning at page 335. See also *Newton v. Middleton*, 127 Atl. Rep., Adv. Sheets, March 12, 1925 (Vol. 7), also *Cooper v. Colson*, 66 Eq., page 328.

The complainant does not claim he owns this road, nor does he wish to have his title increased over what he got by deed. There can be no question, but that the complainant's rights may be protected only in the Chancery Court. The defendant may as at the trial suggest that complainant's claim does not come within the class of cases referred to in *Hart v. Leonard*, 42 Eq., page 416.

However, an examination of the case of *Hart v. Leonard* discloses that equity will protect where damages are inadequate or where complainant is attempting to protect his dwelling house from injury which render its occupancy insecure or uncomfortable, or where his right to be protected grows out of the agreement or promise actually carried into effect, and to which the testimony was heard, so that this Court would have had a right to entertain jurisdiction to enforce specific performance, and even assuming that it does not come within the category of cases in *Hart v. Leonard*, that in itself does not bar equity jurisdiction, for as Vice-Chancellor Pitney said in *Dill v. Board of Education*, 47 Eq. 421, at 440, that *Hart v. Leonard* is not a complete classification of the instances in which equity will take jurisdiction. See also *Renwick v. Hay*, 90 Eq., page 147. In the *Dill* case the Court particularly describes the distinction between public and private rights, and the more lasting quality of private over public rights.

The vacation of this road by the Town of Montclair by ordinance and referring to a previous attempted dedication, no doubt extinguished the public rights of this road, but not so easily may private rights obtained by agreement *carried into effect, and upon which complainant's predecessor in title acted, may be extinguished.* By analogy this complainant's rights extend to the right of passage to and from other premises over the road wholly distinct from and independent of any right of passage acquired by the public, which latter rights were extinguished by the vacation of the Board of Commissioners.

As is stated in the Dill opinion, *supra*, at page 433, another right exists, viz.: right of light, air and ventilation, which rights are distinct from each other and capable of being separately exercised and enjoined. These latter rights will wholly be extinguished by the placing of garages at the southerly line of complainant's property and running back to the depth of the same, viz.: 200 feet.

The value of complainant's home will be gone, the prospect of it being a high piece of ground, one of the reasons why Mrs. Hanna purchased it, according to Mr. Hinck, will be absolutely lost. After the road is filled in the garages will stand even with the house.

Chief Justice Beasley in *Banghart v. Flummerfelt*, 43 L., page 28 at page 33, suggests the rule that an easement ordinarily cannot be created by parol. In the cited case there was a verdict for the plaintiff, based upon the following facts; that the defendant entered into a parol agreement with the then owner of a mill property subsequently owned by the plaintiff to substitute an artificial aqueduct and a dam for a certain embankment, which by an article of agreement under seal, the defendant before that had covenanted to build; and that it was one of the terms of such parol agreement that the defendant and his heirs and assigns would keep such substituted aqueduct and dam in repair. These works thus referred to were to be made on the lands of the defendant, which were contiguous to the mill property of the plaintiff. The Court in reversing a judgment for the plaintiff held that an interest such as the plaintiff's was not recognized in a law court.

He goes on to say on page 31:

“It is perhaps not unreasonable to infer that the plaintiff may be in this matter possessed of a stable equity which would be protected by the proper tribunal—such a quality of the transaction (referring to the agreement to continue the repair) would of itself change this suit in this court, while in equity it would, under some circumstances, be an impediment easily to be surmounted.”

At the end of the opinion the Court withheld judgment on the reversal because of the right of the then plaintiff to obtain relief in equity.

Counsel for the defendant referred in his brief to the Court below to the case of *Lawrence v. Springer*, 49 Eq., page 289, and suggested that the headnote indicated that an easement could not be in this State imposed on land by the force of parol evidence, but a reading of this opinion suggests something more than that, for it refers at page 295 to the case of *Short v. Taylor*, where Short built a fine house and Taylor began to build another, but part of his foundation was on Short's land, Short seeing this did not forbid him, but on the contrary he brought his action. The Court goes on to say at page 295:

“It will be observed that the case of *Short v. Taylor* was correctly disposed of for the facts do not seem susceptible of other than two interpretations, viz.: That Taylor took possession of the land in question with the assent of Short, in which event it was a license *executed by possession*, which would be enforceable in equity, etc.” The Court thereupon rejects another case referred to, because it did not disclose that the complainant incurred any expense or would sus-

tain any damage in consequence of a revocation of his license.

In our case it is not a mere license, but is something that we have paid for and as part of the consideration. On page 297, the Court indicates that his remarks are dicta; on page 298 the Court indicates that if the outlays of money are because of the assurances or promises of the defendant, that that goes to the nub of the question. In our case the Hinck family lived close by and saw the house being built, saw the architecture and directed that the road be built.

We maintain that the cited case is not authority for the proposition that equity must refuse relief in a case similar to the one at bar. This Court will protect the complainant from the threat of one to disturb his right of way (*Shreve v. Mathis*, 63 Eq. 170).

The case of *Sumner v. Seton*, 47 Eq. pp. 103-115, is authority for the statement that silence will estop a party against speaking afterwards, and that silence where it is the duty to speak may amount to fraud. This conclusion is important in connection with five requisites of estoppel referred to in *Musconetcong Iron Works v. D. L. & W. R. R. Co.*, 78 Law, p. 717 at 719.

The testimony for the complainant brings his acts within these five requisites.

1st. Because the defendant's predecessor in title made a representation of fact regarding the road, which is not consistent with the position of the defendant at this time.

2nd. If their representation was honest then there would have been no mental reservation as to what they would do in the future in limiting

the complainant's right to use the road, and if there was a mental reservation, then the facts as represented to the purchaser of the land they knew to be otherwise than the representation, viz: that later on perhaps as long after as thirty years they would attempt to close up the road.

3rd. That the testimony distinctly shows that the representation was made to induce Mrs. Hanna to pay an enhanced price for the land.

4th. That Mrs. Hanna, had no reason to disbelieve the representation made to her, but on the contrary would believe the representation as to the continuance of the road, since the road was actually built, even before the house was completed.

5th. That an imposing looking home was built upon the representation as to this road, and the architecture was different from a house in the middle of a block, and if the defendant who holds through Hinck is now permitted to repudiate, the damage will be irreparable.

It, therefore, can immediately be observed that the doctrine of equitable estoppel applies. What is to become of this beautiful home if this rule does not apply? A mere glance at the pictures which are exhibits will disclose the result.

The case of *Philhower v. Todd*, 11 Eq. p. 312, is authority, followed by numerous cases, as to what length equity will go to prohibit one from taking advantage of his own wrong.

The relief argued for by the complainant is based upon a well established principle of the court of equity. The first case we find similar in principle is *Bechtel v. Carslake*, 11 Eq. p. 500. The defendant in his brief in the chancery court argued that the relief was not granted in that

case. That is true, but the denial of the relief was based upon the uncertainty of the evidence and not of the principle involved. Our case is stronger because we are not asking the defendant *to build a road or increase its size, we are merely asking that he be enjoined from reducing the size or destroying one already built.* An examination of the opinion of the Court in the cited case demonstrates that the last head note at the beginning of it, is the principle enunciated in it, viz: A. purchased a lot from B. on an alley actually opened eight feet wide. B. at the time of the purchase, promised to widen the alley to the width of sixteen feet. B. widened the alley. A court of equity will enjoin B. from narrowing the alley to its original width. This rule is equally effective whether the promise, or in some cases, a license is by parol or in writing.

Defendant's counsel also argued below that this case has not been referred to with approval in any other cases, except the Gill case, *supra*, which is correct. The Gill case, however, *has been* quoted with approval and there are numerous cases to support the complainant's theory that the doctrine of equitable estoppel should apply here.

As we have hereinbefore shown, the evidence is clear, convincing and without serious contradiction; and the rule contended for by us would apply, even though the testimony of Mr. Hinck who sold to Mrs. Hanna were uncontradicted, viz: that he only spoke about the building of this road in question after Mrs. Hanna had purchased. As a matter of fact, the testimony of Mrs. Hanna, Mr. Bowman and Mr. Miller, is to the contrary.

Where improvements of a permanent nature have been made by a person on his own land, the

enjoyment of which depends upon a right recognizable by the law affecting the land of another and to which his consent is necessary, and where such consent is expressly proved or necessarily implied from the circumstances (and in our case the circumstances are that the road was built before the house was completed) and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon a proper bill filed, enjoin the licensor from accomplishing his fraud, etc.; and further, an equitable estoppel will affect a subsequent purchaser to the same extent as his grantor, when he had had actual notice of the condition of things upon which it is based, or when the circumstances are such as to put him upon inquiry to ascertain the facts. (*Raritan Power Co. v. Veghte*, 21 Eq. p. 463.)

The defendant in this case could not have escaped seeing the road. It had been there for over thirty years, and no doubt his reason for failing to take the stand was fear lest he be cross examined on this phase of the case. The last cited case is also authority for the principle that *even assuming it to be a mere license*, that, when it has been executed upon the lands of the licensor to the extent of permanent works and improvements in pursuance thereof at great expense, equity will not permit its revocation, at least to the extent of its execution. The cited case in the Court of Appeals has been quoted as authority in subsequent cases.

It is quoted with approval in *Van Horn v. Clark, et als.*, 56 Eq. p. 476, a case almost identical in principle with the case at bar, in which

the Court distinguishes the principle, mostly dicta, laid down by Chief Justice Beasley in *Lawrence v. Springer*, 4 Dick. 289, since in the latter case it did not appear that there was any consideration moving to the licensor operating as part of an easement or that the licensee has gone to expense, etc., in pursuance to the authority granted. The above cases are followed by *Polakoff v. Halphen*, 83 Eq., page 126, and follows the principle laid down in those cases and in the Carslake case, *supra*. It is immaterial whether these cases determine that an easement is created or that the parol authority may not be revoked if it will work a fraud upon the innocent person who has acted pursuant to such authority at great expense. The case of *Klein v. Stamler*, 124 Atl. Rep. 366, follows the above principle. The Court there says after citing numerous cases on this subject:

“A license with an interest or an equity will be protected, etc.”

In conclusion, we maintain that the complainant had an easement in the road in question or that the license to use the road, upon which complainant's predecessor in title acted, in the building of the house, should be protected in equity. The doctrine of equitable estoppel is not a novel experiment in this case, but follows a long line of decisions. We have already shown that the defendant is equally bound under the circumstances existing here as would be his grantor for the road has never been shut and has been used for over thirty years. *He certainly was put upon inquiry before purchasing, as to the rights of others in that road.*

In equity and good conscience the defendant should be restrained from in anywise interfering with the road and the complainant's use of

it; and the entire decree of the Court of Chancery should be reversed and a decree ordered in favor of the complainant and permanently enjoining the defendant pursuant to the prayer of the bill.

KALISCH & KALISCH,
Solicitors of Complainant-Appellant.

ISIDOR KALISCH,
On the Brief.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

VINCENZO DE LUCA,
Complainant-Appellant,

and

BERGER MELIN,
Defendant-Respondent.

BRIEF FOR DEFENDANT.

Facts.

In October, 1894, Christopher A. Hinck was the owner of a very large tract of land both east and west of Grove street, Montclair, New Jersey, and for a great portion of the way, running through to Ridgewood avenue, Glen Ridge, New Jersey. About that date, he conveyed a plot having a frontage of 100 feet on the east side of Grove street, by 200 feet in depth, to Josephine Hanna. This lot was situated on a knoll next south of a similar tract Mr. Hinck had sold to Inness, the artist. The negotiations were entirely between Mr. and Mrs. Hanna and Ernest Hinck, who apparently acted for his father, Christopher Hinck. Inasmuch as it is the claim of the present complainant, that he succeeds to whatever rights Mrs. Hanna acquired, complainant's whole case rests on what was said between these two people, Ernest Hinck and Mrs. Hanna, thirty years ago. They alone know the facts. Ernest Hinck never had any interest, financial or otherwise, either directly or indirectly in this property, or in the outcome of this suit; Mrs. Hanna's only interest was that she

sold the property by warranty deed to the present owner in 1902.

Mrs. Hanna says that Ernest Hinck promised, at the time she bought the lot, that at some time in the future, a street would be laid, so as to make her lot a corner lot, and that about a year, or at any rate, not more than fourteen months after the sale of the lot, such a road was commenced.

On page 26, line 18, she says:

“A It should be a corner lot. ‘We will make it a corner lot.’ That is what he said.”

On this all important matter, there is practically no other testimony bearing upon the issue than this, and there is no positiveness in her testimony, even on this point. For instance, on page 27, line 17, on direct testimony, she says:

“Q Was that before you paid the money for the place or after? A I think, before, I think, before.”

This good lady’s memory, which is so important to us, is none too clear on other matters that took place at the same time, which must have been more important to her. For instance, on page 27, line 28:

“Q Will you please tell us whether your house was started first, or the road, which was spoken about between you and Mr. Hinck, was started first? A I can’t tell you. I don’t know.

Q Have you any recollection at all? A I think the house was started first.”

On page 40, bottom and top of page 41, she says that she thinks she had Mr. Goodell search the title, but although, if her memory is correct now, this street must have been uppermost in her mind, nothing was said to her counsel about it.

While in justice to her, at the same time, she insisted that she was promised a corner lot, this is what she testified on cross examination, on top page 45:

“Q Now, as a matter of fact, you had your negotiations with Ernest, and had agreed upon the price of the lot— A Yes.

Q —before there was anything said about this street? A Yes.

Q And that subsequently Ernest told you about their plans for developing that property, and that those plans included putting through a public street, didn't they? A Yes.”

So too, at page 45, line 25:

“Q At the time he had no map of this property prepared? A No.

Q The exact location of this street hadn't been determined? A No.

Q Of the course of the street hadn't been determined? A No.

Q Except in a general way: it was to run to Ridgewood avenue? A That's all.”

Mrs. Hanna lived there eight years, and yet, the so-called street which they are now making such a point about, could not have made very much of an impression upon her. Certainly, from any language thus far, and from the following, it does not look as though she built on the faith of the street being there.

On page 45, line 34:

“Q I understand you to say, during the period you were there you didn't make any use of this road at all? A None whatever.”

She testified (p. 43, ll. 20-30) that never at any time after this one alleged conversation, was this road, which was admittedly put through long after the sale, mentioned either to Ernest Hinck or to his father, or to any of the members of the family.

In view of some cases quoted later on, it might be well, at this time, to bring home clearly that at that time, even from Mrs. Hanna's standpoint, whatever conversation was had with Ernest Hinck, referred to a road to be built in the future.

On page 46, top:

“Q In this conversation with Ernest Hinck, besides speaking of the proposal to build this road, he spoke also about the development of the other lots to the south, didn't he? A Yes.

Q All this was something in the future? A In the future.”

If she was depending upon this street, as is now contended, she did not go very far to reach an understanding.

On bottom page 41 and top page 42:

“Q Now, how wide was this road to be, under your agreement with Mr. Hinck? A How wide?

Q Yes. A I don't know.

Q There was no agreement as to width? A There was no agreement as to width.

Q There was no agreement as to how long it should be there? A It was going to be a street.

Q I am asking you the width of it. No agreement about grading it. No agreement about the nature of the paving? Was there any agreement it should go through to Ridgewood avenue? A It was said it would go through. He said it would go through.”

In order to make out a case of estoppel for his present client, on the theory that this was a corner lot, it is now earnestly urged by counsel, that Mrs. Hanna designed her house as a corner house, but let us challenge him to show one word from Mrs. Hanna, the only person who would

know this, to support any such theory. How passing strange it is that the lady who owned the house, who had all to do with the planning of it, didn't realize it, although counsel almost put the words in her mouth. In order to show what this lady's intention was, an architect, whom she never knew, and never saw, is brought out from New York thirty years later, to testify that she must have intended it as a corner house. There might have been some point in calling the architect who designed the house, for we might have elicited some information from him, but her own architect "never saw the house; never saw the place" (p. 48, l. 27).

After all, it is not what the house looks like. It is whether Mrs. Hanna, supposing she had a corner lot, planned her house as a corner house. She is the only one who knows that, and she says she didn't. Taken in connection with a quotation from her testimony above, in which she said that they never used the road, it is quite apparent that this so-called road was not only not used, but not even thought of in connection with the house. Counsel cannot look to anybody else for Mrs. Hanna apparently dominated the situation.

On page 41, line 24:

"Q I understand you to say you had most of the negotiations? A It was *my house; my land.*"

Though complainant's counsel tried valiantly to draw some expression from Mrs. Hanna, to lend color to the fact that she intended it as a corner house, he failed utterly.

On page 48, line 27, she says:

"The architect was never there—never saw the place."

Nor does it appear that they ever mentioned this so-called street to him. If we are trying to find out whether Mrs. Hanna intended to put up a corner house, here is her testimony, bottom page 37 and top page 38, she testifies unequivocally:

“Q Mrs. Hanna, when you built this house, before you built this house, you contemplated the kind of house you were going to have, for quite some time before that, of course? A Yes.

Q This house was about the house that you would build irrespective of where you built it, isn't it? A Yes.

Q This was only the lot. Had you selected the lot elsewhere you would probably have built the same house? A Probably.”

She then goes on to say that she merely built her house in keeping with the class of people in the neighborhood. That the only reason that the porch was on the side toward the street was because that was a southerly exposure. There is not one atom of evidence to show any change of position, relying upon the fact of these alleged representations as to a road being built there. This, then, is the testimony of the only person in a position to know the facts, outside of Ernest Hinck.

In the case of *Bechtel v. Carslake*, 11 N. J. Eq., p. 501, and religiously relied upon by adversary, the Chancellor says, at p. 508.

“The burthen of proof is with the complainants. They are seeking to deprive the defendants of the use and enjoyment of the property, the title to which is indisputably in them. They should show a clear case *free from all reasonable doubt.*”

And although, in the very case he relies upon, the complainants had produced a number of wit-

nesses who testified very positively to the verbal representations, the Chancellor did not grant complainant's relief for this very reason.

To this testimony of Mrs. Hanna is opposed the testimony of Ernest Hinck, who, in spite of counsel's intimation, never was, and is not now either interested in the property, in the Hinck estate, or in the outcome of this suit. He is a man of high standing in his community; having been Mayor of Montclair; he is clear and specific. He acted as broker for his father. This is what he says (p. 94, l. 20):

"A Captain Hanna and Mrs. Hanna were looking for a well drained piece of property and, instead of taking them up to the mountainside, I showed them the property on the west side of Grove street, which is a knoll; it is a stretch of property of about four or five hundred feet, which was the cream of the property in that neighborhood, and the view of New York, the view of the mountain induced them to buy the property."

Then (p. 95 top):

"A I told them that I had a knoll and took them to the knoll and then sold them the property on the strength of that."

Counsel must be either mistaken or somewhat technical in his brief, when he says that he did not contradict Mrs. Hanna's testimony about the corner lot. On (p. 95, l. 10):

"Q It was testified by Mrs. Hanna that you said, 'This will be a corner lot,' and that she purchased that lot, paid the price, because you said it was to be a corner lot. Did you have such a conversation? A I positively did not have a conversation of that kind with her before she got the deed to the property or before she made a contract for the property."

Then he goes on, on (p. 95, l. 21), and tells the nature of the conversation that he did have.

“Q What was the conversation? A The property in general, the layout and the plan of the property in general was discussed with Mrs. Hanna and in that conversation I stated to her—it was our intention of laying the street between Grove street and Ridgewood avenue.

Q Did you tell her where? A No.

Q Was this before she bought or after?

A This was *after* she bought.”

Though it appears that Mrs. Hanna had nothing to do with the road; never used it; never mentioned it to the Hincks, or to anybody else, corroboration of the corner lot theory is said to be shown in the testimony of a Mr. Bowman, who now lives in Ossining, New York; but who, at that time, was a boy, living about a quarter of a mile South of the property in question. He said that Hinck told him that the property had been sold as a corner lot. This alleged conversation was thirty years ago. There is not shown, nor does there appear any reason whatever, for Bowman to remember it. He had no interest in the property. The conversation is almost too pat; the Vice-Chancellor saw the man and undoubtedly viewed with great amount of doubt, testimony that purported to give an exact conversation so long ago. On (p. 52, l. 14) he says that Ernest Hinck said,

“I have promised Mrs. Hanna and Captain Hanna that the road would be dug there and the lot should be made a corner lot and remain so.”

Notice how *every legal element* of what they are now trying to establish is carefully couched in this short conversation made to a disinterested boy of eighteen, thirty years ago, and in weighing this testimony, we must recall that Mr.

Bowman testifies that Mrs. Hanna is his client. Mr. Bowman was also hired to secure Mrs. Hanna's affidavit, for use by the complainant on the preliminary hearing.

The depositions of Mrs. Hanna for this final hearing, were taken in the presence of this witness, at Mr. Bowman's office, by arrangement with complainant's counsel. One cannot overlook that, however unconsciously, the memory, dimmed by thirty years, can be wafted one way or the other.

Bowman's testimony is contradicted absolutely by Ernest Hinck, (p. 98) top:

“Q Did you have such a conversation?
A Indeed I did not.”

This is all the testimony that bears on the direct issue. There were some other witnesses, to be sure, but they were not in a position to know. Take, for instance, all the Millers, and Miss Wainwright; all these people are intensely interested in the outcome of the suit. In fact, George Miller voluntarily came all the way from Massachusetts to testify. Why? The Miller property is directly across the street from this alleged road, and if buildings were put up, or if this land were improved, the Miller's view is entirely cut off on that side. All of their testimony proved to be pure hearsay, except George Miller. The only thing that George Miller testified to is what he alleges Louise Hinck said, and it is quite apparent, from the testimony, that Louise Hinck was never in a position to know anything about the road we are interested in. Louise Hinck denies absolutely the conversation he alleges was made in his presence. On (p. 105) top:

“Mr. George Miller was never present when Colonel Miller discussed the purchase of that (Miller) lot with me. I never men-

tioned the opening next to the Hanna property to Colonel Miller.”

And furthermore, she denies that she ever heard of any such promise having been made to the Hannas.

But it is said that there was subsequently an attempt to settle any friction with the complainant; and that would tend to show that the Hincks recognized complainant's title. The Court very properly said at the hearing, and that appears in the record that he did not give very much weight to that part of the complainant's testimony. It is clear that if it were in fact an attempt to compromise, it would be incompetent evidence, as the Court well knows. What actually took place is this: A new street called Ardsley Road had been built, at right angles to Grove street, and a little over 100 feet South of and parallel with the opening that we are discussing.

The Hincks were about to sell property on Ardsley Road; and this corner lot, they first offered to Mr. DeLuca, with a frontage of 200 feet on Ardsley Road. The property was more valuable to DeLuca than to anybody else; but to fill up this opening of 60 feet by 200 feet, they figured it was worth at least \$2,000, because, as will be seen, there is quite a cut. This is what Miss Hinck, on (p. 105, l. 30) says of this meeting:

“I told Mr. DeLuca that I was cutting through this street, Ardsley Road; that I would sell him the land south of his house to Ardsley Road at a depth of two hundred feet

on Ardsley Road for \$6,000, that I could sell it for him at \$8,000, thinking that he might need \$2,000 for the filling in of that opening. Mr. DeLuca said he would give \$7,500. My brother, Otto H. Hinck said, 'Well, let us split the difference; sell it to him for \$2,500, then we will really—let us sell it to him for \$5,500; then we are giving you \$2,500,' because we knew we could sell the land for \$8,000.'

I have referred to this at more length than I intended, because the Court, in a little examination of Otto H. Hinck on (p. 112) (who, all his life, has been in the cotton brokerage business, and knows nothing about real estate), bottom (p. 114, l. 19), seemed to get the impression that the Hincks were willing to sell this property which adjoined the part they had sold to Mrs. Hanna on the South some thirty years later, at practically the same figure that they had sold to the Hannas. It is counsel's fault that this was not made clearer at the hearing. Although this property next South is not on the knoll, the Court can readily see, by reading the testimony, that the \$40.00 a foot was for the 200 feet fronting on Ardsley Road, which is a new street; and which, of course, is subject to future and heavy assessments. This plot only has a little over 100 feet on Grove street, which would make the price, if they sold in reference to the Grove street frontage, (as they did to Hannas) at something like \$75.00 or \$80.00 a foot.

Now that we are on the question of the price of the land, counsel seems to make much of the fact that the Millers paid \$30.00 a foot in 1903, for land on the *West* side of Grove street, while seven or eight years earlier, Mrs. Hanna paid \$40.00 a foot on the *East* side. The Vice-Chancellor knows that section of Montclair, which, on

account of the lack of transportation facilities, did not develop at all, until about five years ago.

But, as testified to, there is no comparison between the two sides of Grove street at this point. On the East side (the Hannas' side) is a knoll, commanding a vista for miles around, and a clear view of New York. With all of Montclair to choose from, the great artist Inness had chosen the plot adjoining this Hanna place on the North, as his home—undoubtedly for the same reason. Inasmuch as he purchased from Christopher Hinck, we can show that he paid almost a like price. The Miller property, on the other hand, was on the opposite side of the street, and enjoyed none of these advantages, and was likewise subject to being cut off from any view at all by buildings on the opposite side of the street. It is a well-known fact, for instance, that land on the West or high side of Upper Mountain avenue, Montclair, sells for almost double the land directly opposite, on the East side, for the very reason just mentioned. Should any sinister inference be drawn from that?

Nor is it to be overlooked that the year 1903 was a year of financial stringency and depression.

Before closing a review of the facts, a glance at the surveyor's testimony will show that complainant's position is not particularly equitable. The DeLucas purchased and paid for only 100 feet front—yet he has presumed to incorporate in his lawn, use and occupy as his own, a plot of land with a frontage of 24.28 feet by 200 feet deep, of this so-called road, title to which is conceded in defendant. On this, complainant is naught but a squatter. The Hinck estate, according to the evidence, has always paid the taxes

and assessments on it. Without a deed or grant or reference to any street in any deed, but by mere words testified by an aged lady of uncertain memory to have been spoken thirty years ago, this complainant tries to cement his possession of the 25 feet thus incorporated in his lawn and acquire 35 feet more.

Shades of the Statute of Frauds! As Chief Justice Beasley says, in the leading case of *Lawrence v. Springer*, 49 Eq. at page 298:

“According to Professor Pomeroy on such occasions as this (*i. e.*) (a case of estoppel, where an attempt was made to get around the Statute of Frauds by verbal testimony) *the most certain and unmistakable evidence* is inexorably demanded, and it is manifest that this requirement is not fulfilled by the above stated evidential contradictions that are nearly in equipoise.”

THE LAW.

The evidence leaves no doubt as to the nature of this opening. At law, it was, as long as it was opened, a *continuing offer to dedicate*. It was not a dedication, because a dedication would involve some sort of acceptance by the public, or the municipality, either by formal action or by constant user by the public. It is conceded that neither of these existed.

Whatever rights the public had acquired were given up by an ordinance passed in accordance with the laws of 1917 at 416, which provides for the procedure whereby the public gives up its rights in cases like this. If, however, complainant had acquired *private* rights in this road, not as a mere member of the public, it is, of course, conceded that such rights would not be affected by this ordinance.

Complainant can only acquire the rights which he now asserts in this alleged road.

1. By deed or grant of an easement.
2. By adverse user over the statutory period.
3. By implication.
4. By dedication.
5. By estoppel.

We may at once eliminate number 1, as it is admitted that there was no reference to the street in any deed; though there isn't the slightest doubt that, had this alleged road the significance they now say it had, Mr. Edwin B. Goodell (a splendid real estate lawyer), who, it is testified, closed the title, both when Mrs. Hanna bought and when DeLuca bought, would have inserted a reference to their alleged rights therein.

We may also eliminate number 3—title by implication—because complainants do not claim such; and that would, of course, involve selling with reference to some actually existing street.

Nor do they claim under number 4—a dedication—for as the evidence amply shows, there was no dedication. As was said in the case of *Schmidt v. Spaeth*, 82 N. J. L., p. 575.

“A dedication of land as a public highway does not, *ipso facto*, create such a highway. There must be not only dedication by the owner for that purpose, but the acceptance of that dedication by the public in order to create it. Acceptance may be by a formal action, or user by the public.”

This leaves title by adverse user and estoppel—under either or both of which some claim is made by complainant.

Adverse User.

But if *adverse* user for the statutory period is claimed, both the law and the facts are against complainant (p. 45, l. 33).

“Q I understand you to say, during the period you were there you didn't make any use of this road at all? A None whatever.”

The only shred of evidence is that of the interested party, DeLuca, who says, in a rather casual way, that he and his family had always used the road. Where? Admittedly not 60 feet; admittedly not the whole length. Certainly, the 24.28 feet he calmly incorporated in his lawn, he does not hope to acquire by adverse user. As to that, he is merely a squatter. Under such a theory, any man may acquire a foot or two of his neighbor's lawn, by simply mowing it, while his neighbor was in ignorance of where his exact line lay. That is not adverse user.

The law is clear. Here, the road was admittedly opened by Christopher Hinck for all to use. He was going to make a public street. Everyone could use it. It was with his full sanction and permission, as all the evidence shows. The element of *adverse, i. e.*, against the will of the owner, is entirely lacking.

In the note to 44 L. R. A., N. S., p. 89:

“It is a well-settled principle that the use by the express or implied permission of the owner, no matter how long, continued, cannot ripen into an easement, by prescription, since one of the elements essential to the acquisition of such an easement—namely, *user* as of *right* as distinguished from *permissive* user is lacking.”

In the case of *Penn. Railroad v. Hulse*, 59 N. J. L., p. 54, is the following headnote:

“Where the plaintiff’s use of a way was, at its inception, permissive, its mere continuance for the statutory period will not ripen into a *hostile* right.”

In *Cobb v. Davenport*, 32 N. J. L., p. 369:

“A user to be adverse must be under a claim of right against the true owner, with such circumstances of notoriety as to afford of indication to the owner that a right is claimed against him. The theory of law is that the owner *knew* that they were claiming a *hostile* right and acquiesced in it.”

If the question depends upon the adverse user (which is absolutely in dispute), then I think the Court will agree with me that the Chancellor has no jurisdiction, especially in view of the fact that this objection was raised in the answer.

Such was the holding in *Todd v. Staats*, 60 Eq., p. 507 (Court of Errors, 1900); also *Hart v. Leonard*, 42 Eq., p. 416.

Estoppel.

Complainant undoubtedly realizing that his title by adverse user is of little account; realizing, as he must, that he is claiming an interest in lands, without a writing, as required by the Statute of Frauds, insists that he has a right by estoppel. That by reason of something that he alleges Ernest Hinck said to Mrs. Hanna thirty years ago, control of the plot 60 feet by 100 feet vests in complainant.

There is nothing unfamiliar about the doctrine of estoppel, but in every instance, in any well considered case, it will be found to involve *fraud*—a misrepresentation of an existing fact. Or,

with full knowledge of *existing facts*, the party maintains silence, when it was his duty to speak.

In the present case, Mrs. Hanna's testimony is clear on one point in her conversation (whether that took place *before the sale*, as she vaguely said it did at times, or *after the sale*, as Hinck said it did, or as Mrs. Hanna says, top of page 45). She is quite clear that it referred only to a *promise at some future time* to put down a road (p. 39, ll. 10-20). The road was not there. There was no map, no stakes, nothing indicating a road (p. 45). Christopher Hinck meant to put through a road sometime, to Ridgewood avenue, but the fact that he could not get Lindenmeyer's permission made him change his plans.

In the leading case of *Insurance Co. v. Mowry*, 96 U. S., p. 544, at p. 547, the Supreme Court of the United States, speaking through Justice Field, says that estoppel cannot be based upon an agreement for something to be *done in the future*.

"If the representations relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion liable to modification or abandonment upon a change of circumstances, of which neither party can have knowledge * * * estoppel cannot arise from a promise as to further action, with respect to a right to be acquired upon an agreement not yet made."

In Professor Pomeroy's justly famous work on Equity, 4th Ed., Vol. 11, Sec. 808, on page 547, he says:

"The facts represented or the concealment must in general be either existing or past, or at least represented so to be. A statement concerning future facts would either be an expression of opinion, or would

constitute a contract, and be governed by rules applicable to contracts.”

In the case of *Musconetcong Iron Works v. D., L. & W. Railroad* (a Court of Errors case), 78 N. J. L., at the bottom of p. 718 and top p. 719, five elements that must be present in order to create an equitable estoppel in this State are carefully set forth.

I submit that the first and second elements are entirely lacking, and there is certainly grave doubt as to whether the fifth is present.

Element No. 1. “The party against whom the estoppel is urged must have made a representation or concealment of a material fact inconsistent with the facts forming the basis of his present claim.” But both agree that Hinck told only of plans or promises *for the future*. Whatever he said was absolutely honest, but circumstances prevented their being carried out.

Element No. 2. “He must *know* that such facts are otherwise than as represented.”

Hinck couldn't know the *facts* were otherwise, because they were but plans for the future, and even complainant does not for a moment contend that Christopher Hinck (well knowing that he never intended to build a road) sent Ernest Hinck over to represent that he was.

It is submitted that these two of the five elements (all of which the Court of Errors says must be present), being lacking, complainant's theory of equitable estoppel must fail.

Nor does it appear that there is the slightest proof that anybody relied on what complainant alleges were representations. Complainants say the house was built as a corner house, but they utterly fail to prove it.

In the case of the *Mutual Life v. Norris*, 4 Stewart, at p. 585:

“In other words, it must be a *fact* which is misrepresented.”

In the case of *Banghart v. Flummerfelt*, 43 L., p. 29—this is an important case—the facts were that the defendant agreed with one Albertson to convey to him a certain mill and lands; before the delivery of the deed, it was mutually agreed between the defendant and Albertson, by *word of mouth only*, that in the place which apparently separated the two premises the defendant was to dig a new channel for the creek and construct a new dam and embankment thereon. Moreover, defendant also verbally agreed to keep this ditch in good repair.

Defendant actually built the creek and constructed the dam and embankment. The suit arose over a failure to keep up repairs. The great Chief Justice Beasley delivered the opinion. On page 31, he says:

“If the defendant should tear down this dam and fill up this aqueduct, it seems quite clear that the plaintiff could have not redress for the damage that would ensue, founded on this unwritten agreement. The most cursory reference to the books will raise a conviction that the law on this subject is entirely settled. ‘An easement in the land of another,’ says one of the text writers, ‘is by common law grantable only by deed, and, of course, no verbal agreement which amounts to conferring an easement or a right in the nature of one can be, as such, available to either of the parties to it. The law on this point is too well settled to require any detailed citation of authorities.’”

In the leading case of *Lawrence v. Springer*, 49 Eq., p. 289 (a Court of Errors case), Chief

Justice Beasley holds that an easement cannot be imposed by parol. The headnote is as follows:

“It would seem that an easement cannot be, in this State, imposed on land by the force of parol evidence.”

The Chief Justice, on page 292, takes occasion to call attention to the fact that where in some jurisdictions the strict enforcement of the Statute of Frauds has not been observed, it has proved disastrous.

“ ‘The statute,’ says Lord Redesdale, ‘was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed the result would probably have been that few instances of parol agreements would have occurred. Agreements from the necessity of the case would have been reduced to writing. Whereas, it is manifest that the decisions on the subject have opened a new door to fraud.’ ”

The Chief Justice made it very clear where the Court of Errors stood on the subject in this State in 1892. This date is significant, as this is a decision of the Court of Errors. The case of *Bechtel v. Carslake* was decided in 1858, and never appealed. The case of *Dill v. The Board of Education* was decided in 1890, and was never appealed. Neither of these cases have been recognized by the Court of Errors in any subsequent case.

Before taking up a few criticisms of adversary's brief, I would respectfully point out that complainant would not be in a position to make

his present contention before this Court, were it not for the introduction of illegal evidence. Without the introduction of what we conceive to be illegal evidence, (and strongly objected to at the time) no color of representation of any kind could have been made out.

In the case of *Dewees v. Manhattan Ins. Co.*, 35 L. 366, equitable estoppel was relied upon by the plaintiff on an insurance policy. Chief Justice Beasley, in deciding the case, and in criticising a New York case which had been cited, says at (p. 375).

“It is idle to say that estoppel, if permitted to operate, will prevent a fraud or inequitable result; most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties * * * The mistake of the court appears to have been in regarding simply the legal effect of the facts which were proved by parol. *Receiving that testimony* into the case, a clear estoppel was made out; but *the error consisted in the circumstance that such oral evidence was, on rules well settled, inadmissible.*”

How, for instance, without doing violence to our leading case of *Naumberg v. Young*, 15 Vr. p. 331, could the testimony of Mrs. Hanna be possibly admitted to enlarge her title. I know of no case except where there is a direct attack on the instrument, such as in a case of reformation or rescission where testimony of this nature could on any theory be admissible, and I think, if this one point stood alone, it is strong enough in point of merit, to defeat complainant's claim.

I submit, that upon reflection, and upon considering again such cases as *Naumberg* against *Young* and *Deweese v. Manhattan Ins. Co.*, the Court will feel that to allow complainant to attempt to enlarge his title by verbal testimony, and by verbal representations alleged to have been made, either prior or subsequent to the delivery of the deed, is illegal and does violence to the plain rules of evidence and the Statute of Frauds.

The last case I wish to refer to on defendant's part is the case of *Hart v. Leonard*, 42 Eq. p. 416. This terse, carefully considered opinion by Justice Dixon (speaking for the Court of Errors and Appeals), has been considered for generations, almost a sacred code, fixing the limit of Chancery jurisdiction. Dixon's principles are held up by law schools and by judges everywhere as something fixed. This opinion was by the Court of Errors, and what was said was necessary for the decision. It was the unanimous opinion of the Court. It is inconceivable that the great Justice Dixon, as well as the other able Judges, who were associates, did not carefully examine the case of *Bechtel v. Carslake*—decided 1858—a case which never went beyond the Chancery Court, was never quoted or followed in any case, was never recognized by the Court of Errors, and is merely referred to in a passing way by Vice-Chancellor Pitney, in the case of *Dill v. The Board of Education*. Of these great principles, only the sixth could come even within striking distance, namely, "cases where the object of the bill is to prevent an injury which will be destructive of the inheritance, or which equity deems irreparable," but an examination of all the cases collected under that rule does not include cases like the present; and certainly, if

complainant has the rights he claims he has, he can readily establish them at law.

Let us turn for a short consideration of adversary's brief. Counsel refers to all of his witnesses as though he had several whose testimony shed any light on it, and tries to show that they are disinterested. As shown above, Mrs. Hanna is naturally vague, and little reliance can be placed on Bowman's testimony for the reasons given.

In *Bechtel v. Carslake* (relied upon by counsel), complainants were able to produce a large number of witnesses, who testified (the Chancellor says) very positively of Miles' intention to open up an alley 16 feet wide; but in spite of this, the Chancellor did not give the relief.

Counsel also refers to all the Hincks as though they are interested. This is not a fact. Ernest Hinck has no more interest in the estate of Hinck than counsel has and is not in the slightest degree directly or indirectly interested in the outcome of this suit. Counsel has said that Louise Hinck and Otto Hinck are interested, because they gave a warranty deed, but he speaks apparently without looking at the deed which is a bargain and sale deed. Legally, neither Otto Hinck or Louise Hinck have the slightest interest, and will not be affected, no matter which way the case is decided. He refers to it as a peculiar circumstance that the purchaser should go to the title company to get his title examined. It would be very peculiar if he didn't. He tries to make a point because defendant's counsel did not call the defendant. What could the defendant have testified to? He knew nothing about the matters in dispute. Counsel goes gaily along in his brief, as though he has proved that the house was

built as a corner house, but it is very significant that he does not assist the Court by showing any evidence to that effect by Mrs. Hanna—the only lady who knew.

Let us consider certain cases he cites. First, *Bechtel v. Carslake*, 11 N. J. Eq., p. 508. This was a Chancery case decided in 1858. As stated above, it has never been followed or referred to in any case but the case of *Dill v. The Board of Education*, which was another Chancery case, and then only in a very passing manner. No case in this State or any other State of respectable authority, goes so far as the principle that is suggested there.

After his long dissertations on the law, set forth in that case, it is very notable that the Chancellor *did not* grant the relief.

It must be noted also in that case, that there was an *existing fact*. There were deeds of record, referring to a 16-foot alley—an alley opened at the time of sale. In spite of numerous witnesses testifying in a most positive manner, to a promise on the part of the then owner to widen it, the Chancellor did not think that they met that inexorable rule which is demanded in such cases of leaving practically no doubt whatever.

The case of *Dill v. The Board of Education*, 47 Eq. 421, does not help the complainant. This was a Chancery case, which was never appealed. In this case, there was an actual public street. All the deeds referred to this alley as a boundary in express terms. What the Court held was that having recognized this alley in their deeds, they cannot now deny it, but that is a very far cry from getting an easement or title by mere

word of mouth, as is contended here. The Vice-Chancellor leaves no doubt as to how he arrived at his conclusion, as he says he based it upon *Parker v. Smith*, 17 Mass., page 413, and considers that decisive.

Parker v. Smith, was decided in 1821, and was not by the Court of last resort. This is what it says:

“The principal question in this case arises upon the construction of a deed. In it, a piece of land is described bounding it southwardly and westwardly upon a street. By this description, the grantor and his heirs are estopped from denying that there is a street or right of way to the extent of the lands on those two sides.”

When you read the case, you find that the deeds go up to a certain street, which is named. Nobody can quarrel with the principle enunciated in that case, and that is as far as the Dill case goes. A good deal of what the Vice-Chancellor says in the Dill case, is *dicta*, and it is rather amusing in reading the case of *Stevens v. Headley*, where Vice-Chancellor Stevens happened to be the complainant, to see how Vice-Chancellor Pitney hedges very considerably on the *dicta* so freely expressed in the Dill case.

Counsel also quotes the case of *Central Railroad ads. State*, 33 L. 220. This is not in point. This refers to public roads. The familiar principle is that if I lay down a road, and lead the public to believe it is a dedicated street, and allow houses to be built each side of that street, as though it were a public street, I am estopped to deny that it actually is one. That, of course, is good law and good sense, but it doesn't apply to the present situation.

Counsel refers to the case of *Sumner v. Seaton*, 47 Eq. 103. This does not help the Court in the present instance. It is an illustration of that familiar principle that if a man, knowing well the true facts, stands silent while the other changes his position, he cannot afterward assert it.

If they had proved that Ernest Hinck knew full well that his father hadn't the slightest intention of building a road, and had promised to build one, and then stood by while complainants changed their position—in other words, acted the fraud, the case might have some application.

The case of *Philhower v. Todd*, 11 Eq., page 312, is in the same category.

The case at bar is important not only on account of the situation involved in the case itself, but because complainants are contending for a principle, which, in method of proof, is novel in this State, and is not upheld by authority anywhere. Granting for the moment, for the sake of argument, that the principle which they contend is good law, yet that they have not for a moment met that inexorable requirement of producing such clear and convincing evidence that forces the Court to its conclusion, beyond a reasonable doubt.

Respectfully submitted,

CHARLES JONES,
Solicitor of Defendant.

Note: Defendant's counsel, not having been served with appellant's brief up to the last moment, he can safely hand this brief to the printer, and is unable to meet or analyze any additional cases that may be cited in appellant's brief, outside of what were presented in the Chancery case.

CHARLES JONES.

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