New Jersey Court of Errors and Appeals

Between

NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,

Complainant-Respondent,

and

HENRY HEPBURN,

Defendant-Appellant.

On Appeal.

Between

NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,

Complainant-Respondent,

and

DANIEL HEPBURN,

Defendant-Appellant.

On Appeal.

Between

NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,

Complainant-Respondent,

and

WILLIAM B. HEPBURN,

Defendant-Appellant.

On Appeal.

SUPPLEMENT TO CASE.

Exhibit D. 1.

CERTIFICATE OF THE ORGANIZATION
OF
THE EAST JERSEY WATER COMPANY.

This is to certify that we Charles Hartshorne, John B. Garrett, Henry S. Drinker, Thomas N. McCarter, Louis R. Barrett, John Hood and David G. Baird do hereby associate ourselves into a company under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey, entited "An Act concerning Corporations" approved April seventh, eighteen hundred and seventy-five, and the several acts supplementary thereto, and amendatory of the same, for the purposes hereinafter mentioned, and to that end we do by this our certificate set forth.

First: That the name which we have assumed to designate such company, and to be used in its business and dealings is "The East Jersey Water Company."

Second: That the places in this State where the business of such company is to be conducted are the Counties of Essex, Union, Morris, Passaic, Hudson and Bergen, and the principal office of said company shall be in the City of Newark in said County of Essex. And that the objects for which the company is formed are the storage, sale and delivery of water and the construction and maintenance of the necessary reservoirs, pipe lines and other works therefor, the acquisition of the necessary and appropriate property real and personal, with the power to lease, sell, mortgage and convey the same or any part thereof.

Third: That the total amount of capital stock of said company is three million dollars; the number of shares into which the same is divided is thirty thousand, and the par value of each share is one hundred dollars.

The amount with which said company will commence business is three million dollars, which is divi-

ded into thirty thousand shares of the par value of one hundred dollars each.

Fourth: The names and residences of the stockholders and the number of shares held by each are as follows:

Charles Hartshorne, Philadelphia, Pa., twenty-nine thousand four hundred (29,400) shares.

John B. Garrett, Philadelphia, Pa., one hundred (100) shares.

Henry S. Drinker, Philadelphia, Pa., one hundred (100) shares.

Thomas N. McCarter, Newark, N. J., one hundred (100) shares.

Louis R. Barrett, Bloomfield, N. J., one hundred (100) shares.

John Hood, Camden, N. J., one hundred (100) shares.

David G. Baird, Beverly, N. J., one hundred (100) shares.

Fifth: The period at which said company shall commence business is the first day of August A. D., eighteen hundred and eighty-nine, and the period at which it shall terminate is the first day of August, A. D., nineteen hundred and thirty-nine.

In witness whereof we have hereunto set our hands and seals this first day of August, A. D., eighteen hundred and eighty-nine.

CHARLES HARTSHORNE, (L. S.)
JOHN B. GARRETT, (L. S.)
HENRY S. DRINKER, (L. S.)
THOMAS N. McCARTER, (L. S.)
LOUIS R. BARRETT, (L. S.)
JOHN HOOD, (L. S.)
D. G. BAIRD. (L. S.)

Signed, sealed and delivered
in presence of

ROBERT H. MCCARTER.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

Be it remembered that on this first day of August, A. D., eighteen hundred and eighty-nine, before me the subscriber a master in chancery of the State of New Jersey, personally appeared Charles Hartshorne, John B. Garrett, Henry S. Drinker, Thomas N. McCarter, Louis R. Barrett, John Hood and David J. Baird, who I am satisfied are the persons named in and who executed the foregoing certificate, and I having first made known to them the contents thereof, they did each severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed. All of which I certify.

ROBERT H. McCARTER,
Master in Chancery of New Jersey.

Endorsed:

"Received in the Essex County Clerk's Office Aug. 1st, 1889, and recorded in Book 4 of Incorporated Business Co.'s, on page 4 &c.

S. A. SMITH,
Clerk."

"Filed August 1, 1889,

HENRY C. KELSEY,
Secretary of State."

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

Between

NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,
Complainant and Respondent.
vs.
HENRY HEPBURN,
Defendant and Appellant.

THE SAME,
vs.
DANIEL HEPBURN.

THE SAME,
vs.
ROBERT HEPBURN.

On Appeal.

BRIEF OF APPELLANTS.

FACTS.

The facts in the case are as follows:

By several conveyances during the month of July, 1891, the East Jersey Water Company obtained from the appellants, or their predecessors in title, a grant of a right of way over certain property of the appellants for the purpose of laying a water pipe line. The grant was in the following words: That the grantors do "hereby grant and convey to the East Jersey Water Company * * * its successors and assigns, the right of way over, through and across the

lands hereinafter described, situate, etc., * * * in and upon which to lay, operate and maintain a water pipe or water pipes for the transportation of water to the City of Newark in said state and other places; such pipe or pipes to be laid within a space not exceeding the width (99 feet) particularly described in the description hereinafter set forth, with the right to set up, operate and maintain a telegraph or telephone line or lines thereon, and with right of ingress and egress to and from said right of way for all purposes."

The following limitation is placed upon this grant after the habendum clause: "The possession and use of the said premises are to be and remain in the said grantors, their heirs, executors, administrators and assigns, subject to the grant herein made, as fully as if this conveyance had not been executed."

By deed dated May 2, 1892, the East Jersey Water Company assigned the right which it had acquired under this grant to the City of Newark, conveying also to the city all the works erected in the meantime by the water company "with all and singular every appurtenance, adjunct and appliance of whatever nature, kind and description soever * * * and also all and every the lines and rights of way over which the conduit or conduits, pipe line or lines have been laid or constructed, and all and singular the lands and rights of way acquired, etc."

In 1900, by another deed, the water company expressly conveyed to the city its right, title and interest in the existing telephone line, with an exception and reservation to the water company of the right to maintain two telephone or telegraph wires upon the poles conveyed, and with a joint agreement for the maintenance of the poles.

By deed dated August 24, 1905, the City of Newark conveyed to the Northeastern Telephone and Telegraph Company the privilege of operating upon the right of way a telephone line, reserving to the city,

free of charge, the use of a single line. Subsequent to this conveyance the telephone company entered upon the property of the appellants, replaced the poles already there with larger poles, placed larger arms upon the poles, in order to string a larger number of wires. Thereafter, the complainant stretched upon these new arms a larger number of wires, which were cut down by the appellants on the theory that as the lines added an additional burden to the land than that which was granted by the original conveyance from the appellants to the East Jersey Water Company, there was no right in the respondents to stretch the lines and that in so doing they were trespassers.

Upon the happening of this event, the telephone company applied to the Court of Chancery for an injunction to prevent the appellants from interfering with them in the maintenance and erection of such telephone lines as they might deem proper to place upon the right of way.

The Court of Chancery, upon final hearing, granted the injunction prayed for in the bill of complaint, and from the decree granting this injunction the defendants appeal to this court.

I.

The right given to the East Jersey Water Company to maintain telephone lines is by the terms of the deed granting this right, strictly limited to the right to use them as an appurtenance and as an incident to the main easement of way for water pipes.

a. This construction is the natural one to be drawn from the wording of the deed. The deed grants an easement of way to build and maintain a pipe line "with the right to set up, operate and maintain a telegraph or telephone line or lines thereon."

The natural meaning of the word "with" is "and as incident to," and had the grantors intended to convey this right to maintain telephone or telegraph wires as an independent grant, the word "and" would have been used to show the co-ordinance of the two easements. As it is, the word "with" was used, and doubtless for the purpose of showing that the grant of telephone rights was to be subordinate and merely incidental to the grant of the right of way for the pipes.

In the case of *Durham & S. Ry. Co.* vs. *Walker*, 2 Adol. & E. (N. S.) 940 it was held that in an indenture demising a fee in lands, "except and always reserving the woods, underwoods and trees now growing or hereafter to grow on said premises and the mines, quarries and seams of clay within and under the same, with full and free authority and power to cut down and carry away the said wood and to dig, work and carry away the said mines, quarries and seams of clay," the word "with" should be construed as meaning "and as incident thereto."

Again in the case of *Leek* vs. *Bennett*, 1 Atk. 470, a clause in a will "I give to my niece Elizabeth Martin during the time of her natural life my house in Mals Hill, in Greenwich, with all the household goods that shall be found therein at the time of my decease," was construed to mean that the niece therein mentioned took the household goods located in the said house merely as an incident to the enjoyment of the house and that therefore her estate in the household goods was limited to a life estate, as was her interest in the house.

It will be seen that in both these cases it was held that the word "with" ordinarily imports dependence upon the clause to which it is subjoined and that in order to show that the intent of the parties was that the second clause should be considered as co-ordinant, there must be some other cogent reason for such a construction appearing in the deed itself.

The case of *Richards* vs. *Baker,* 2 Atk. 321, well illustrates the difference between the words "with" and "and," for in that case a testator having by the first clause bequeathed certain property to his wife during her widowhood, he concludes the paragraph as follows: "and I likewise give her my jewels, coach, chariot and coach horses," and it was in this case held that the two gifts were independent and that the limitation of use during widowhood applied only to the first of the two.

Our Court of Errors and Appeals in the case of *Mitchell* vs. *D'Olier,* 39 Vr., 375, has very strongly affirmed the correctness of the construction which the appellants contend for in this case. This case necessitated the construction of a grant of a tract of land upon a portion of which was a fresh-water lake, the deed conveying a portion of the upland adjoining the lake "together with" certain rights and privileges to be exercised upon the waters of the lake by the grantee, her heirs and assigns. Mr. Justice Pitney in construing the rights of the grantee under this last clause held, in the first place, that the right was a profit a prendre and that such profits a prendre could be held in gross as well as appurtenant to the land, but that in this case, on account of the use of the words "together with" the right was held as appurtenant to the estate and could not be granted apart from it.

The court says (page 382): "We observe at once that there is no separate grant of the rights and privileges in question; they are inserted in the deed immediately after the description of the tract of fifteen and one-half acres, and to that description they are joined by the words 'together with,' words inmporting a close and inseparable union. * * * * Finally, the clause granting the rights and privileges plainly evinces an intention that all the rights shall be enjoyed not only by Mrs. D'Olier, but by her heirs and assigns, yet a pure easement (the boating privilege) is

grouped together with rights of profit a prendre, while, as already appears, in order to be heritable and assignable, an easement perhaps must, and a profit a prendre certainty may, be held as appurtenant to land.

"For these reasons we are clearly of the opinion that the rights and privileges in question were granted to Mrs. D'Olier, not in gross, but as an appurtenance of the fifteen and one-half acre tract.

"Being thus annexed, the incorporeal hereditament becomes so inseparably connected with the ownership of the dominant tenement that it cannot be held and enjoyed separate therefrom."

Nor can we agree with the distinction made by the learned vice-chancellor in his opinion in the court below. He therein argues that as a telephone line is not a necessary adjunct to the maintenance of a water pipe line, inasmuch as water pipe lines were maintained before the invention and use of telegraphs and telephones, therefore the grantors could not have intended that the line should be used merely as an adjunct, but must have intended that it should be operated independently, and therefore must have intended an independent grant of the right to operate them.

We fail to see the force of this argument. Many of the instruments ordinarily used at the present time for the convenient and expeditious conduct of business were a hundred years since not in existence, and while absolutely considered, it cannot be said that these instruments are necessary to the conduct of the business, yet when one considers that these same instruments are being used by competitors in the same lines of business and that to refuse or neglect to use them would put the company so refusing at a tremendous disadvantage in competition with other like concerns, it seems hardly unreasonable to say that such instruments are necessary to the conduct of the business. But necessity need not be shown, since convenience alone would justify the use of a telegraph or telephone line as an adjunct to the waterpipe system.

(b) The charter of the East Jersey Water Company did not permit it to operate an independent telegraph or telephone line. It is well established by numerous decisions in our state that the grant of powers from the state is to be strictly construed and that such powers only as are necessary to the proper conduct of the business for which a corporation is created will, in the absence of express grant, be implied.

Jersey City Gaslight Company vs. *The Consumers Gas Company*, 13 Stew., 427.

National Trust Company vs. *Miller*, 6 Stew., 155.

Stockton vs. *Central Railroad*, 5 Dick., 52.

No powers were given to the East Jersey Water Company whereby it could claim the right to act as a telephone or telegraph company. The right to maintain a telephone or telegraph line for the convenient maintenance of its pipe line, however, stands upon another footing. The learned vice-chancellor in his opinion very summarily dismissed the consideration of the argument by the appellants in the court below on this point. "The answer to this objection is simply that it does not lie in the mouth of the grantor of real estate or an interest in real estate to set up that the grantee was incapable of receiving and accepting the title or right of way conveyed. Only the public authorities can take advantage of that disability." This, however, is not an effort on the part of the appellants to question the right of their grantee to hold an interest which they have conveyed to it. The appellants assert that no such interest has been granted to the East Jersey Water Company and in support of that contention and in aid of the construction of the deed to the water company, have offered to show that the water company was unable to take such a grant as it claims to have received.

This is a very material point in the construction of the contract, if it is held that the wording of the contract leaves the matter in some doubt. If the deed granted to the East Jersey Water Company the rights which the respondent claims it did, then the contract was an illegal one, but the courts will not construe a contract to be illegal providing there is a rational interpretation by which it may be held to be legal. Of two constructions, one legal and the other illegal, the courts will always adopt the former.

15 *A. & E. Enc.*, 933.

In order to make this contract a legal contract, it is necessary to assume that the right to maintain telegraph and telephone lines was granted merely as an incident to the right to maintain a pipe line. This construction harmonizes perfectly with the wording of the instrument and removes from it any suggestion of illegality. It is therefore the construction which should be adopted.

II.

The East Jersey Water Company could convey no more than it had received. It is an elementary rule of law that no one can grant that which he has not and that an effort to do so will operate only to pass title to so much as he has.

I *Washburn Real Property*, 4th Ed., 120.

Rogers vs. *Moore*, 11 Conn., 553.

Graves vs. *The Amuskuag Mfg. Co.*, 44 N. H., 462.

It follows, therefore, that the grant from the East Jersey Water Company to the City of Newark conveyed to the city only the right to operate a telegraph or telephone line as an appurtenance to the pipe line, which was granted at the same time to the city. The City of Newark then having acquired the telephone right merely as an appurtenance, it was able to convey

only that appurtenant right to the complainant and an effort to grant to them the right to operate an independant telephone line could at most constitute nothing further than a waiver of damages by the city for any injury which might result to it by the erection of such a line upon its right of way.

Hodges vs. *Western Union Telegraph Co.*, 45 S. E. (N. Carolina) 572.

III.

A telephone constructed upon the right of way is an additional burden for which the owners of the fee are entitled to compensation. In the case of *Nichols* vs. *The Telephone Company*, 33 Vroom, 733, it was held by the Court of Errors and Appeals that the erection of a telephone line upon a public highway constituted an additional burden to the land for which the owners of the fee were entitled to compensation.

The case of the *American Telephone and Telegraph Co.* vs. *Smith*, 18 At. Rep., Maryland, 910, is one very strongly in point. It was there held that a telegraph line erected in good faith by a railroad company for the use of the company in the maintenance of its road, did not constitute an additional burden to lands, but that where the right to operate the line was granted to another company for the purpose of carrying on an independent business, such a telegraph would constitute an additional burden for which the land owners were entitled to compensation.

To the same effect is *Hodges* vs. *Western Telegraph Company*, *supra*, where it was held that a railroad company which has acquired a right of way over certain lands by conveyance from the owner, cannot grant a telegraph company an easement in the right of way for the erection of poles, wires, etc. The only right acquired was a license as against the railroad

company and could not in any way affect the rights of the owners of the fee.

Other decisions to the same effect are *Western Union Telegraph Company* vs. *American Union Telegraph Company*, 9 Biss., U. S., 72; *Eels* vs. *Telegraph Co.*, 38 N. E., N. Y., 202; *Kester* vs. *The Western Union Telegraph Company*, 108 Fed., 926.

IV.

Condemnation proceedings are necessary before the complainant can construct its line upon the right of way. Inasmuch as the grant from the City of Newark to the complainant conveyed to it only the same right which was originally conveyed to the East Jersey Water Company, namely, the right to maintain a telephone line as an appurtenance to the right of way for the pipe line, it follows that any act done by the complainant in excess of its right under the grant constituted it a trespasser and that an injunction would not lie to enforce its alleged rights to maintain a telephone line for its independent business upon the right of way.

In the case of *Broome* vs. *The New York and New Jersey Telephone Company*, 15 Stew., 141, Chancellor Runyon granted a mandatory injunction against the defendant, commanding them to remove their poles from the highway in front of the complainant's premises and forbidding the erection of others. In that case it appeared that the complainant's consent to the erection of the poles had not been obtained nor had his lands been condemned for that purpose.

It was held that in the absence of permission from the complainant allowing the erection of the poles upon his property, condemnation proceedings were necessary before the defendant could acquire any right to the maintenance of its poles upon the premises.

In the case of *Nichols* vs. *The Telephone Company*, *supra*, it was directly held by the Court of Errors and

Appeals that only by condemnation proceedings could the right to erect a telephone line be obtained.

It follows as a necessary conclusion from these cases that the complainant in the case at bar was without any right to maintain its independent telephone line on the right of way granted by the defendants and that in the absence of any consent from the defendants, the only way in which such a right could be obtained would be through condemnation proceedings.

Such being the case, it is evident that the Court of Chancery should not have granted an injunction for the protection of a right which had no existence. It follows, therefore, that the Court of Chancery erred in granting the complainant the injunction in accordance with the prayer of its bill of complaint.

Respectfully submitted,

RIKER & RIKER,

Solicitors for and of Counsel with the Appellants.

NEW JERSEY

Court of Errors and Appeals.

BETWEEN THE NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY, *Complainant—Respondent,* *and* DANIEL HEPBURN, *Defendant—Appellant,* (*And two other cases.*)	*On Appeal from Chancery.*

Brief for Complainant—Respondent.

I.

The Complainant's title to the easement disturbed is complete.

The original grants in question were made to the East Jersey Water Company in fee, all in the following terms:

"The right of way over, through and across "lands hereinafter described, in and upon which to "lay, operate and maintain a water pipe or water "pipes for the transportation of water to the city "of Newark, in said State, and other places, such "pipe or pipes to be laid within a space not exceeding the width particularly described in the description hereinafter set forth. With the right to set "up, operate and maintain a telegraph or telephone "line or lines thereon, and with right of ingress "and egress to and from said right of way for all "purposes."

Then follows a description of a tract of land ninety-nine (99) feet wide, after which appears the following :

"The right of ingress and egress hereinbefore "referred to is limited strictly to the premises "above described, and is not to be over any portion "of the remaining land of the grantor."

It will be seen that this is a grant of three different rights in the land :

First—A right to lay and maintain therein any number of water pipes.

Second—A right to set up and maintain thereon any number of telegraph or telephone lines.

Third—A right of ingress and egress to and from said right of way and along same *for all purposes.*

A right of occupancy so broad leaves nothing of value in the grantor beyond the right to cross the right of way in the using of the land of the grantor on either side. The grantor could not make any valuable use of land where the grantee could enter at any time and dig up for the operating of any number of pipe lines, and where the grantee could enter at any time to maintain telegraph and telephone lines in an unrestricted number, and where the grantee had a right of ingress and egress *for all purposes.*

While, in terms, the grant is of a right of way, yet that expression throws very little light upon the extent of the grant. These rights of way vary greatly, and what is obtained under such a term must be ascertained by an examination of the particular purposes for which the grantee may use the land. A right of ingress and egress for all purposes over a right of way, includes, of course, the right to use it as a roadway to reach that portion of the route granted by other grantors.

In point of fact, such a right of way as is here granted, with a structure of such importance in it as the municipal supply of a great city, is a right of way over which travel is carried on daily in the course of the watching and caring for the pipe line and the telephone line.

The right retained by the grantor under such a deed, for such a purpose, is of little more value than the right retained by one who grants a right of way for the purposes of a railroad. In fact, a single track railroad, over which rights of crossing are reserved, would involve much less complete occupancy of the soil than these great pipe lines with their appurtenances.

The grant of the right to construct telephone lines is a grant of a separate easement from the right to lay water pipes. The telephone grant is not given with any restrictions as to the purposes for which messages shall be sent over the line, or as to the persons who shall send messages. There is no limitation on the number of lines. The telephone grant is as distinct from the pipe line grant as if they were found in separate deeds, or to separate grantees.

These grants are made to the grantee, its successors and assigns, and such grants are valid and transferable apart from any other lands of the grantee. If it were necessary, we should not hesitate to argue that the right to operate a telephone line could be sold and operated wholly independent of the pipe line. In the present case, however, no complete severance has been made of the telephone easement from the pipe line easement. The owner of the pipe line has made provision, by agreement, for the exercise of its rights and privileges in the telephone easement, through the telephone company, its assign. All that the telephone company

does with the land is something which the grantee might have done in its own name. That such an easement is assignable, see:

Bowen v. Conner, 6 Cush., 132, 137.
Goodrich v. Burbank, 12 Allen, 459, 460.
Hankey v. Clark, 110 Mass., 262.
Poull v. Mackley, 33 Wis., 482.
Pinkum v. Eauclaire, 81 Wis., 301.
New York v. Law, 125 N. Y., 380, 392.

In order to defeat the exercise of the privileges granted by the deed, the defendant must show that the proposed use is more burdensome than that for which the land is granted, or is different in kind. Clearly, it is not different in kind, for it is the precise use described in the deed, namely, a use for telephone lines. The number of wires is no greater than the number which the private grantee could erect, because that number is unlimited, and is left wholly to the grantee. Neither is it more burdensome in the extent of use. There is nothing in the use of a telephone wire which burdens the owner of the fee at all. Whether one person or another sends messages over the wire, or whether one message or one hundred passes over the wire, makes no difference to him. This distinguishes the case from that of a private way, where the use is discontinuous, and where an owner having a right of way for one tract seeks to use the land as a right of way for other tracts, and thereby increases the burden. Even where a private way, open to a number of travelers, is converted into a public way, the added burden being only nominal, the damages are nominal.

See, Olean v. Steyner, 135 N. Y., 341.
Matter of Adams, 141 N. Y., 397.

If the grant in this case were limited to the use of the wires for the purposes of the water supply, the damages for enlarging that use so as to accommodate others, would be nominal. The use, however, being wholly unrestricted by the terms of the deed, there is no occasion for even nominal damages.

The provision for ingress and egress "for all purposes" is highly significant. In face of it, how can the grantor say the owner may enter for the purpose only of erecting lines connected with the water supply?

It is true that there are authorities that a private easement in order to be transferable must be connected with some dominant estate and be transferred with it, and that an easement in gross is ordinarily the personal property of the grantee, and cannot be sold.

It has been said that a grant of a public easement is always in gross, and needs no dominant tenement.

Jones on Easements, § *422*.

It has also been suggested that a grant of an easement to a company for a public use is annexed to the public franchise, and may be transferred with it. (*Mitchell v. D'Olier*, *99 Vr.*, *375*, *380*); but, it is evident that broader rights of transfer than this must be recognized. Suppose we take the common case of an oil pipe line in New Jersey, having no public franchise. Will any one contend that a right of way for such a line, which has been granted in one hundred parcels, and occupied by a pipe line, can be used by the grantee only, and is not assignable? Would it not, in such a case, be judicially held that the owner of such a pipe line

can use it as he sees fit, and grant the use of it to as many others as he sees fit, for their use, so long as the use is not burdensome beyond the terms of the grant? If a dominant estate is necessary, we find it in each of the other parcels of the right of way, all serving a common use, and each essential to the enjoyment of the others. When Hepburn granted a right of way over his land for a telephone line, he knew that the purpose of the grant was to use the land to continue the telephone line to be built upon the adjacent land. That adjacent land receives a benefit from the easement to carry wires over the granted land, and comes, therefore, strictly within the definition of a dominant tenement. Such rights are beyond question assignable, together with the dominant tenement, where granted to the grantee, and his heirs and assigns—and such an assignment is that which has been made here. The grantor has given to the grantee, and its successors and assigns, the privilege of erecting lines of poles and wires without limit, and to enter upon the land not only for that but for all purposes, and it cannot matter to the grantor to know to whom the grantee has assigned that right, so long as all the assigns together make no use of it in excess of that use which the original grantee could lawfully make of it.

In this discussion we have been quoting from our brief in the Court below. Since his decision in this case the same learned equity Judge who decided it has had occasion to deal with same subject with respect to oil pipe lines. Re-examination led to re affirmance. His opinion in this latter case is a helpful complement to that now before the Court.

Standard Oil Co. v. Buchi, 66 Atl. Rep., 427.

The case has not been appealed.

The presumption is that the grantee paid for all that was expressly granted, and is, therefore, entitled to make use of it. What is granted is the use of the entire width of the tract, and it is granted not for one line alone, but for "*lines*" and the right to enter is given not for one purpose, but for all purposes and at all times. Even if we should say that the primary purpose of the purchase was to aid in the management of the water supply, that would not warrant the owner of the fee to restrict the use to that purpose, in the absence of such a restriction in his deed. The grantee saw fit to buy and pay for more land than it needed for present public purposes, and the grantor saw fit to sell more than was needed for such purpose, and, in such a case, it is the privilege of a grantee, in addition to serving the public purpose, to use the surplus of his property, for which he has paid, to the best advantage within the terms of his grant. Thus, where a railroad or canal company take land by condemnation, it may, in addition to the use for public purposes, make other uses of the land up to the full extent of the estate granted.

The language of the deed, or of the statute, is to receive its full common law effect, and is not to be limited by inferences drawn from the purpose for which the grantee is organized. The grantor is not to retain rights, by uncertain inference, against the express language of the grant. Such an interpretation was rejected in our Court of Errors and Appeals, where it was said that it "would ~~dissem-~~ dismable ~~ble~~ every corporation which holds land, by statute or by contract, from putting up any building or improvement on their lands, or using them for any purpose, except what could be shown as strictly necessary for the enjoyment of their corporate rights, and that, too, when it would do no injury to the grantee."

Barnett v. Johnson, 2 McCart., 481, 484.

Followed in *Currie v. N. Y. Transit Co., 21 Dick., 313, 319.*

In *Slingerland v. Newark, 25 Vr., 62, 69,* the Court maintained the right of the city to condemn a right of way to be used by a water company partly to supply the city, and the residue for the private purposes of the company. Dixon, J., said that it was "not apparent how the prosecutor can have "any legal concern with the quantity of water "drawn through the acqueduct, or with the use "made of so much of it as the public does not need."

So where the right of way granted is used for the purposes of the pipe line, the owner of the fee cannot complain of the private use of the residue of the right granted.

Furthermore, the contract between the City of Newark and the complainant's assignor, afforded the city a substantial benefit for a public use free of charge, thereby dispensing with a large annual payment which the city theretofore had to make in order to get needed telephone service. We submit that under the broad grant of the land owners, now enuring to the city, the arrangement made is a perfectly legitimate one for a municipal corporation to make.

As to the claim of defendant that the East Jersey Water Company had not legal capacity to receive such a grant; as to the interpretation of the words of the grant, and as to the attempt to vary it, by parol, as to one of the cases, we have nothing to add to the unanswerable reasoning of the Vice Chancellor.

II.

Should this Court hold complainant's title to be incomplete it should direct the injunction to be held until compensation can be ascertained and made.

The Telegraph Act, which includes telephones, (*24 Vr., 341*), contains a statutory grant of the right to construct and maintain lines not only in roads, but "upon, through or over any other lands, subject "to the right of the owners to full compensation "for the same" (*P. L. 1900, p. 76, § 8*).

The General Condemnation Act, passed on the following day, provides, that whenever any corporation, having power to take land for public use, shall determine to acquire land, and cannot acquire the same by agreement with the owner, the compensation shall be ascertained as directed by that Act (*P. L. 1900, p. 79*).

This constitutes a full grant of the right to condemn, the first Act giving the right to take lands for public uses, on payment of compensation, and the second Act providing how that compensation shall be ascertained.

Under such circumstances, the power is vested in the Court of Chancery to fix the compensation, or to hold the status until proceedings to condemn can be taken.

In the present case there are a number of reasons why, if compensation must be made, it should be ascertained by the Court of Chancery. The right to be taken is a right in land in which the defendant has only a limited interest. The proceeding at law would be an imperfect one; the award would be made against all parties interested in the land, and

the money would then be paid into the Court of Chancery to determine the relative interests of the various parties concerned. There is manifest propriety, to avoid circuity of action, that the interest should be valued in the Court of Chancery, where full relief can be given in one proceeding. The fact that the land is admittedly subject to telephone service in favor of the city, and that the complainant is under contract to render that service, is a material consideration in fixing the damages, if the Court should find that the complainant was entitled to any.

The situation is this: The complainant has a contract right to maintain the poles, with wires thereon, for the benefit of the City of Newark, in connection with its pipe line. Conceding, for argument's sake, that the use of the same poles and wires for general public service is an additional burden, the compensation must be limited to the injury caused by that additional burden, and the value of such a right is not within the functions of commissioners or a jury.

It is argued that such valuation in equity is granted only where the original occupancy was by consent or without objection; but, here the objection is not to any occupancy at all, but merely to an increased use of the property already taken. No rule is violated, and it is in accord with equitable principles to determine the additional damages, if any, in this Court. Vice Chancellor Pitney regretted that he had not taken this course in *Baltimore & N. Y. R. R. Co. vs. Bouvier, 62 Atl. Rep., 868, 881.*

Precedents are ample. In *Paterson R. R. Co. v. Kamlah, 15 Stewart, 93,* Chancellor Runyon directed the ascertainment of compensation in his

Court. True in that case the original occupation was with the acquiescence of the land-owner, but the Chancellor deduced from the cases a rule of much broader scope. He said at page 97 near the bottom:

> "Where possession has been taken of land "for a public work, and the work has "been constructed upon it, but no com- "pensation has been made for the land, "if the company in taking possession "has acted in good faith under acquies- "cence of the owner or by mistake as "to the property *or as to the validity of "the authority given it so to occupy*, and "the property is in public use, equity "will not permit the company to be dis- "turbed in its possession, provided it "make compensation if equity shall so "require."

This case afterward came to this Court on questions of fact and amount of compensation, and the principle declared was not challenged. *2 Dick., 331.*

Other adjudged cases are collated in *Sparks Mfg. Co. v. Newton, 12 Dick., 367, 393*, which, however, was a case of acquiescence.

Finally this Court fully upheld the declared principle in *Simmons v. Paterson, 15 Dick., 385, 394.*

We submit that decree should be affirmed; but in any event that the injunction should be retained.

COLLINS & CORBIN,

Of Counsel with Complainant-Respondent.

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New Jersey Court of Errors and Appeals.

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and
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IN CHANCERY OF NEW JERSEY.

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

Humbly complaining, shows unto Your Honor your orator, Northeastern Telephone and Telegraph Company, a body corporate of the State of New Jersey, that:—

1. Your orator was incorporated on May 27, 1903, under the act entitled, "An Act to incorporate and regulate telegraph companies" (Revision), approved April 9th, 1875, and the supplements thereto, for the purpose of constructing, owning, using and maintaining electric telegraph and telephone lines, partly beyond the limits of this State.

2. On August 24th, 1905, the Mayor and Common Council of the City of Newark, a municipal corporation of this State, being in ownership and possession, acquired from the East Jersey Water Company, as hereinafter mentioned, of a right of way for the construction and maintenance of a water pipe-line or aqueduct, to the Pequannock water shed, extending from Belleville, in the County of Essex, to Charlottesburg, Oak Ridge, and other towns in the County of Passaic, with the right to construct and maintain telephone lines thereon, on which right of way there was then in use a pipe line or aqueduct and a line of poles carrying two wires for telephone service used in connection with the maintenance of said pipe line or aqueduct and two wires of the East Jersey Water Company; and was paying to The New York and New Jersey Telephone Company, a body corporate of this State, legally authorized to maintain and operate telephone lines, an annual rental for telephone service over its said wires and for the maintenance of said poles and wires and said New York and New Jersey Telephone Company was desirous to erect a telephone line upon said right of way, from Belleville to the Macopin intake, and was willing to furnish the city of Newark telephone service in connection with the

maintenance of said pipe-line, or aqueduct, and to carry the wires of the East Jersey Water Company upon terms and conditions to be agreed upon. Thereupon the said Mayor and Common Council of the City of Newark, and The New York and New Jersey Telephone Company entered into an agreement in writing, and under seal, a true copy whereof, marked Schedule "A," is annexed hereto and made a part of this bill of complaint.

3. On the 29 day of November, 1905, The New York and New Jersey Telephone Company, by writing under its seal, assigned and transferred unto your orator all its rights under the said agreement of August 24th, 1905, and your orator agreed, under seal, to keep and perform all the terms and conditions of the said agreement. A true copy of the said assignment and agreement between the said two companies, is hereto annexed, marked Schedule "B," and made a part of this bill of complaint. Your orator determined upon and has laid out a public telephone line, including and connecting Belleville and the Macopin intake of said pipe line and extending beyond in either direction—utilizing therefor so much of the said pipe-line right of way as was available for that purpose, including those portions thereof that cross the respective Hepburn lands hereinafter mentioned.

4. Your orator proceeded to replace most of the poles of the telephone line existing between said points on said pipe-line right of way at the time of the execution of said agreement, including all those on those portions thereof that cross said Hepburn lands—with larger and more serviceable poles, and to transfer the wires in use for the service of the City of Newark, and also the wires of the East Jersey Water Company, to its new poles. This was done in the month of December last past. Said Hepburn lands comprise the farms of Henry Hepburn and of his sons William B. and Robert Hepburn in the Township of Bloomfield, in the County of Essex, and the farms of the said Henry Hepburn and of his said sons, and of his son Daniel Hepburn, in the Township of

Aquackanonck, in the County of Passaic. Said farms lie near together, but in some cases are separated by the farms of other owners. Prior to the 30th day of April, 1906, your orator's telephone line was fully constructed with thirty-two wires, including the two used for the service of the City of Newark, in connection with its pipe-line, and the two for the use of the East Jersey Water Company—except that only the four wires last named were in place on the poles on those portions of said right of way that cross said Hepburn lands, your orator, in compliance with the agreement, of which the annexed Schedule "A" is a copy, having delayed the stretching of the other wires, and attaching them to the cross arms on said poles until it should have exhausted endeavor to procure consent of said Hepburns to the construction and maintenance of its pole line, agreeably to the recital of said agreement. Having been unable to procure such consent, and being advised that it had a legal right to construct and maintain its line without such consent, your orator determined to complete the construction of its line.

5. On April 30, 1906, your orator sent its assistant chief-foreman, with a gang of workmen, to complete the striking of its wires, and ten wires were strung on all the poles on those parts of the right of way that cross said Hepburn farms, and your orator's telephone line was put in operation. It was the purpose of your orator to string eighteen more wires, but before the stringing thereof had been completed, the workmen were interfered with by the Hepburn brothers, and said foreman and some of the workmen of your orator were arrested at their instigation.

6. Afterwards, and on the day last named, all the wires on said poles, including those in use for the City of Newark and those of the East Jersey Water Company, were cut by direction of the various Hepburn landowners at the places where said right of way crosses their respective farms, and the wires were removed from the poles, and those of your orator were cut into small pieces. The top of one of the poles

standing on that part of the right of way that crosses William B. and Robert Hepburn's farm in Essex County was cut off, and with its cross arms carrying the wires of your orator, was thrown down to the ground, and said wires were cut into small pieces. Your orator later in the day replaced the City of Newark, and the East Jersey Water Company, wires on the poles. In the late afternoon and evening of the same day your orator's workmen again began to string wires on the poles standing on that part of the right of way crossing the farm of Henry Hepburn in the Township of Bloomfield, and continued the work until stopped by nightfall, at which time they had strung the entire complement of wires across that part of said right of way.

7. On May 1st, 1906, a workman, acting under the direction of the Hepburn Brothers, by authority of their father, cut down your orator's wires, and one of the City of Newark wires, and sawed off the top of the pole standing on that part of the right of way that crosses said farm of said Henry Hepburn, and the same with its cross arms and wires came down to the ground, where the wires were cut into small pieces: Your orator's workmen replaced the City of Newark wire on the pole.

8. The following is a statement of the interest of the Mayor and Common Council of the City of Newark in the Hepburn farms at the time of the making of the agreement, a copy whereof is Schedule "A," annexed to this bill of complaint:

Said Henry Hepburn and Mary his wife, by deed dated July 3rd, 1891, acknowledged in due form of law on that day, and recorded on that day in Book L-10 of Deeds for the County of Passaic, on pages 498, &c., and on September 10th, 1891, in Book E-26 of Deeds for the County of Essex on pages 494, &c., granted and conveyed to the East Jersey Water Company, its successors and assigns, the right of way over, through and across his said two farms in and upon which to lay, operate and maintain a water pipe, or water pipes for the transportation of water to the

City of Newark in said State, and other places, such pipe or pipes to be laid within a space not exceeding the width particularly described in the description therein set forth; with the right to set up, operate and maintain a telegraph or telephone line or lines thereon, and with right of ingress and egress to and from said right of way for all purposes, reciting that it was intended to convey in the one case a strip of land 99 feet wide, containing about 1 63-100 acres—referring to a plan thereto annexed and made a part thereof,—and in the other case to convey a strip of land 99 feet wide and containing about 62-100 of an acre—referring to a plan thereto annexed and made part thereof. The strips therein described and shown include those portions of the right of way across the farms of said Henry Hepburn upon which the poles above mentioned are erected.

Cornelius A. Van Houten, by deed dated April 17th, 1891, acknowledged in due form of law on that day, and recorded April 20, 1891, in Book A-26 of Deeds for the County of Essex, pages 432, &c., granted and conveyed to the East Jersey Water Company, its successors and assigns, like rights to those conveyed as aforesaid to said company by said Henry Hepburn and wife, in a strip of land described in said deed, 99 feet wide, and containing about 50-100 acres, referring to a plan thereto annexed and made a part thereof, and reciting that it was intended to convey said trip of land. Said strip includes that portion of the right of way that crosses the farm of William B. Hepburn and Robert Repburn, in said Township of Bloomfield, upon which the poles above mentioned are erected. Said Cornelius A. Van Houten afterwards died leaving a last will and testament duly proved before the Surrogate of the County of Essex, whereby he devised the farm, out of which said rights in said strip of land were conveyed, to Albert Van Houten. Said Albert Van Houten died leaving a last will and testament, duly proved before the Surrogate of the County of Essex, by which he devised said farm to his wife Ann Eliza Van Houten. Said Ann

Eliza Van Houten, by deed dated April 5th, 1895, acknowledged in due form of law on that day, and on that day recorded in Book Y-28 of Deeds for the County of Essex, at pages 403, &c., conveyed said farm, with other lands, to said William B. Hepburn and Robert Hepburn, subject to said deed from Cornelius A. Van Houten, to the East Jersey Water Company, recorded in Book A-26 of Deeds for the County of Essex, at page 432.

Mary Ella Van Riper and Peter S. Van Riper, her husband, by deed dated July 7th, 1891, acknowledged in due form of law on that date, and on July 8th, 1891, recorded in Book N-10 of Deeds for the County of Passaic, on pages 158, &c., granted and conveyed to the East Jersey Water Company, its successors and assigns, like rights to those conveyed, as aforesaid, by said Henry Hepburn and wife, in a strip of land described in said deed, 99 feet wide, and containing about 1 9-100 acres, referring to a plan thereto annexed and made a part thereof, and reciting that it was intended to convey said strip of land. Said strip of land includes that portion of the said right of way that crosses the farm of said William B. Hepburn and Robert Hepburn, in said Township of Aquackanonck, upon which the poles above mentioned are erected. Said Mary Ella Van Riper and Peter S. Van Riper, her husband, by deed recorded in Book K-15 of Deeds for the County of Passaic, pages 80, &c., conveyed said farm, excepting the rights and easements theretofore conveyed by them as aforesaid to the East Jersey Water Company, unto Andrew Harris, his heirs and assigns. Said Andrew Harris by deed dated May 2, 1904, acknowledged in due form of law on June 16, 1904, and on July 1, 1904, recorded in Book N-16 of Deeds for Passaic County, pages 399, &c., conveyed said farm, excepting said rights and easements and reciting said last mentioned two deeds, unto the said William B. Hepburn and Robert Hepburn.

Daniel Hepburn and Katie W., his wife, by deed dated July 27th, 1891, acknowledged in due form of law on that day, and on August 18th, 1891, recorded in Book P-10 of Deeds for the County of Passaic, on pages 38, &c., granted and conveyed to the East Jersey Water Company, its successors and assigns, like rights to those conveyed, as aforesaid, by said Henry Hepburn and wife, in a strip of land described in said deed, 99 feet wide, and a small triangular parcel, containing together about 2 59-100 acres, referring to a plan thereto annexed, and made a part thereof, and reciting that it was intended to convey said strip and triangular parcel of land. Said strip includes that portion of the right of way that crosses the farm of said Daniel Hepburn upon which the poles above mentioned are erected.

The East Jersey Water Company by deed dated May 2nd, 1892, duly proved according to law on August 1st, 1892, and recorded August 2nd, 1892, in Book X-26 of Deeds for the County of Essex, at pages 560, &c., and on September 13th, 1892, in Book Y-10 of sale for the County of Passaic, at pages 569, &c., did grant, bargain, sell, alien release, enfeoff, convey and confirm unto the Mayor and Common Council of the City of Newark, its successors and assigns, among other things, all and every, the rights granted and conveyed to it as above mentioned, with the appurtenances, and by deed dated September 21st, 1900, duly proved according to law, and on September 25, 1900, recorded in Book R-14, of Deeds for Passaic County, pages 163, &c., and on January 24, 1902, recorded in Book Y-34, of Deeds for Essex County, on pages 345, &c., did grant and convey all its right, title and interest in a telephone line, constructed by it, partly on said pipe-line right of way, and partly on other lands, to The Mayor and Common Council of the City of Newark, its successors and assigns, reserving the right to maintain two wires, for its own use, from Belleville to Little Falls, upon the poles of said telephone line.

9. Your orator submits that as the assignee of the East Jersey Water Company, and the City of Newark, through the New York and New Jersey Telephone Company, it has a clear right to erect, construct, maintain and operate a telephone line along said pipe-line right of way and that the agreement between the New York and New Jersey Telephone Company and the City of Newark is a proper one in the interest of the public service, and cannot be questioned by the farm-owners; but your orator further submits that if the said grant to the East Jersey Water Company shall be so interpreted by this Honorable Court as to limit the telephone right granted to a service only for the requirements of the pipe line, nevertheless the wanton destruction of your orator's telephone line was unjustifiable, for the reason that under said act to incorporate telegraph companies, above cited, and its supplements, your orator has a right to condemn private property for the purposes of a telephone line, and having acquired the rights of the city of Newark and having actually erected and put in operation its line, this Honorable Court should protect said line in the public interest on terms that your orator proceed with reasonable dispatch to condemn and pay for the reversionary rights of the farm owners, if any, or submit itself to the ascertainment by this Honorable Court of just compensation to be made to said defendant. Your orator hereby submits itself to this Court and hereby offers to abide by its decision, and to make to the farm owners any compensation to which they shall be adjudged to be entitled.

In tender consideration whereof, and forasmuch as your orator is remediless by the strict rules of the common law, and can only have adequate relief in this Honorable Court where matters of this nature are properly cognizable and relievable—to the end therefore that the said Daniel Hepburn, who is the defendant to this suit may, without oath—answer on oath being hereby waived—full, true and perfect answer make to all and singular the premises as fully as if the same were here again repeated, and he there-

unto particularly interrogated; that the said defendant, his servants and agents may be perpetually enjoined from interfering with your orator in the erection, construction, maintenance and operation of a telephone line on said pipe-line right of way where it crosses his land, and in the restoration and use by your orator of any wires that have been cut, or of any wires or poles that may be cut, and that your orator may have such further or other relief as the circumstances of the case may require, and as may be agreeable to equity.

May it please your Honor, the premises considered, to grant unto your orator not only the State's most gracious writ of injunction issuing out of and under the seal of this Honorable Court, to be directed to the said defendant—therein and thereby commanding him, his servants and agents, absolutely to desist and refrain from interfering with your orator in the erection, construction, maintenance and operation of a telephone line on said pipe-line right of way, where it crosses his farm, and in the restoration and use of any wires or poles that may have been cut down, and from cutting or in any way removing or interfering with such wires and poles when restored, but also the State's most gracious writ of subpoena issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, therein and thereby commanding him personally to be and appear before your Honor in this Honorable Court, then and there to answer the premises and to stand to, abide by and perform such decree as to your Honor shall seem meet and agreeable to equity.

And your orator as in duty bound will ever pray, &c.

COLLINS & CORBIN,
Solicitors for and of Counsel with Complainant.

SCHEDULE "A."

WHEREAS, The City of Newark has acquired a right of way for the construction and maintenance of a water pipe line or aqueduct, to the Pequannock Water Shed, extending from Belleville, Essex County, to Charlottesburg, Oak Ridge and other towns in Passaic County, New Jersey, and

WHEREAS, The City of Newark has erected on the said right of way a pole line carrying two (2) wires for telephone service used in connection with the maintenance of said pipe line or aqueduct, and is paying to The New York and New Jersey Telephone Company annually the sum of eight hundred and twenty-five dollars ($825.00) for such telephone service and the maintenane of said poles and wires, and

WHEREAS, The New York and New Jersey Telephone Company desires to construct a pole line upon said right of way and is willing to carry and maintain the said two (2) wires on its poles to be erected in place of the existing pole line and to furnish the City of Newark telephone service to be used in connection with the maintenance of said pipe line or aqueduct upon terms and conditions hereinafter set forth, and

WHEREAS, The New York and New Jersey Telephone Company has secured the consent of a large majority of the owners of property abutting the said right of way to the construction and maintenance of its proposed pole line on the said right of way of the city of Newark, and will endeavor to secure the legal consent of all of the remaining owners of property abutting said right of way:

NOW THEREFORE, This agreement, made this twenty-fourth day of August, 1905, by and between the Board of Street and Water Commissioners of the City of Newark, on behalf of the municipal corporation entitled, "The Mayor and Common Council of the City of Newark," hereinafter for brevity called "City of Newark," party of the first part, and the New York and New Jersey Telephone Company, a corporation duly organized and existing under and by virtue

of the laws of the State of New Jersey, hereinafter for brevity called "Telephone Company," party of the second part,

WITNESSETH: That the City of Newark, for and in consideration of the sum of one dollar ($1.00), the receipt of which is hereby acknowledged, and of the conditions and agreements hereinafter set forth, hereby grants to the Telephone Company, its successors and assigns, the right, permission and authority to construct and re-construct, operate and maintain a line of telephone and telegraph, including the necessary poles, wires, cables and fixtures, upon and along the property of the City of Newark, known as the pipe line or aqueduct to the Pequannock water shed, between Belleville, Essex County, and the Macopin intake, Passaic County, New Jersey, with the right to trim any trees along said line so as to keep the wires cleared at least eighteen (18) inches; to elect the necessary guy and brace poles and anchors, and to attach thereto and to trees the necessary guy wires, with the right to permit the attachment of the wires of other associate telephone companies to the poles erected in accordance with this grant.

In consideration of the foregoing grant of right of way to it, its successors and assigns, the Telephone Company agrees to furnish to the City of Newark free of charge during the life of this agreement, telephone service to be used by the said city, from telephone stations installed and to be installed at such points in Essex, Passaic, Morris and Sussex Counties, in the State of New Jersey, as may be designated by the Water Department of the Board of Street and Water Commissioners of the City of Newark; provided, however, that the said Telephone Company shall not be required to install or furnish service from more than fifteen (15) such stations, and provided further that in case it is necessary to build branch pole lines from the line of the Telephone Company, constructed on said right of way to the stations designated as aforesaid, such branch pole lines, with the necessary wires, shall be built and renewed at the expense of the City of Newark.

The Telephone Company agrees to carry and maintain upon its poles to be erected under this agreement, the two (2) wires of the City of Newark to be used for the telephone servie as hereinbefore provided, and in the event that said wires of the city are at any time temporarily out of order and service cannot be given over them, then the Telephone Company will provide, so far as possible, such service over its own wires so that communication may be had between points along the pipe line or aqueduct and the office of the Chief Engineer in Newark, and said Telephone Company agrees to carry two (2) wires of the East Jersey Water Company, from the Belleville Gate House to the Passaic River, at Little Falls, in accordance with the terms of a certain conveyance of the telephone line from said Company to the City of Newark, dated September 21st, 1900. The Telephone Company also agrees that if it constructs the line built under the terms of this ageement, beyond the Macopin intake, it will carry on its poles in the Pequannock water shed, erected beyond the Macopin intake, two (2) telephone or telegraph wires of the City of Newark, said wires to be used by the City of Newark, and the City of Newark hereby grants to the Telephone Company, its successors and assigns, the right to erect and maintain its lines along the highways abutting property which it owns in the Pequannock water shed.

If it shall be found at any time that the poles of the Telephone Company upon and along the said right of way of the City of Newark are so located as to interfere with the laying of additional pipe lines, or prevent any change in or enlargement of the present pipe lines, or interfere with any work to be done by the city in connection therewith, or any use of such right of way by the city whatsoever, or any work connected therewith, then and in that event, the Telephone Company agrees, at its own expense, to relocate promptly, upon receipt of written notice from the city, any or all of its poles as may be necessary to avoid such interference. It being understood that

the right hereby granted to the Telephone Company is entirely subservient to any use of the right of way by the city.

The City of Newark shall not be liable, independently or jointly with the Telephone Company, for any damage, or claims for damages to persons or property, arising by reason of the construction, maintenance and operation of the line of the Telephone Company along the right of way of the City of Newark, or for any damages or claims for damages arising from, or in any way growing out of this grant, by the City of Newark to the Telephone Company of the right to construct, operate and maintain its lines and along the said right of way of the City, and the Telephone Company hereby agrees to indemnify and save harmless the said City of Newark from and against all liability arising from any such damages or claims for damages.

The contract and the grant herein made shall be in force and effect for a term of twenty-five (25) years from September 1st, 1905, but the City of Newark shall be entitled to the telephone service herein provided for from July 1st, 1905.

The said Telephone Company agrees that upon the termination of this agreement, or in the event of the right hereby granted not being renewed at the expiration of said term of twenty-five (25) years, it will either construct a telephone line for said city equal to the present telephone line, or will turn over to the said city, the poles, the city's wires, and the telephone lines erected for the city by said Telephone Company, in a good and serviceable condition without any expense to the city, together with all rights necessary for the use of said poles and wires.

IN WITNESS WHEREOF, the said party of the first part has caused the common seal of the City of Newark to be hereunto affixed and this contract to be executed on behalf of the City of Newark by the Board of Street and Water Commissioners of the City of Newark and to be signed by the President of said Board, and the said party of the second part has

caused its corporate seal to be hereunto affixed, and this contract to be executed by its officers thereunto duly authorized.

THE MAYOR AND COMMON COUNCIL
OF THE CITY OF NEWARK,
By the
BOARD OF STREET AND WATER COMMISSIONERS OF THE CITY OF NEWARK.

[SEAL.] AUGUSTUS E. EGGERS,
President of the Board.

Attest:

WM. E. GREATHEAD,
Clerk of the Board.

THE NEW YORK AND NEW JERSEY
TELEPHONE COMPANY,
By

[SEAL.] U. N. BETHELL,
President.

Attest:

W. HOPPINS,
Secretary.

(Duly moved by the clerk of the board and the secretary of the company.)

SCHEDULE "B."

AGREEMENT entered into this twenty-ninth day of November, in the year one thousand nine hundred and five, between The New York and New Jersey Telephone Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, party of the first part, and the Northeastern Telephone and Telegraph Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, party of the second part;

WITNESSETH, In consideration of the sum of one dollar each to the other in hand paid, the receipt of which is hereby acknowledged, and the mutual cove-

nants and agreements hereinafter set forth, the said parties do hereby covenant and agree with each other, as follows:

First—The party of the first part has sold, assigned and transferred, and by these presents does sell, assign and transfer to the party of the second part, its successors and assigns, subject to the terms and conditions of a certain agreement entered into between the City of Newark and the party of the first part, dated the 24th day of August, 1905, a copy of which is hereto annexed, and subject to the rights of the City of Newark thereunder, its line of telegraph and telephone, including the poles, wires, cables and fixtures, upon and along the property of the City of Newark, known as the pipe line or aqueduct, to the Pequannock water shed between Belleville, Essex County, and the Macopin intake, Passaic County, State of New Jersey, and has granted and hereby does grant unto the said party of the second part its successors and assigns, the right, permission and authority to reconstruct, operate and maintain said line in accordance with and subject to the terms and conditions of the said agreement.

Second—The party of the second part hereby accepts said grant, subject to the rights of the City of Newark, as aforesaid, and hereby agrees to keep and perform all the terms and conditions of the said agreement of August 24, 1905, therein specified to be kept and performed by The New York and New Jersey Telephone Company, the party of the first part hereto. The said line and poles are to be hereafter maintained at the sole risk of the party of the second part, and said party of the second part hereby further agrees to indemnify and save harmless the party of the first part, its successors and assigns, and the City of Newark from and against all liability for any damage or claims for damage to person or property arising by reason of the construction, maintenance and operation of the aforesaid line along the right of way of the City of Newark, or for any damages or claims for damages arising from or in any way growing out of said grant by the City of Newark to the

party of the first part by said agreement of August 24, 1905.

Third—The party of the first part hereby agrees, upon written request of the party of the second part, its successors and assigns, to continue to furnish to the City of Newark the telephone service provided to be furnished by the said party of the second part to said city, under said agreement of August 24, 1905, upon being paid therefor by the party of the second part at the usual and customary rates for such service.

IN WITNESS WHEREOF, the parties hereto have caused their corporate seals to be hereunto affixed, and this contract to be executed by their officers duly authorized thereunto.

THE NEW YORK AND NEW JERSEY TELEPHONE COMPANY.

By

[SEAL.] U. N. BETHELL,
President.

Attest:

W. HOPPINS,
Secretary.

NORTHEASTERN TELEPHONE AND

[SEAL.] TELEGRAPH COMPANY,

By

U. N. BETHELL,
President.

Attest:

J. H. CAHILL,
Secretary.

(Annexed is Agreement, Schedule "A.")

(Duly proved by secretary of N. E. T. & T. Co. for both parties.)

NOTE. The bills of complaint in the two other suits designated at the beginning of this book, are the same as the foregoing, except as to the names of the parties defendant.

In Chancery of New Jersey.

Between

THE NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,

Complainant,

and

DANIEL HEPBURN,

Defendant.

On Bill, etc.

ANSWER.

The answer of Daniel Hepburn to the bill of complaint of the Northeastern Telephone and Telegraph Company,

1. This defendant answering says that as to whether or not the complainant was incorporated on May 27, 1903, under "An Act to incorporate and regulate telegraph companies," as claimed in said bill, he knows nothing, but leaves the same to be proved as this honorable court may direct; that this defendant denies that under said act the complainant has any right whatever to cross private lands or even to follow any road or highway without permission from abutting owners first had and obtained.

2. This defendant answering says that he admits that the mayor and common council of the City of Newark was the possession of a right of way for the maintenance of a pipe-line for its water supply extending from Belleville to Oak Ridge as alleged in said bill of complaint, but he denies it has any right to maintain a telephone line thereon, as therein alleged; as the only right whatever which said City of Newark possessed in the pipe-line right of way for telephone purposes was the right to have and use the same only in connection with the maintenance of the

water pipes for necessary communication between its reservoirs and other points along the line to the City of Newark, which said right of way was only obtained by the deed from the East Jersey Water Company to the said mayor and common council of the City of Newark, dated September 21, 1900, and recorded in the clerk's office of Passaic County in book R-14, of deeds, page 163, a copy of which deed is hereto annexed, and forms a part of this answer, which said deed conveys only the telephone poles, and two wires at that time thereon, as it then existed, the East Jersey Water Company reserving to itself the right in common with the said municipality to use said poles for maintaining two wires to be strung and used by the East Jersey Water Company, both parties being obliged to maintain the poles, and each party to preserve its wires thereon. And that the said City of Newark never acquired any right, title and interest in any land along said pipe line whereon it could erect poles and string wires for any purpose whatsoever, and therefore could not grant to the New York and New Jersey Telephone Company any right or authority to construct, operate and maintain any public telephone or telegraph poles or wires and fixtures upon and along said pipe line thus in its possession, and that any such grant or conveyance or contract as referred to in complainant's bill as set forth in Schedule "A" is null and void, as to the land of this defendant over which said line is designed to pass.

3. This defendant denies that the New York and New Jersey Telephone Company acquired any right, title or interest in and under any contract to erect poles and maintain a telegraph or telephone line on the lands of this defendant, and insists that the complainant could not in any way by an assignment from the New York and New Jersey Telephone Company, acquire any interest in any lands of this defendant to erect and construct such telephone or telegraph line or lines thereon as alleged in said bill of complaint.

4. This defendant answering says that he is the owner of the land mentioned in said bill of complaint,

and through which said pipe line passes, and over which there were four telephone wires used exclusively for the maintenance of said pipe line and for no other purpose whatsoever; and that the said poles supporting said four wires were good and sound and answering all purposes for which they were erected, and would continue to do so for at least twelve or fifteen years to come without having to be renewed. This defendant is the owner of the fee of the land occupied by the said pipe line, and the possession and use of said premises was never granted for any other purpose to the East Jersey Water Company, other than the easement or right of way to lay pipes under the strip now in question with the right to maintain a line of telegraph or telephone wires used in connection with the water pipes; that when the deed of grant was executed by this defendant to said East Jersey Water Company, through Albert A. Wilcox, agent and attorney, who was in full charge of this matter, then and there, and at other times, declared to this defendant that the right mentioned in said grant for erecting and maintaining a telegraph or telephone line or lines was for no other purpose than for the sole use in connection with the water was executed by this defendant to said East Jersey Water Company was never allowed to use any interest in said right of way, other than to carry out the object for which it was incorporated, viz. the storage, sale and delivery of water through said pipes. That the articles of incorporation do not extend to any other power or privileged whatsoever; that the strip of land which the East Jersey Water Company acquired from this defendant and from the other Hepburns near by and continuing, was ninety-nine feet wide; but that the part which was assigned by it to the mayor and common council of the City of Newark, was only a part of said strip twenty-four feet wide, with the use of an additional easement nine feet wide, on its westerly side, for necessary repairs to the Newark pipes as assigned to it, and that the whole interest as acquired by the East Jersey Water Com-

pany was never conveyed or assigned to said municipality.

5. This defendant answering says, that the said acts of the complainant as set out in the 4th, 5th, and 6th paragraphs of its bill are clear acts of trespass without warrant or law, and that these trespasses were begun in the night time, thus showing the complainant's guilty intentions to trespass on the land of this defendant.

This defendant answering says that last November he learned that a trunk line Telegraph Company was erecting a line from somewhere in the west to the City of New York, and that it proposed to cross over the pipe line right of way on the defendant's land; and that soon thereafter persons and linemen representing themselves as acting on behalf of the City of Newark attempted to cross this defendant's land for the purpose of erecting large poles with four cross arms each ten or twelve feet long, with notches cut for three more cross arms; these poles being large and over fifty feet high, and capable of carrying as many as one hundred wires. These linemen and workmen stated that these poles were necessary for repairing the Newark telephone line; but this defendant, knowing that these linemen were in the employ of the Northeastern Telephone and Telegraph Company, refused to allow them to enter their land belonging to this defendant, but the defendant was overpowered by at least one hundred linemen who proceeded to forcibly erect these poles on the defendant's land where the same was crossd by said pipe line; and the said workmen continued to work at erecting said poles on his land from Saturday, all day Sunday following; that thereafter the said workmen cut down all the poles belonging to the City of Newark and the East Jersey Water Company, and the four wires belonging to the City of Newark and the East Jersey Water Company were immediately strung on the poles of the Northeastern Company; this defendant says that thereafter the said complainant sent agents to him to inquire what he would take per pole to allow the stringing of the complainant's wires on said poles.

7. This defendant answering says, that on or about the last of April or the first of May, at two o'clock in the morning and during a severe thunder storm the said Northeastern Telephone Company set a large number of linemen at work on said poles stringing wires for a public telephone or telegraph line, as stated in its bill of complaint; that the work was not completed on the following day, when this defendant caused the wires of said company to be cut at all points where they entered and left the defendant's lands. That this defendant did not cut or cause to be cut any wire belonging to the City of Newark, or the East Jersey Water Company, as alleged in complainant's bill, nor in any way interfere with the said four wires. That the defendant did not cut or cause to be cut any wires of the complainant's in small pieces, and that no wanton damage was done to any of the complainant's wires. This defendant denies that the said complainant ever completed its line over this defendant's said lands, and denies it ever obtained any possession in said lands, and this defendant submits that the complainant is a trespasser on his lands and that it has no right whatever on said lands, and cannot condemn the same for the erection of its said line, and that as it is organized and incorporated, it can acquire no right to cross any private land by condemnation, but can only pass along public streets, roads, and highways, where it may have a lawful right to condemn; and that the said complainant is not entitled to any relief in this honorable court.

And this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained

WM. W. WELCH,
Solicitor.

Revenue Stamp. $1.00
THE EAST JERSEY WATER CO.,
to
THE MAYOR AND COMMON COUNCIL
OF THE CITY OF NEWARK.

This indenture made the twenty-first day of September, A. D., 1900, between the East Jersey Water Company a corporation of New Jersey, party of the first part.

And the mayor and common council of the City of Newark a municipal corporation, party of the second part,

WITNESSETH:

That the party of the first part in consideration of one dollar, and other valuable considerations to it in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed unto the party of the second part, their successors and assigns forever. All its right, title and interest in and to its existing telephone line, extending from this Belleville Reservoir near Newark northwardly to and along the Newark Water Pipe line to the Macopin intake, and to the Oak Ridge Reservoir in the County of Passaic, together with the right to maintain and repair and operate the same upon the lands of the party of the first part, as far as the same is situated upon their lands.

To have and to hold the same unto the party of the second part, their successors and assigns forever, excepting and reserving however to the party of the first part, its successors and assigns, the right to place, maintain and operate for its own use, not exceeding two telephone wires upon the poles of the party of the second part constituting part of the telephone line above granted, from the Belleville Reservoir to Little Falls; necessary maintenance and renewals of poles jointly used, to be made by the city.

The company to pay one half the cost thereof on demand so long as the joint use continues, each party to maintain its own wires and fixtures, reserving also as part of the consideration for the foregoing conveyance the right and privilege to the party of the first part, its successors and assigns hereafter, through its own connection to use in common with the City of Newark, the overflow pipe from Belleville to the Passaic River, and the right of way whereon the same is laid, which common user is hereby agreed to by the parties hereto.

In witness whereof, the party of the first part hath caused its common seal to be hereto affixed and duly attested and these presents to be signed and delivered by its vice-president, the day and year above written.

THE EAST JERSEY WATER COMPANY,
BY HENRY S. DRINKER,
Vice-President.

[L. S.]

Attested,

ALBERT P. FISHER,
Secretary.

(Duly proved by secretary of the company.)

Received and recorded September 25th, A. D., 1900 at 2:10 P. M.

A. D. WINFIELD.

Note: Similar answers filed by the defendants in the other suits.

Replication in common form.

IN CHANCERY OF NEW JERSEY.

November 28, 1906.

Between
NORTHEASTERN TELEPHONE & TELEGRAPH COMPANY,
Complainant,
and
HENRY HEPBURN,
Defendant.

Between
NORTHEASTERN TELEPHONE & TELEGRAPH COMPANY,
Complainant,
and
DANIEL HEPBURN,
Defendant.

Between
NORTHEASTERN TELEPHONE & TELEGRAPH COMPANY,
Complainant,
and
WILLIAM B. AND ROBERT HEPBURN.
Defendants.

Appearances: Mr. Gilbert Collins (of Collins and Corbin) for the complainant. Mr. Adrian Riker (of Riker & Riker), Mr. Wm. W. Welch and Mr. J. W. DeYoe, for defendants.

Transcript of shorthand notes of testimony taken in the above entitled causes before Hon. Henry C. Pitney, Vice Chancellor, at Chancery Chambers, Newark, N. J., on November 28, 1906.

Casses all tried together by consent.

Mr. Collins. I offer in evidence certified copy of deed from Henry Hepburn and wife to the East Jersey Water Company, dated July 3, 1891, recorded in L 10 of Passaic County, 498, and E. 26 for Essex County, page 494.

Marked Exhibit C 1.

I now offer certified copy of deed from Cornelius A. Van Houten to the East Jersey Water Company dated April 17, 1891, in Book A 26 for Essex County, page 432.

Marked Exhibit C 2.

Mr. Collins. Now it is admitted that Cornelius A. Van Houten afterwards died, leaving last will and testament duly proved before the Surrogate of the County of Essex whereby he devised a farm, devised the said rights and said strip of land last mentioned, to Albert Van Houten, that Albert Van Houten died leaving last will and testament duly proved.

The Court. That is where William and Robert Hepburn get their share?

Mr. Collins. Yes; in which he divided this farm with Ann. Now I offer in evidence deed from Ann E. Van Houten, dated April 5, 1895, recorded in Book Y 28 in the County of Essex, page 403.

Mr. Riker. It is all admitted.

Marked Exhibit C 3.

Mr. Collins. I offer in evidence certified copy of deed from Mary Ella Van Reyper and husband dated

July 7, 1891 and recorded in Book N 10 of Deeds for Passaic County, page 158, to the East Jersey Water Company.

Now a deed from Mary Ella Van Reyper and Peter S. Van Reyper her husband to Andrew Harris, recorded in Book K 15 of Deeds for the county of Passaic, page 80. I will state incidentally that that conveyed the farm, excepting the rights and easements theretofore conveyed to the East Jersey Water Company.

Marked Exhibit C 5.

And Andrew Harris, deed of May 2, 1904, recorded in Book N 16 of deeds of Passaic County, 399; that is to William B. Hepburn and Robert Hepburn.

Exhibit C 6.

Now we come to Daniel Hepburn and wife to the East Jersey Water Company, July 27, 1891, recorded in Book P 10 of Deeds for the County of Passaic on Page 38.

Exhibit C 6.

Now I come to the deed from the East Jersey Water Company to the Mayor and Common Council of the City of Newark,—that is an original, not certified copy; the city counsel, loaned it to me for use in this case; I have made a typewritten copy, which will be useful to all of us.

Exhibit C 8, but not marked on the original deed itself.

Certified copy of the original just offered marked Exhibit C 9.

I offer certified copy of the certificate of incorporation of the New Jersey Telephone Company which is filed August 28, 1882.

Exhibit C 10.

Then certified copy of a change of name of that company to the New York and New Jersey Telephone Company which was filed July 6, 1883.

Marked Exhibit C 11.

Then original contract between the city of Newark and the New York and New Jersey Telephone Company, schedule A in the bill, beginning at page 12.

Exhibit C 12.

Then I offer the certificate of incorporation of the Northeastern Telephone and Telegraph Company, and that was filed May 27, 1903.

Marked Exhibit C 13.

The agreement also in the bill beginning at page 20 between the New York and New Jersey Telephone Company and the Northeastern Telephone and Telegraph Company, schedule B.

Exhibit C 14.

I find that everything else that I need for my case is admitted in the answer, so that I now rest. Mr. Riker suggests, however, that inasmuch as this deed to Newark of the East Jersey refers to a contract of a water supply company between the East Jersey and Newark that that ought to be in, and I am perfectly willing it should be in. We can get printed copies of that if it is needed; consider it in if either party needs it; we will consider it in if either party needs it.

Mr. Riker. Now the defence of course is that the deeds, the title is not in the—

The Court. That these people, the defendants here, never did grant any right to do it?

Mr. Riker. That the title is not in the complainant to do what they claim the right to do.

The Court. Question of construction.

Mr. Riker. I want to put in certificate of incorporation of the East Jersey Water Company, of which I have certified copy.

Exhibit D 1.

Judge Collins and I are in accord on the proposition that the pole line and wires existing when the complainant went in were sufficient for the purposes of the telephone line required by the City of Newark.

The next proposition is that the actions of the complainant were contrary to the express disagreement, disapproval of the defendants in the suit; they didn't go in to do what they did by consent; in fact, they had no consent.

The Court. I don't know about the poles being sufficient.

Mr. Riker. They say so here.

Mr. Collins. The polls there, already there, were sufficient for four wires.

The Court. That is before the complainant attempted to put more wires.

Mr. Riker. Yes; now, I want to call—I am going to make an offer, we will admit the testimony, but I am going to make the offer.

HENRY HEPBURN, Jr., sworn.

Direct examination by Mr. Riker.

You are the son of Henry Hepburn, one the defendants in one of these actions?

A I am; yes, sir.

Q Do you know a Mr. Albert A. Wilcox?

A Yes, sir.

Q Who is he, if you know?

A He was the buyer for the East Jersey Company.

Q Buyer of the rights of way you refer to?

A Yes, sir.

Q Did he negotiate with you or did you hear a conversation in which he negotiated for the right of way through your father's farm?

A I heard the conversation; I was there at the time; we both negotiated together.

Q Now what was said by Mr. Wilcox in that negotiation with reference to the telephone line, if anything?

Mr. Collins. I object to the question on the gound that all preliminary negotiations were merged in the deed, and if it be intended to at-

tack the deed it would have to be done directly and not collaterally.

The Court. Way back to the East Jersey Water time?

Mr. Collins. Yes. Want to claim there was some representation made by these people to Wilcox when he bought the right of way, bought the use?

Mr. Riker. Yes.

Mr. Collins. I object to it on the grounds stated.

Mr. Riker. The offer is made in this view,—that there is perhaps an ambiguity in the language of the deed,—that the deed is not so clear that it should not be subject to oral explanation.

The Court. Which one of the answers is that set up in?

Mr. Riker. Set up in all of them.

The Court. Well, without expressing any definite opinion on it, I am inclined to think that Judge Collins' objection is good, but I shall receive the evidence, as it is set out in this answer, and you had an opportunity to get Mr. Wilcox here; it would not do for me to rule it out. I will tell you my grounds. Wherever a deed or other instrument of this kind is procured by an agent, and the agent makes any representations which in the end amount to fraud or question of fraud, or anything of that kind, when the principal accepts them he accepts it subject to that incubus, if it is one. I have held that; I think I am right about it. But subject to your objection, and I am inclined to think the way the case now stands the objection is good; but there is a ground on which it may be possible, it would be proper for me to reject it.

Mr. Collins. I only want to protect myself. I understand the doctrine to which your honor alludes, but while that might be sufficient to hold

the East Jersey Company to the representations made by its agent, it would not have any force whatever against *bona fide* purchasers for value, without notice, nor would it have any effect as a rule in and against the East Jersey Water Company. It would have to be in a direct proceeding.

The Court. I did not state the ground on which I thought your exception was good.

Mr. Collins. I want to add another thing, in view of Mr. Riker's—

The Court. *Bona fide* purchaser without notice of that and remedied by the East Jersey Water Company that is your ground.

Judge Collins. Yes; those are my grounds, but I will add another one, in view of this statement just now that he thought it might be possible to justify this evidence to explain an ambiguity. Now as to that I suggest that it is only a latent ambiguity that can be explained by evidence, and then only of some surrounding facts. You cannot explain a paten ambiguity or any ambiguity of what the people represented.

The Court. My strong view is that your point of *bona fide* purchaser without notice ends the case on that, but the other point I suppose the evidence would be good as between the parties, would be that it would be inequitable for the grantee to set up the strict language of the deed when it was procured by a representation of that kind if it was between the original parties, but whether it must amount to fraud or not is another question, quite another question here. A deed is framed and signed, and the general rule is safety, and it is a rule of safety that you must stick by the writing,—it is as old as the hills,—and you must stick by the writing, and you cannot construe the deed by parole, that is certain. I had occasion to go all through this in a very recent case, which has been flung up to me more

than any case I ever decided, that is O'Brien against Brewing Company; I had it flung up to me within a week, or within two months. There I distinguished between construing a paper by parole and the proof that the paper was never to take effect, and I held in that case that the parole evidence showing that the paper was not to take effect as a binding instrument was not a breach of the rule that you cannot construe a paper by parole. I am using very rough language now, and I think I have got it better stated in the opinion; so here you cannot construe this deed by parole; you can only hold, only prove that it would be inequitable and unjust for the grantee to take advantage of the language used in the deed when his agent in procuring it stated that it didn't mean that.

I will admit the evidence, but I must say I don't see how it is going to affect the grantee.

Q (Question read.)

A Why, he said the telephone line was for the use of the water company.

Q Did he say anything further?

A Why, yes, he told, that is, he was particular in stating that often; I know I heard him say that many times, for the telephone line only.

Q (*By the Court.*) On that occasion when the negotiations between the purchaser, Mr. Henry Hepburn and Mr. Wilcox, when they were talking about the deed and before the deed was signed, what was said on that subject then and there.

Mr. Riker. By Wilcox, as near as you can remember?

A Why, he said it was for a water line only, and the telephones, it was necessary to have telephone poles in order to conduct the business for the use of the water company, he stipulated that lots of times and told it.

Q (*By the Court.*) Do you mean to say lots of times in that conversation?

A In that conversation; when he was talking about this telephone line, at first, he didn't talk any about it, that is, he was merely for the Water Company, and then he said it would be necessary to have these poles up in order to operate their water supply, and it would be only a light line of poles.

Q (*By the Court.*) Line of light poles?

A Line of light poles I should say, that it would not be any trouble to us, he said, talked in that way.

Mr. Riker. That is all; that is the defendants case.

The Court. The point that struck me, perhaps I mentioned at the time this thing was argued—was it argued before me before?

Mr. Collins. Yes, sir, quite fully.

Mr. Riker. Yes.

The Court. Is this, whether or not,—it seems to me the thing is in a nut shell, whether or not taking the grant with its surrounding and circumstances a court ought to or ought not to imply that the grant of the right of the telephone poles was confined, not in words perhaps, but by the circumstances confined to the particular circumstance; that is one thing; and then the other is, I think it was taken by somebody, I suppose it is all covered by your proof, but I will tell you now what is in my mind, that the East Jersey Water Company was incapable of taking the grant for any other purpose, or taking it as merchandise, to be conveyed first to the city of Newark and by the city of Newark to somebody else,—whether it was competent for city of Newark to require a merchantable right, that is, a right to convey to somebody else that grant. Then I understand what your answer was to that. I am telling you what I am recollecting about it now, that is, they wanted to do it because they didn't want the trouble of maintaining it themselves.

Mr. Collins. Consideration between the two.

NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,
vs.
HENRY HEPBURN.

THE SAME,
vs.
DANIEL HEPRURN.

THE SAME,
vs.
ROBERT HEPBURN.

Three causes tried together. Final hearing on bill. Answer and proofs.

Mr. Gilbert Collins for the complainant.
Mr. Adrian Riker for the defendants.

OPINION.

PITNEY— *V. C.*

The object of these bills is to protect the complainant in the enjoyment of an easement in land by enjoining the disturbance thereof by the defendants. The easement was created by the predecessors in title of the several defendants in the three causes (which were tried together) by grant made to the predecessor in title of the complainant. The grant was for the right to set up, operate and maintain "a telegraph or telephone line or lines" over certain lands, and a telephone line was at once erected and has ever since been maintained.

The complainant and its predecessors in title have been in the possession and enjoyment of this easement for several years, and their right to do has never been and is not now seriously contested by the several defendants.

The defendants justify their action complained of by complainant, which consisted of cutting down certain of the wires, etc., on the arms of the poles constituting the telephone line, on the ground that the complainant is increasing the burden of the easement beyond the scope of the original grant.

That I conceive to be the question involved in these causes, and its solution depends upon the true construction of the terms of the grant. It was made by the predecessors in title of the defendants to the East Jersey Water Company and be it assigned in part to the City of Newark.

One point made by the defendants may be dealt with at the start. They contend that the East Jersey Water Company had no power to take and accept a grant of a right to maintain a telephone or telegraph system. The answer to this objection is simply that it does not lie in the mouth of the grantor of real estate or an interest in real estate to set up that the grantee was incapable of receiving and accepting the title or right so conveyed. Only the public authorities can take advantage of that disability. The authorities on that question are abundant and are collected and collated by Justice Harlan in *Fritts* vs. *Palmer*, 132 U. S. 282 at page 291 *et seq.*

Coming now to the grant itself—the language is this, as found in the deed from Henry Hepburn and wife to the East Jersey Water Company, dated July 3rd, 1891, the grantors "do hereby grant and convey to the East Jersey Water Company * * * its successors and assigns, the right of way over, through and across the lands hereinafter described, situate," etc. * * * "in and upon which to lay, operate and maintain a water pipe or water pipes for the transportation of water to the City of Newark in said state and other places; such pipe or pipes to be laid within a space not exceeding the width (99 feet) particularly described in the description hereinafter set forth, with the right to set up, operate and maintain a telegraph or telephone line or lines thereon and with right of ingress and egress to and from said right of way for all purposes." Then follows a description of the right of way ninety-nine feet wide.

After the *habendum* clause which follows the description, we find this language, "the possession and use of the said premises are to be and remain in the said grantors, their heirs, executors, administrators

and assigns, subject to the grant herein made, as fully as if this conveyance had not been executed."

This language is the same in each of the conveyances of the predecessors in title of the defendants and was probably found in a printed form used by the East Jersey Water Company in acquiring a right of way for their works from the northern portion of Morris and Passaic Counties to the City of Newark and elsewhere.

That company assigned to the City of Newark its rights in this right of way by a deed dated May 2nd, 1892, which recites an agreement of September 24th, 1889, and then conveys to the city all the works in the meantime erected by the water company "with all and singular their appurtenances, adjuncts and appliances of whatever nature, kind or description soever" * * * "And also all and every the lands and rights of way over which the conduit or conduits, pipe line or lines have been laid or constructed, and all and singular the lands and rights of way acquired" etc. "Together with all and singular the ways, profits, privileges and advantages," etc. with a corresponding *habendum*.

This deed seems to be ample to convey every sort of right which the Water Company acquired by the conveyances from the defendants.

Later on, however, in 1900, another agreement was made between the Water Company and the city by which the Water Company expressly conveyed to the city, its right, title and interest in the existing telephone line here in question, with an exception or reservation to the Water Company of the right to maintain two telephone or telegraph wires upon the poles conveyed, and a joint agreement for the maintenance of the poles.

This right was later on assigned by the City of Newark to the complainant by deed dated August 24th, 1905. That assignment is special and reserves certain rights in the city, or rather, in consideration of the conveyance, the complainant herein agreed to perform certain services for the city.

Shortly after this arrangement the complainant entered upon the right of way and replaced the telephone poles already in existence with larger poles and placed upon them larger arms and prepared to string upon them a greater number of wires, but did not increase the number of poles. The sole increase of the burden of the easement was a subsequent increase in the number of wires strung on the poles.

As soon as this increase was made the defendants entered on the right of way and cut off all the wires, *manu forti*. Subsequently they restored two wires, being the number in use before the increase. Upon *ex parte* application to this court an injunction was granted under its protection the cut wires were restored.

It is not easily perceived how the adding of additional wires, and, if you will, arms on the poles increases perceptibly the burden of the easement. The language of Mr. Justice Dixon in *Slingerland* vs. *Newark*, 54 N. J. L. (25 Vr.) at page 69 is significant in this connection. "Under these circumstances it is not apparent how the prosecutor can have any legal concern with the quantity of water drawn through the aqueduct, or with the use made of so much of it as the public does not need." In fact the circumstances show that the right and interest of the owners of the fee in the soil is of little practical value. It resembles the ownership of the soil of a railway strip subject to the easement of the railroad.

The East Jersey Water Company conveyed to the City of Newark the right of way for pipes and telephone lines over only a part of the whole strip, twenty-four feet in width. The Water Company reserved to itself the right to lay pipes for its own use on the rest of the strip.

The city has and maintains two large parallel mains beside its line of telephone poles. Besides these easements is the general right of way from end to end of the whole strip which is naturally and necessarily in constant use and must be nearly or quite exclusive in its character.

But the complainant itself has encouraged the defendants in the notion that the additional use to be made by it of this telephone line over and above that which the city previously used has some pecuniary value by providing by a sort of stipulation in its contract of assignment with the city that it would attempt to acquire from all the owners of the fee along the miles of the pipe line the right to make this additional burden on the land.

This right it did acquire on what was, to it, satisfactory terms, from all the other owners of the fee, but was unable to agree with the defendants.

This conduct on the part of the complainant ought not and will not prejudice its right to the relief it asks in this court if such right is clear under its contract.

The defendants assert that it is not clear. Their counsel does not argue that the grant is not in terms very broad and general, and I have already expressed the opinion that they cannot take advantage of the circumstances that the Water Company was not capable, under its charter, to enter into the business of carrying on a telephone line for public purposes, but their counsel relies on a single word in the grant taken in connection with the circumstances to manifest an intention on the part of the grantors to confine the use of the telephone line to a use in connection with and as an adjunct to the beneficial use of the great water works the Water Company was about to construct.

The word relied upon is the single word "with" which follows the grant of the right to lay, operate and maintain a water pipe or water pipes over the land in question, and precedes the words "the right to set up, operate and maintain a telegraph or telephone line or lines" on the land.

But two matters must be taken into account in considering the force of the word "with." First: The grant is a right to maintain a line or lines, leaving the number unlimited. Now it is quite clear and undisputed that by a line of telegraph or telephone poles is meant a line of poles carrying an unlimited number of wires, and that such a line is not rendered plural in

its nature by having more than one wire stretched upon it. It still remains a single line, hence the use of the plural in the grant is sufficient. And the question arises how could it be supposed that the water company could ever need more than one line of poles for its use in connection with the water works. The other matter is that the grant of the right to maintain telephone and telegraph line or lines is followed in the same part of the sentence with a grant of ingress and egress to and from the right of way "for all purposes."

Now it seems to me that the words "for all purposes" cannot be entirely ignored, although its immediate connection is with a grant of a right of way.

Moreover, it seems to me that if the parties had intended to limit the right to maintain the telegraph and telephone poles to a use strictly in aid of the original construction and subsequent maintenance and operation of the great water works they would have said so.

The fact is that the burden of the telephone and telegraph line of poles is not affected or increased or varied by the number of messages sent over the wires, and hence there was no occasion to make any provision on this subject.

If the defendant's contention in this behalf is sound then it follows that it is not within the right of the Water Company or its assignee, the city, or the complainant, as the assignee of the latter, to send a single message from the City of Newark over the line to Newfoundland which does not relate to the business of the water supply, and, according to the practice here adopted by the defendant and contended for by counsel, the sending of such a message would authorize the defendants to enter and, *manu forti,* destroy the wires.

The contention of the defendants is, as before stated, that the use of the word "with" in the grant confines the use of the telephone line to purposes strictly adjunct to and in aid of the grant of the right to lay water pipes, which was for the "transportation of

water to the City of Newark in said state, and other places." For this contention counsel relies upon three adjudged cases which I will not refer to.

The first is *Leeke* vs. *Bennett,* 1 Atk. 470, a decision by Lord Hardwick, which arose out of the construction of a clause in a will as follows: "I will give to my niece Elizabeth Martin, during the time of her natural life, my house on Mals Hill in Greenwich, with all the household goods that shall be found therein at the time of my decease."

The estate of the testator in the house was a term of years with only ten years unexpired. The question was whether the gift to the niece of the household goods was for life or in fee, and it was held that the word "with" so connected the household goods with the house as that the estate in those was limited in the same manner as that in the house. The lord chancellor relied upon the fact that the words "during her natural life" preceded the gift of the house, and remarked, "if the words 'during her natural life' had been subjoined to the devise of the house it had not been so clear a case, though I think that would not have varied the law of the case" * * * "but those words being put before the devise must operate equally on both parts of the subsequent devise, and the same interest passed in both. The word "with" would have had the same effect and been considered in the same manner in the case of a grant."

Here it is to be observed that the use of the house and the use of the goods consisted in substantially the same act or series of acts; unless they were separated one could not be used without the other, and the circumstance that they were not separated made the subject of the devise in effect a single one of the house and furniture. This circumstance differenciates that case from the present one.

Here there was no necessary or even natural unit of use between the water pipes for carrying water from Newfoundland to Newark and the telephone line; either could be used and were in fact used without the other. There was nothing common in the mode of use. The telephone line was simply a con-

venience, and although used as a convenience, not as a necessity, in maintaining and operating the water pipes, the actual use of each was quite distinct and dissimilar.

The next case cited is *Richards* vs. *Baker, et als.*, 2 Atk. 321. That also was the construction of a will. There the testator gave his widow two thousand pounds, to be paid in six months after his decease, and then proceeds, "I do also give and bequeath to my dear and loving wife all my household goods, furniture, plate, linen and china in my house at Edmonton wherein I now dwell or to the said house belonging, and also the said house, gardens, fields and lands thereto belonging, so long as she continues my widow, and no longer; and I likewise give her my jewels, coach, chariot and coach horses."

The master of the rolls decreed the widow to leave with the master a schedule of all the several things specifically bequeathed to her during widowhood, which was the usual mode of limiting her right to a life estate. The matter came on before the lord chancellor on appeal and he said that he had to determine what is the relation and extent of the words of limitation "so long as she continued a widow, and no longer;" whether they are to be confined to the house at Edmonton or to be extended to the whole; and he held that it was to be confined simply to the house and the household goods, and did not include the jewels, coach, chariots, and coach horses. Careful consideration of that case seems to me to make against the defendants rather than in their favor, for the gift of the jewels, etc., was connected with the other gift by the word "likewise," which means "in like manner," and might well be construed to mean "to the same extent." But the lord chancellor held otherwise.

These two decisions by Lord Hardwicke illustrate the true distinction to be applied in such cases. In the one case the natural and necessary use of the furniture with the house made the two a single subject of the gift, while in the other case the jewelry, coach, chariots and horses, though convenient, were in no

sense necessary to the use of the house, and their use was entirely distinct from it. The present case falls under the latter category. Water works like those erected by the East Jersey Water Company had been erected and maintained many years before the invention and use of telegraphs and telephones.

The next case cited by defendants is *Durham and Southern Railway Company* vs. *Walker*, 2 Adol. and Ellis, N. S. Q. B., 940, also reported in 2 Gale and Davidson 326, 11 L. J. Ex. 442. In that case the court of Exchecquer Chamber had before it on bill of exceptions and writ or error a construction put by Justice Coltman at *nisi prius* on a reservation out of a lease granted for years by the Dean and Chapter of the City of Durham to one Walker of a right in certain lands. Under that reservation the lessors had granted to the defendant the right to build an ordinary double track railway for through traffic and an action at law had been brought by the tenant for years against the persons acting under the grant. The reservation was of "woods, trees, mines, quarries and seams of clay and with full and free authority and power to cut down, carry away, etc., said woods and trees, and to dig and carry away the mines, quarries, etc., with free ingress, egress and regress, way, leave and passage to and from the same or to or from any other mines, quarries, etc., with cars and all manner of carriages, and also all necessary and convenient ways, passages, etc., for the purposes aforesaid, and particularly laying, making and granting wagonway or wagonways in or over the premises or any part thereof, paying reasonable damages," etc. The learned judge at *nisi prius* declared his opinion that if the railway was made for other purposes as well as for the carriage of coals and minerals it was not such a road as could be made in pursuance of the exceptions and reservations contained in the indenture of demise, and he directed the jury that if they thought the railway was so made for such other purposes as well as for the carriage of coals and minerals then they ought to find a verdict for the plaintiff.

The court of error held that that direction was not right. It held that the plaintiff could not claim for a trespass affecting his present possession of the land, it being in the occupation of a sub-tenant, but that it was an injury to the inheritance, or rather the portion of the term which would remain to him after the expiration of the under lease out of the term of years which was granted to him, and it used this language:

"Now if the railway is such a railway as the defendants, at the time when it was formed, might lawfully make for the purposes for which when made they might lawfully use it, the plaintiff can have no ground of complaint by reason of the intention of the defendants also to use it for other purposes for which they have no right to use it. Such an unwarranted use of the railway, if afterwards put in execution, may entitle the tenants in possession to maintain an action of trespass; but the mere intention to commit such a trespass is no injury to the reversioner; and we therefore think that the direction of the learned judge was incorrect. The proper question for the jury, as it appears to us, was, not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether it was such a railway as, at the time it was made, it was reasonable and proper to make for the purposes for which it was lawful to make it, and for those purposes only."

But the court then proceeds to determine what would be the proper direction on new trial. It will be observed that all reservations were there declared to be "for the purposes aforesaid," which refers entirely and exclusively to the clauses giving what is called way leave. And then after "the purposes aforesaid" follows; "and particularly of laying, making and granting wagonway or wagonways, etc.," Now that word "particularly" was the word upon which the case turned, and it shows clearly that the words which follow it were intended to be a mere amplification of the language which had preceded it. The court refers to the word "with" in the previous part of the reservation and says it means as an inci-

dent merely. That is quite plain when you read it, because, as well remarked by the court, the reservation of the timber and the minerals without a right and privilege of removing them would be nugatory, and those reservations of way leave were no more than what the law would imply. The construction put upon the word "with" in that case does not seem to me to reach the present case. That case turned upon the force of the word "particularly" and not on the force of the word "with."

For the reasons I have stated I am unable to limit the grant here in question in the manner contended for by the defendants. I am of the opinion that the word "with" has the force of the word "also" or "and" and is a mere conjunctive.

Undoubtedly the circumstances that the water company was not entitled to engage in the public service of a telegraph or telephone company, and the line was going into a region where there was no reason to suppose that there would be any public service of that sort, would naturally lead to the supposition that the telegraph and telephone line would be used for the purpose of the water company only. But against any inference from that circumstance is the very broad language of the grant itself, to which I have already alluded. It is a "telegraph or telephone line or lines" without limit in number, or any direct designation of purpose for which it was to be used, unless it be found in its immediate connection with the grant of a right of way "for all purposes."

Moreover, I am of the opinion that this is a case where the rule that before a complainant can have relief of this sort in this court his right at law must be perfectly clear, does not apply in its full force. The complainant here is simply asking that the defendants should not enter with strong hand and destroy its property, of which it has full possession and right of possession. See in this connection *French* vs. *Robb,* 67 N. J. L., (38 Vr.) 260. The case is far outside that relied upon by defendants, to wit, *Broome* vs. *Telephone Company,* 42 N. J. Eq. (15

Stew.) 141. There the telephone company had hardly a color of right, and the landowner was defending his possession.

The effect of permitting the defendants not only to tear down the wires, which they did in this case, as before stated, but also to saw off the top of the poles, as is also charged and admitted, would be to compel the complainant either to wait for years the result of an action of trespass before enjoying the easement, or else to admit that the construction of the grant claimed by the defendants is the true one and apply for condemnation of the additional right so claimed and incur all the expense and hazard of condemnation proceedings.

On the contrary I think the rule of clear right at law ought to be applied to the man who undertakes to enforce his rights by the strong hand, and that the defendants should be enjoined from enforcing his right in that manner until he shall establish it at law. I think therefore that the complainant is entitled to relief in this court.

One other point made by the defendants remains to be considered. The defendants offered parol proof, and it was admitted, subject to timely objection by the complainant, to the effect that at and before the time when one or more of the original grants in this case was made the purchasing agent of the water company stated to that particular grantor that the telephone line was to be used only for use in assisting in the construction and maintenance of the water works. I stated at the hearing, and I still think not only that the evidence was incompetent as tending to vary a written instrument but that it was not of a character to rise to the dignity of a contract or representation which affected the transaction. In this connection I refer to *Chetwood* vs. *Brittin,* 1. H. W. Gr (2 N. J. Eq.) 438 on motion for an injunction, and 4 N. J. Eq. (38 W. Gr.) on final hearing. I dealt with that case in *O'Brien* vs. *The Paterson Brewing and Malting Company,* 61 Atl. Rep. 437 at page 444 and will not repeat what I there said. I will only add that I attempted, and I think succeeded, in there

drawing a distinction between the case where the parol evidence amounted to a stipulation that the instrument in question was not under certain circumstances to have binding effect, and one in which its effect was to vary the construction to be put by the court upon a written contract. In the latter case the rule is hard and fast that parol evidence cannot be used except in a direct proceeding to reform the contract. This element is not found in this case. Moreover, I see nothing in the evidence to lead to the conclusion that the remark made by the purchasing agent, as testified to by the witness, amounted to anything more than a casual explanatory remark, quite insufficient to maintain a bill to reform.

But if I had come to a different conclusion on this point I should have been met by another point made by the complainant in answer thereto, namely, that it stands in the position of a *bona fide* purchaser without notice of the parol agreement. The contents of the agreement between the city and the complainant shows a consideration passing or to pass between the two, and the complainant entered and put up its new line of poles and incurred other expenses on the strength of that agreement as it appears in writing, and this constitutes it a *boni fide* purchaser for value.

Upon the whole case then I find it necessary to adjudge and determine only this—that the defendants have no such right, adverse to that claimed by complainant, as to entitle them to enforce such right, if any, by the strong hand, and will advise a decree for an injunction.

IN CHANCERY OF NEW JESREY.

Between

NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,

Complainant,

and

DANIEL HEPBURN,

Defendant.

On Bill, etc.

FINAL DECREE.

This cause coming regularly on to be heard, in presence of Gilbert Collins, of counsel with the complainant, and William W. Welch, and Adrian Riker, of counsel with the defendant, and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and the court being of opinion that the complainant is entitled to the relief sought and prayed for by it in its bill of complaint,

It is on this twenty-ninth day of December, nineteen hundred and six, by his honor William J. Magie, chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, and the said chancellor, by virtue of the power and authority of this court, does hereby Order, Adjudge and Decree that the injunction heretofore issued in this cause be and the same is hereby made permanent; and that the defendant in said cause, his servants and agents be and they hereby are perpetually enjoined from interfering with the complainant in said cause in the erection, construction, maintenance and operation of the telephone line in the complainant's bill of complaint described, or with any cross arms that have been or may be placed upon the poles of said line, or with any wires that have been or may be strung upon such cross-arms.

And it is further Ordered, Adjudged and Decreed that the said defendant pay to the said complainant the costs of this suit to be taxed, and that execution issue therefor according to the practice of this court.

W. J. MAGIE.

Respectfully advised,

H. C. PITNEY,

Vice Chancellor.

Filed December 31, 1906.

(Same decree in other suits.)

New Jersey Court of Errors and Appeals.

NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,
Complainant,
vs.
DANIEL HEPBURN,
Defendant.

PETITION OF APPEAL.

To the Honorable the Court of Errors and Appeals in the last resort of all causes:

The petitioner, Daniel Hepburn, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the court of chancery by his honor William J. Magie, chancellor of New Jersey, bearing date the twenty-ninth day of December, nineteen hundred and six, in a cause wherein the said Northwestern Telephone and Telegraph Company was complainant; and the said Daniel Hepburn was defendant, in this respect, to wit, that the said decree adjudges that the injunction theretofore issued in said cause be and the same was thereby made permanent, and that the defendant in said cause, his servants and agents, were thereby perpetually enjoined from interfering with the complainant in said cause in the erection, construction, maintenance and operation of the telephone line in the complainant's bill of complain described, or with any cross-arms that have been or may be placed upon the poles of said line, or with any wires that have been or may be strung upon such cross-arms. And further adjudges that the said defendant pay to the said complainant the costs of said suit to be taxed, and that execution issue therefor according to the practice of said court.

And your petitioner humbly appeals from the whole of said decree upon the ground that the same is erroneous, for that said decree should have adjudged that the injunction above mentioned should have been dissolved and the defendant in said cause, his servants and agents, should not have been perpetually enjoined from interfering with the complainant in said cause in the erection, construction, maintenance and operation of the telephone line in complainant's bill of complaint described, or with any cross-arms that have been or may be placed upon the poles of said line, or with any wires that have been or may be strung upon such cross-arms; and for that the defendant should not pay the cost of said suit but that the costs of said suit should have been paid by the complainant to such defendant.

Your petitioner therefore prays that the said decree of the said chancellor may be in the particulars aforesaid revised, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

RIKER & RIKER,

Solicitors for and of counsel with the petitioner.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY,
Respondent,
and
DANIEL HEPBURN,
Appellant.

ANSWER TO PETITION OF APPEAL.

The answer of the above named respondent to the petition of appeal of the above named appellant:—

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was on the twenty-ninth day of December, nineteen hundred and six, 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 substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and it prays that same may be affirmed, with costs to be adjudged to this respondent.

COLLINS & CORBIN,
Solicitors for and of Counsel with the Respondent.

(Like answers filed in each of the other causes).