

# INDEX

	PAGE
Notice of Appeal .....	1
Summons .....	2
Complaint .....	3
Answer .....	8
Reply .....	10
Stipulations .....	11
Finding of Facts and Judgment .....	12
Judgment .....	17
Certificate of Clerk .....	18
Motion for a Non-suit .....	71
Motion for Direction of a Verdict .....	91
Decision of Trial Judge .....	92
Verdict .....	96
Reasons .....	97

## TESTIMONY.

### *Plaintiff's Witnesses.*

Mrs. Josephine L. Hanna,	
direct examination.....	20
cross " .....	33
re-direct " .....	38
Harold H. Bowman,	
direct examination.....	39
cross " .....	42
Gertrude Miller,	
direct examination.....	44
cross " .....	45
Christiana Wainwright,	
direct examination.....	47
cross " .....	48
re-direct " .....	49
George A. Miller,	
direct examination.....	49
cross " .....	53
re-direct " .....	53

	PAGE
Harry P. Kreiner,	
direct examination.....	54
cross " .....	59
re-direct " .....	60
Vincenzo De Luca,	
direct examination.....	61
cross " .....	66
re-direct " .....	67
Thomas G. Sessa,	
direct examination.....	67
cross " .....	69
re-direct " .....	70
<i>Defendant's Witnesses.</i>	
Ernest C. Hinck,	
direct examination.....	71
cross " .....	76
re-direct " .....	79
re-cross " .....	79
Louise C. Hinck,	
direct examination.....	79
cross " .....	82
re-direct " .....	84
re-cross " .....	85
(recalled) further cross .....	90
Otto Hinck,	
direct examination.....	86
cross " .....	88
re-direct " .....	89
re-cross " .....	89

*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed April 6, 1926.

**Essex County Circuit Court**

VINCENZO DE LUCA,

*Plaintiff,*

*vs.*

BERGER MELIN,

*Defendant.*

*Action  
at Law.*

*Notice of  
Appeal.*

10

To Kalisch & Kalisch, attorneys of plaintiff:

TAKE NOTICE that the defendant appeals to the  
Court of Errors and Appeals of the State of  
New Jersey on the whole of the judgment en-  
tered in this cause. 20

CHARLES JONES,

Attorney for of Counsel with Appellant.

Dated, Newark, N. J., March 26, 1926.

Service of the within notice is hereby acknowl-  
edged this 27th day of March, 1926.

KALISCH & KALISCH,  
Attys. of Defendant.

30

40

*Summons.*

**SUMMONS.**

The State of New Jersey to Berger  
Melin:

(SEAL) YOU ARE SUMMONED to answer the  
annexed complaint of Vincent De  
Luca in an action at law in the Essex  
10 County Circuit Court. AND TAKE NOTICE that  
unless you file your answer to said complaint  
with the Clerk of said Court, at Newark, within  
twenty days after service upon you of this writ,  
and the annexed complaint, the plaintiff may  
proceed in the suit and judgment may be entered  
against you.

WITNESS, Honorable NELSON Y. DUNGAN, Judge  
of the said Essex County Circuit Court, at  
20 Newark, this 22nd day of June, 1925.

JOHN H. SCOTT,  
Clerk.

KALISCH & KALISCH,  
Attorneys of Plaintiff.

30

40

*Complaint.*

**COMPLAINT.**

ESSEX COUNTY CIRCUIT COURT.

VINCENT DE LUCA,  <div style="text-align: center;"><i>vs.</i></div> BERGER MELIN,	} <i>Plaintiff,</i>  <i>Defendant.</i>	} <i>Action</i> <i>at Law.</i>  <i>Complaint.</i>	10
--	---	---	----

Plaintiff, residing in the Town of Montclair, County of Essex and State of New Jersey, complaining of the defendant, says that:

FIRST COUNT.

1. Plaintiff, Vincent De Luca, before and at the time of the committing of the grievances by the said defendant as hereinafter mentioned, was and from thence hitherto has been and still is lawfully possessed of a certain tract of land and premises with the building thereon and appurtenances, known and designated as 155 Grove street, in the Town of Montclair, County of Essex, aforesaid, more particularly described as follows:

BEGINNING: at a point in the east side of Grove Street in the Southerly line of land of Elizabeth Inness which point is distant measuring North thirty one degrees forty three minutes East one hundred and sixty eight feet from an angle in the East side of Grove Street; thence running along the East Side of Grove Street South sixty one degrees forty two minutes East Two hundred feet; thence North thirty one degrees forty three

20

30

40

*Complaint.*

minutes East One hundred and forty feet to said southerly line of lands of Elizabeth Inness, and thence along said line of said lands North seventy two degrees fifty two minutes West two hundred and six feet three inches to the place of Beginning.

10     2. And the said plaintiff also before and after  
the committing of the grievances by the said  
defendant as hereinafter mentioned was and  
from thence hitherto has been and still is law-  
fully possessed of a certain right of way and  
easement from and out of the rear of his said  
tract of land, into, through and over a certain  
close of the said defendant in the Town of  
Montclair, aforesaid, adjoining on the south said  
tract of land and premises of said plaintiff, unto  
20 and into said Grove street, a public street or  
highway of said Town of Montclair, and so back  
again from said public street and highway unto  
and into the said tract of land of the said plain-  
tiff, for himself and his servants and tenants  
and members of his family, on foot and with  
horse and wagons and other vehicles, to go, re-  
turn, pass and repass, every year and at all  
times of the year, at their free will and pleasure.

30     The said right of way and easement aforesaid  
covers and runs over the part of the premises  
of the said defendant particularly described as  
follows:

Beginning in the Easterly line of Grove  
Street where the same is intersected by the  
Southerly line of land belonging to Vincenzo  
De Luca; thence running along said De  
Luca's line South sixty one degrees forty  
two minutes East Two Hundred feet; thence  
south thirty one degrees forty three minutes

*Complaint.*

West and parallel with Grove Street Sixty and eleven hundredths feet; thence North sixty one degrees forty two minutes West Two Hundred feet to Grove Street and thence along Grove Street North thirty one degrees forty three minutes East Sixty and eleven hundredths feet to the place of Beginning. 10

3. Said defendant, well knowing the premises and wrongfully and unjustly contriving and intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of his said way as aforesaid whilst the said plaintiff was so possessed of his said land and premises with the appurtenances aforesaid, to wit, on the 14th day of January, in the year 1925, and on divers other days and times between that day and the day of the commencement of this suit, at Montclair, in the County of Essex aforesaid, wrongfully and injuriously placed and deposited large mounds of dirt and other obstructions in and across said right of way and easement for a long space of time, and thereby during all the time aforesaid the said way was and still is obstructed and stopped up, and the said plaintiff by means thereof could not during the time aforesaid, or any part thereof, nor can he now have or enjoy his said right of way or easement as he of right ought to have done and otherwise might and would have done, and has been and is by means of the premises deprived of the use, benefit and advantages thereof. Wherefore the said plaintiff says that he is injured and has sustained damages to the amount of one thousand (\$1,000) dollars on this count, and therefore he brings his suit. 20  
30  
40

*Complaint.*

## SECOND COUNT.

1. Plaintiff repeats paragraph 1 of the First Count and makes it a part of this count.

2. And the said defendant before the committing of the grievances by him as hereinafter mentioned, did dedicate and donate to the public use an easement and right of way over his (defendant's) property on Grove street, aforesaid, adjoining on the south the said property of said plaintiff; said public easement and right of way covering and running over that part of the premises of the said defendant which is particularly described as follows:

Beginning in the Easterly line of Grove Street where the same is intersected by the Southerly line of land belonging to Vincenzo De Luca; thence running along said De Luca's line South sixty one degrees forty two minutes East two hundred feet; thence south thirty one degrees forty three minutes West and parallel with Grove Street Sixty and eleven hundredths feet to the place of Beginning, and said public right of way and easement being for the purpose *inter alia* of permitting the plaintiff, for himself and his servants and members of his family, tenants, and the public generally to pass to and from the said property of the said plaintiff, either on foot, with horse and wagon or other vehicles, to and from said Grove St., aforesaid every year and at all times of the year at their free will and pleasure.

3. Said defendant, well knowing the premises and wrongfully and unjustly contriving and intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit

*Complaint.*

of his said way as aforesaid, whilst the said plaintiff was so possessed of his said land and premises with the appurtenances aforesaid, to wit, on the 14th day of January, in the year 1925, and on divers other days and times between that day and the day of the commencement of this suit, at Montclair, in the County of Essex aforesaid, wrongfully and injuriously placed and deposited large mounds of dirt and other obstructions in and across said public right of way and easement for a long space of time, and thereby during all the time aforesaid the said way was and still is obstructed and stopped up, and the said plaintiff by means thereof could not during the time aforesaid, or any part thereof, nor can he now have or enjoy said public right of way or easement as he of right ought to have done and otherwise might and would have done, and has been and is by means of the premises deprived of the use, benefit and advantages thereof.

Whereof the said plaintiff says that he is injured and has sustained damages to the amount of one thousand (\$1,000) dollars, on this count, and therefore he brings his suit.

KALISCH & KALISCH, 30  
Attorneys of plaintiff.

Service of a copy of the within summons and complaint is hereby acknowledged this day of July, 1925.

CHARLES JONES,  
Atty. of Deft.

*Answer.*

**ANSWER.**

Filed June 27, 1925.

Defendant, residing in the Town of Montclair,  
County of Essex and State of New Jersey, says:

10                   DEFENSE TO FIRST COUNT.

1. He has no knowledge of paragraph one (1).
2. He denies paragraph two (2).

3. He denies paragraph three (3) and says that the land therein described has not been, and is not being disturbed, obstructed or stopped up, although this defendant reserves the right to do so at any time he so desires.

20                   DEFENSE TO SECOND COUNT.

1. He denies paragraph one (1) of the second count.

2. He denies paragraph two (2).

30                   3. He denies paragraph three (3) and says that the land referred to and described in paragraph two (2) has not been and is not being disturbed, obstructed, or stopped, although he reserves the right to do so at any time he so desires.

SECOND DEFENSE TO SECOND COUNT.

1. That defendant says that there was no dedication of the strip of land described in paragraph two (2) of the second count, as a public street or public right of way.

40                   2. That if any rights were acquired by the Town of Montclair, or by the public in general,

*Answer.*

they were relinquished prior to the beginning of this suit, by an ordinance duly passed by the governing body of the Town of Montclair, pursuant to legislative authority.

FIRST SEPARATE DEFENSE TO BOTH  
COUNTS.

10

1. That plaintiff acquired title to the premises described in paragraph one (1) of the first count, by deed from Josephine L. Hannah, widow, dated May 15, 1902, and recorded in Book M 35 of Deeds for Essex County, page 284.

2. That neither by said deed or by any deed in plaintiff or defendant's chain of title, or by any other writing, was the plaintiff granted any right or easement over the premises described in paragraph two (2) of the first count.

20

3. That plaintiff's alleged rights over said strip of land are based purely upon parol evidence. That the alleged easement being an interest in defendant's land must be in writing, pursuant to the provisions of the Statute of Frauds of this State, which statute the defendant hereby pleads.

SECOND SEPARATE DEFENSE TO BOTH  
COUNTS.

30

1. That any user of the said alleged rights of way was with the full consent and sanction of defendant's predecessors in title, and was, therefore permissive in character.

THIRD SEPARATE DEFENSE TO BOTH  
COUNTS.

1. That plaintiff's use of said strip of land amounted to a license, which was revocable at

40

*Reply.*

any time by the grantor or his successors in title, and such license was revoked.

FOURTH SEPARATE DEFENSE TO BOTH COUNTS.

10 1. That defendant's interest in said alleged right of way can only be established by a deed or instrument in writing, pursuant to section 5 of the Statute of Frauds and Perjuries of the State of New Jersey, which statute is hereby pleaded.

CHARLES JONES,  
Attorney of Defendant.

20 Service of the within answer is hereby acknowledged this 25th day of June, 1925.

KALISCH & KALISCH,  
Attys. of Plaintiff.

**REPLY.**

Filed June 27, 1925.

30 The plaintiff, replying to the answer filed in the above-entitled cause, says that:

1. He denies all the new matter set forth in the said answer.

KALISCH & KALISCH,  
Attorneys of Plaintiff.

*Stipulations.***STIPULATION.**

Filed July 3, 1925.

It is hereby stipulated by and between the attorneys of the parties hereto that the above-entitled cause be tried by and before Hon. Nelson Y. Dungan, Circuit Court Judge, at the Essex County Circuit without a jury, and that the Court in the trial of the issue shall decide all disputed questions of fact. 10

KALISCH & KALISCH,  
Attorneys of Plaintiff.  
CHARLES JONES,  
Attorney of Defendant.

**STIPULATION.**

Filed January 11, 1926.

WHEREAS, Hon. Nelson Y. Dungan, who sat in the above-entitled matter in the Circuit Court and dictated his findings of fact at the conclusion of the trial, has since become disabled by reason of sickness from attending to his duties as Circuit Court Judge, and whereas, counsel for the defendant, it is therefore stipulated by and between the attorneys for the parties hereto that the findings of fact and order for judgment may be signed by Hon. Worrall F. Mountain, Circuit Court Judge, with the same force and effect as though the same had been signed by Hon. Nelson Y. Dungan, who presided at the trial. 20 30

KALISCH & KALISCH,  
Attorneys of Plaintiff.  
CHARLES JONES,  
Attorney of Defendant.

Let this be filed in the Essex County Clerk's office. 40

WORRALL F. MOUNTAIN,  
Judge.

*Finding of Facts and Judgment.***FINDING OF FACTS AND JUDGMENT.**

Filed January 11, 1926.

10 This is an action brought by the plaintiff, Vincenzo De Luca, the owner of a tract of land on the easterly side of Grove street, in the Town of Montclair, against Berger Melin, the owner of an adjoining tract, to the south of his, alleging that Melin is a trespasser on lands which the plaintiff is entitled to use.

20 The first count of the complaint, after stating the ownership and description of the plaintiff's property and the ownership and description of the defendant's property, says that the defendant wrongfully and unjustly contriving and intending to injure the said plaintiff, and deprive him of the use and benefit of the said right of way, and at the various times mentioned in the said complaint wrongfully and injuriously placed and deposited a large amount of dirt and other obstructions in and across said right of way and easement. The first count, therefore, is in terms, for violation of a private right of way. The second count alleges the dedication and donation to public use of this same easement or right of way.

30 It is insisted on behalf of the plaintiff that it is material to their contention in this case that their private right of way has been violated to show that at the time the conveyance was made, or at the time the agreement to convey was made, it was stipulated that this lot should be a corner lot and that there should be a street extending through from Grove street to the next street on the east, and that, therefore, the defendant, and the defendant's grantor,

40

*Finding of Facts and Judgment.*

would be estopped to deny to the plaintiff the right to use this driveway. I do not think the plaintiff has shown an estoppel, nor do I think that such a grant can be created by parol. The deed to the plaintiff's grantor says nothing about a right of way, nor is it bounded by any street or driveway or right of way. These conversations may be quite important as showing the attitude of mind, the intention of the grantors, the Hincks, with reference to a dedication of this strip of land or right of way to public use, but cannot enlarge the scope of the deed.

10

The testimony on the part of the plaintiff is that at the time the agreement was made, or at the time the deed was made, or at the time the lot was conveyed, it was stated that this was to be a corner lot—there was no street there at the time. It is denied on behalf of the Hincks that there was this conversation at that time, but it is admitted that such a conversation was had subsequent to the conveyance of the property. On the subject of intention it seems to me it makes little or no difference whether the conversation was had and the intention arrived at prior to the conveyance or shortly after the conveyance, as Mr. Ernest Hinck suggests. So it is an established fact, it seems to me, that it was the intention that there should be a street in this location. Whether there was a dedication to public use, which was accepted by the town, is not clear, unless acceptance by the town is indicated by the later vacation by the town of the rights of the public in the street. That would seem to imply a previous acceptance of the street either by some act of the governing body of the town or by use by the public and the care

20

30

40

*Finding of Facts and Judgment.*

of the street by the municipality, neither of which is shown, however, in this case, that there was an express acceptance or an acceptance by taking over the repair and maintenance of the street. The evidence in the case is quite persuasive that the Hincks intended that this street should be a public street. The land itself was six feet above the level of the road, and they themselves cut in there to a considerable width, as shown by the photographs.

The blue print introduced in evidence shows the width of the road to be sixty feet.

The Hincks themselves cut that land down all the way to the rear of the lot now owned by the plaintiff, and the reason they did not go further appears to be that they did not own the land all the way through to the next street, and consequently could not do so. The Hincks lived in the community, or at least were frequently there. They owned considerable land around there, and after the land was cut away it appears by the photographs that the north side of this road was terraced, trees were planted not only by the owner of the property to the north, Mr. De Luca, but Mr. Ernest Hinck says that his father planted trees along there. It appears by the testimony of one of the plaintiff's witnesses, denied by one of defendant's witnesses, that drains go underground from plaintiff's house to the street. Defendant's witness says that they go overground, but whether they go over or underground, they come from the house out into this street, this right of way. All of these things could not have been done by the Hincks themselves, and by the owners of the property without the knowledge of the Hincks, and lead, as I have suggested, to a conclusion

*Finding of Facts and Judgment.*

that there was intended to be a dedication to public use. The Town of Montclair has attempted to and apparently has, so far as the public rights in the street are concerned, vacated it: but that fact would not destroy the rights of this plaintiff if he used it for the statutory period under such circumstances as would amount to adverse user, and deprive him of his rights in that street or right of way. The conveyance to the Hannas occurred the first day of October, 1894, almost thirty years before this suit was brought. This street was put in there before the house was completed, which was in 1895, so at the time this suit was commenced that street had been there almost thirty years. It is suggested as to the private right of way the Court should not find in favor of the plaintiff because that user was a permissive one, consequently, not adverse. I do not so regard it. After this street was put in there it does not appear that the Hincks ever said to the owners of that property, "You may have permission to use that street." They used it without any permission and under an apparent claim of right. It is true that Mrs. Hanna said, "We never used it," but that one statement of hers must be taken in connection with her other testimony, which is that the trades people, coming to their house, and their servants, constantly used that driveway. Another witness said they used it to get in with their automobile, particularly in the winter time, because they could not get in any other way, and there is no question that in the construction of the house it was constantly being used by those who had business there and to bring materials to the house: so that for almost thirty years, at the time the suit was

10

20

30

40

*Finding of Facts and Judgment.*

10 brought, this right of way or street had been used in such a way as to indicate that its use possessed all the elements of adverse use, and, if it did, for that length of time, over twenty years, which is the statutory period, then there is no question but that under the principle of tacking of titles beginning with the title of the present owner's predecessor and ending with his title, that a period of adverse use longer than that required by the statute has been exercised over it. I do not know that in a suit for trespass it is necessary for the Court to find the extent of the right of way. It is very persuasive that the extent of the right of way would be the width to which the Hincks had excavated it, but it is not necessary to find that in this case, because 20 it is admitted that the right of way, the trespass of which is the subject of this suit, has been committed and that the defendant has trespassed upon the right of way.

30 That being the view of the Court, the verdict will be in favor of the plaintiff and against the defendant, and the damages of the plaintiff will be fixed at six cents, and counsel for the plaintiff will prepare, as is required in such cases, a finding of law and fact to be filed with the verdict of the Court.

It is, therefore, on this 9th day of January, 1926, ORDERED that judgment final be entered in favor of the plaintiff and against the defendant in the sum of six cents.

WORRALL F. MOUNTAIN,  
Judge.

*Judgment.*

**JUDGMENT.**

ESSEX COUNTY CIRCUIT COURT.

38354. VINCENZO DE LUCA,  <i>Plaintiff,</i>  <i>vs.</i> BERGER MELIN,  <i>Defendant.</i>	}	<i>Action at Law.</i>	10
		<i>Findings of Facts.</i>	

Judgment entered January 11, 1926.

Damages .....	\$ .06	
Costs .....	42.58	
	\$42.64	20

Messrs. Kalisch & Kalisch, Attorneys of Plaintiff:

Judgment on order of the Court in the above-entitled action was rendered on the 19th day of October, A. D. Nineteen Hundred and Twenty-five, in favor of the plaintiff, Vincent De Luca, and against the defendant, Berger Melin, for the sum of six cents damages and forty-two dollars and fifty-eight cents costs of suit. 30

Judgment entered and signed October 19, 1925.

WILLIAM S. GUMMERE,  
Judge.

JOHN H. SCOTT,  
Clerk.

Book 100 Circuit Court Judgments, page 427.

*Clerk's Certificate.*

## ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey, Do HEREBY  
 10 CERTIFY that the foregoing is a true and correct copy of all the pleadings in the case of Vincent De Luca, plaintiff, *vs.* Berger Melin, defendant, prepared for appeal. Judgment entered in Book 100, Circuit Court Judgments, page 427, and the same is taken from and compared with Essex County Circuit Court Judgment Book 100, page 427, and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have  
 20 (SEAL) hereunto set my hand and affixed the official seal of said County at Newark, N. J., this 13th day of April, A. D. 1926.

JOHN H. SCOTT,  
 Clerk.

30

40

*Opening.*

ESSEX COUNTY CIRCUIT COURT.

Monday, October 19, 1925.

---

VINCENZO DE LUCA,

*vs.*

BERGER MELIN.

---

*Action at  
Law.*

10

Before Hon. Nelson Y. Dungan, *J.*, and a jury.

For the plaintiff appear Kalisch & Kalisch (by Isidor Kalisch).

For the defendant appears Charles Jones.

Mr. Kalisch: This is an action for trespass by the plaintiff, Vincenzo De Luca, against the defendant, Berger Melin. The trespass consisted of an invasion by the defendant of a right-of-way which the plaintiff had on a road, to the south of some property, and which he owned, on Grove street, Montclair. 20

The Court: The purpose of the action is to try title?

Mr. Kalisch: That is all, and, as far as we are concerned, we are asking six cents damages for the purpose of this suit. The facts of the case, briefly, are that the plaintiff's predecessor, in title in, I believe, 1893, bought land north of the road. The plaintiff's predecessor, in title, Mrs. Hanna, a woman about eighty-three years of age, in 1894, bought the ground upon which that house which you see in the back was erected. 30

IT IS AGREED that the Court has the right to determine the law and the facts, and any 40

*Mrs. Josephine L. Hanna, direct.*

disputed facts which may arise in the testimony.

Mr. Kalisch: We are going to read the record of the Chancery case in evidence.

10 The Court: Let me see if I understand you. You made objections to the introduction of certain testimony. Your objection was overruled. If the Court will sustain your objection you are not to be bound by your cross examination. Is that the point?

Mr. Jones: Yes; that is the understanding. Of course, our conception of the facts is a little different from Mr. Kalisch's. We differ on the facts.

20 Mr. Kalisch: The first witness was Mrs. Josephine L. Hanna, whose testimony was taken in New York by stipulation, and is as follows (Reading):

30 "Q Mrs. Hanna, you are the widow of Captain Robert M. Hanna? A I am. Q You reside in New York City? A Yes. Q Did you, on or about October 3, 1894, purchase a lot from Christopher A. Hinck, on Grove street, the Town of Montclair? A Yes, is that 1904? Q No, it was 1894. A 1894. Q That was just a vacant lot at that time? A Just a vacant lot; yes. Q After the lot had been purchased did you or your husband cause any building to be erected on it? A A house. Q A house? A Yes. Q I show you a photograph, and ask you whether the house which appears in the center of that photograph, the large one, is the house which you caused to be erected? A Exactly. Q That is the house? A Yes, I wish I had a picture of it. I haven't got a picture of it.

*Mrs. Josephine L. Hanna, direct.*

“Mr. Kalisch: I offer this picture in evidence.

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

“Q Now, Mrs. Hanna, when, if you can remember approximately, was work started for the purpose of building this house? I mean about how long after you had purchased the lot? A You say this was about October we purchased it? Q This was about October, the early part of October, yes. A I thought we bought the land earlier. Q I have a copy of your deed. A Oh, you have a copy of the deed. Why, I thought, I remember, I thought we bought it in the month of August. Q You probably drew the agreement to purchase in August? A I suppose so. Q The date, according to the records of the court, is October 10, 1894. A Well, we began to build very soon after that. Q Very soon after that? A Because we moved into it just before Christmas, the following year. Q In other words, fourteen months after? A Yes. Q Fourteen months after. Now, this lot you purchased from Mr. Hinck, did that adjoin the property of Elizabeth Innes? A Yes. Q Now, did you have any negotiations at all with Mr. Hinck before you actually purchased the house? 30

“Mr. Jones: I object to that.

“Mr. Jones: I withdraw it.

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

“Mr. Kalisch: It is withdrawn.

“Mr. Jones: Withdraw the objection.

A I purchased the lot, not the house. Q The lot, not the house. I mentioned the word ‘house.’ I wish to change that to the word ‘lot.’ A I think it would be better. Q Because you didn’t 40

*Mrs. Josephine L. Hanna, direct.*

buy the house, did you? A No, I didn't buy the house. Q Did you have any negotiations in connection with the price to be paid for the lot? A No; I don't think we did. We didn't haggle about the price, at all. Q Do you recall anything in connection with a road, do you  
10 know whether there was anything said about this road which appears on this picture?

"Mr. Jones: I object to that.

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

Mr. Jones: I object to that. That is a very serious objection.

The Court: It says, "Just answer yes or no."

Mr. Jones: He is trying, by a conversation to give an easement of the adjoining land and I contend it cannot be done nor  
30 can a conversation be let in.

The Court: What was the question presented to the Court of Errors and Appeals to be decided?

Mr. Jones: The question raised in the Court of Errors was this: Mr. Kalisch, in the Court of Chancery, tried the case on the theory of equitable estoppel.

The Court: (After argument.) I am in  
40 agreement with the attorney that what was

*Mrs. Josephine L. Hanna, direct.*

said by the owner of the property to Mrs. Hanna, what she then heard said by the then owner of the property, couldn't change or alter the scope of the deed which was given to Mrs. Hanna, and, therefore, has established a right-of-way, was not properly admissible in evidence, but not bearing on the question of whether or not there was the dedication to public use. My understanding is that it is admissible not only to introduce evidence of what was done by the then owner of the property when the so-called right-of-way was thrown open to the use of the public, but also what he said about it. 10

I will overrule the objection, but I am free to say that my personal thought does not go along with you as establishing any right in this road by reason of any verbal arrangement of that kind, but I am admitting this testimony only on the subject of dedication to public use. I think that makes it admissible. If you change my mind on that point, then it will be considered upon the other points. 20

Mr. Kalisch: As I understand, that means that the answer goes in? 30

The Court: Yes.

Mr. Jones: I will take an exception to your Honor's ruling.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Kalisch: (Reading.) (Continuing) "Do you know which road I mean? A The road on 40

*Mrs. Josephine L. Hanna, direct.*

the side. Q The road on the south of your lot? A This one here (indicating road on photograph.) Q Yes. A Mr. Hinck said at the time, they were going to put a street through there. Q The answer is yes? A Yes. Q What did Mr. Hinck say in regard to this road on the south or this lot?

10

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

20

It will be assumed that your objection goes to all these questions and answers relative to the statement made by Mr. Hinck regarding this road.

Mr. Jones: Any questions that are intended to elicit from the witness statements which would enlarge her title over the deed which she received or giving her an easement in this road, are objected to, whether specific objection was made at the time or not.

30

(Mr. Kalisch, reading.)

“A I said, ‘I will call it Waverly avenue.’ Q What will you call Waverly avenue? A That street they were going to put through. Q You haven’t mentioned the street. You said he would make it a corner lot. What did he say about the street? A The corner lot. He said he would put through a street, I would call Waverly avenue. Q Now, Mrs. Hanna, when

40

*Mrs. Josephine L. Hanna, direct.*

you mention Mr. Hinck, what was his first name, Christopher? Was it Christopher A. Hinck? A We dealt with Ernest. We saw Ernest all the time. Q You saw Ernest all the time? A Yes. Q Did Ernest handle Mr. Hinck's property? A Yes; he did. Q Was Ernest Hinck related to Christopher A. Hinck? A Yes, a son. Q He was a son? A Yes. Q The money was actually turned over to— A Ernest. We gave him the check. Q This conversation that you speak about, was that before you got the deed or after? A About Waverly avenue? Q Yes. Was that before you paid the money for the place, or after? A I think, before. I think, before. Q You think before. Can you tell us whether the conversation you had was with Mr. Ernest Hinck? A With Ernest. Q Do you know, of your own knowledge, whether Ernest Hinck took care of his father's real estate? A I think so. Q The rest of his real estate, also? A I think so. Q Will you please tell us whether your house was started first, or the road, which was spoken about between you and Mr. Hinck, was started first? A I can't tell you. I don't know. Q Have you any recollection at all? A I think the house was started first. Q But you are not clear on that? A I am not absolutely sure. Q As a matter of fact the road was dug? A It was dug, yes. Q Was there a driveway to the rear of your house, after it was built? A No, no. Q Was there any entrance way on the north side of your house, up in there? (Indicating on Exhibit C. 1.) A Yes; a driveway was there. That was the driveway. Q There was a driveway there. Was there anything in the rear of your house to connect with this road? A No. Q You

10

20

30

40

*Mrs. Josephine L. Hanna, direct.*

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

“Mr. Jones: No. Just answer the questions.

10 “Q No. A There wasn’t. Q During the time that you occupied this house, will you tell us whether you, or your relatives, or your friends, used this Waverly avenue, that you described?”

Mr. Kalisch: The objection is withdrawn.

Mr. Kalisch: (Reading.) “Q Now, Mrs. Hanna, are you certain that when Mr. De Luca took this house, that road didn’t continue on and connect in the back? A There was no road. Q The driveway or pathway? A We didn’t have  
20 any carriage. We didn’t have any automobile. We didn’t need it. Q There was an open way in back so that two roads could connect? A Oh, yes; this was all fields. Q In the back? A The whole business. Everywhere. Q Mr. Hinck owned all that? A I think he did. Q How far did the driveway on the north of your house, run?

30 “Mr. Jones: I object. She said there wasn’t any.

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

“Mr. Kalisch: That is on our property.

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

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

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

*Mrs. Josephine L. Hanna, direct.*

“The Court: As to materiality, probably.

“Mr. Jones: Yes; that is the reason.

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

“The Court: I will sustain the objection. 10

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

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

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

“The Court: If it is withdrawn, that is all there is to it. 20

“Mr. Jones: I press it.

“The Court: What do you say to that?

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

“The Court: Never mind. Let it go in.

“A The one between Inness and your house?

“Mr. Jones: Withdraw the objection.

“A The full length of the lot. Q The full length of the lot. How far around did it extend? 30

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

“The Court: I will sustain the objection.

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

“Mr. Jones: I object to that form of question. That is too broad. 40

*Mrs. Josephine L. Hanna, direct.*

“Mr. Kalisch: I will withdraw the question.

“Q You say you don’t know how deep the road to the north of the house, ran? A No. Q What circumstances were there, or are there in your mind, which makes certain the manner in which this roadway was dug, to the south of your land, and the roadway on the north of your land was continued on along the depth of your property? What facts are there?”

“Mr. Jones: I object to that.

“Mr. Kalisch: Well, the question was withdrawn.

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

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

“Mr. Jones: I objected to that.

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

“Mr. Jones: I rely on the statute of frauds, the case of *Naumberg v. Young*.

“The Court: I will overrule the objection.

“Q What was said? A What was said? Q Yes. A Mr. Hinck told me if we bought that piece of land, he would make it a corner lot Q If you bought it? A Because they were going to put a street through. Q You did, actually, afterwards buy it? A We bought it; yes. Q After you had bought it, can you tell us whether the road which I show you on the south of your house, on Exhibit C. 1 was actually dug, and put through? A It was dug; yes. Q Do you know whether he had it dug? A He must have had it dug. Mr. Hinck must have had it dug. We didn’t.”

*Mrs. Josephine L. Hanna, direct.*

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

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

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

10

“Q Do you know whether Mr. Hinck had it dug? A We didn't have it dug. Q That isn't the point. Do you know whether Mr. Hinck had it dug? A I think so. Q Did you ever see him around while it was being dug, or any of the family? A No. Q Who owned the property to the south, of your southerly line? A Mr. Hinck owned it. Q Do you know whether the building of that road took any length of time? A I don't know that. The road was there when we went into the house. Q The road on the south of your house, which appears on Exhibit C. 1, was there when you entered the house, which appears on this picture, C. 1? A Yes.

20

“Mr. Jones: That was about fourteen months later.

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

30

Q To you? A I mean supplies to build the house with. Q Would you have purchased this lot for the price you paid, if Mr. Hinck hadn't agreed to put this road through?”

Mr. Jones: I object to that.

The Court: I will sustain the objection to that.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40

*Mrs. Josephine L. Hanna, direct.*

Mr. Kalisch: (Reading.) "As you recall it, can you remember whether the agreement to put the road through, was part of the agreement, or not?"

Mr. Jones: I object to the question.

10 Mr. Kalisch: It was not answered.

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

Mr. Kalisch: That was objected to by Mr. Jones and sustained.

Plaintiff's counsel prays an exception to this ruling of the Court.

20 Exception noted as ground of appeal.

Mr. Kalisch: (Reading.) "Q 'You told Mr. De Luca that. Well, that is that, too'."

Mr. Kalisch: That goes out.

The Court: It does not mean anything.

30 Mr. Kalisch: (Reading.) "Q Can you state whether Mr. Hinck, at the time he agreed to put this road in, suggested how long the road would remain? A No. Q He didn't limit the time? A No. Q Was Ridgewood avenue to the rear of your house? A Yes, sir. Q Can you tell us whether the road was cut through as far as Ridgewood avenue, or not? A It was not. Q Do you recall any conversation in connection with how long it was to be cut? A No. Q During the time that you were building your house, and before it was finished, can you tell us whether you had some conversations with

40

*Mrs. Josephine L. Hanna, direct.*

Christopher A. Hinck? A None whatever. Q  
 You don't remember any? A No. Q Will you  
 say that you didn't have, or that you can't  
 recall? A I did not have. Q Were there any  
 other houses built upon that street anywhere  
 near where your house was erected? A No;  
 none. Q You paid \$4,000 for the lot?"

10

Mr. Jones: I object to that. What has  
 that got to do with this issue? It is ab-  
 solutely immaterial.

The Court: It cannot have any influence  
 in this case I will overrule the objection to  
 the question on line 31, of page 35.

Defendant's counsel prays an exception to  
 this ruling of the Court.

Exception noted as ground of appeal.

20

Mr. Kalisch: (Reading.) "Q Will you tell  
 us whether after this road was built, you ever  
 had any other conversation about it, with either  
 of the Mr. Hincks, or with Miss Hinck? A  
 Never saw him. Q Or Ernest Hinck? A No.  
 Q Or Louise Hinck? A No; never said any-  
 thing more about the land. Q Never said any  
 more? A Nothing at all. Q Do you recall the  
 manner in which your house was built, the par-  
 ticular style of this house?"

30

Mr. Jones: I object to that.

The Court: I will sustain that objection.  
 I do not see what difference it makes, how  
 they acted. As I see it, that will have no  
 influence.

Mr. Kalisch. That is the top of page 36.

The Court: And that seems to cover all  
 the questions on that page.

40

*Mrs. Josephine L. Hanna, direct.*

Mr. Kalisch: The same ruling and exceptions to all that line of testimony on pages 36 and 37, down to line 28, will prevail?

The Court: Yes.

10 Mr. Kalisch: (Reading.) "Q There is an entrance back there? A Yes. Q Is there another carriage entrance on this side? A Only on the north side. Q There is a carriage entrance into the building? A The front door. Q The front door. I see. That is all." And there is the cross examination.

Mr. Kalisch: Mr. Jones will now read the cross examination.

20 Mr. Jones: This cross examination has a lot to do with this house. Now, that your Honor has stricken that out, I do not see any object in reading it. I will begin on page 59.

The Court: You move to strike out all the questions and answers on page 38?

Mr. Kalisch: And I object to it. I think it should remain part of the record, as part of the direct examination which I have covered.

30 The Court: With reference to the location of the house?

Mr. Kalisch: Yes, and the architecture.

The Court: That will be stricken out. All of page 38 will be stricken out.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

*Mrs. Josephine L. Hanna, cross.*

Mr. Jones: Beginning on top of page 39.  
 (Reading.) "Q Now, as I understand you to say, your negotiations were with Ernest Hinck?  
 A Entirely. Q He sold the lot for his father?  
 A Yes. Q Whatever negotiations or conversation that you had, were with Ernest A. Hinck?  
 A Yes; Ernest. Q Now, as I understand it, he showed you a lot on the east side of Grove street, which is the lot in question, and I understand you to say he promised you some time in the future, he would put a road next to it, on the south? A Yes, a street through it. Q He would put a street through it? A Yes. Q That street, he told you, would some time in the future go through— A To Ridgewood avenue. Q From Grove street to Ridgewood avenue. Is that right? A Yes. Q It was? A I was to name the street. Q You were to name the street? A I named it at once Waverly avenue. Q You took his word as a gentleman that street was going to go through? A I certainly did. That road was wide enough for any vehicle to pass through. We had a cinder path on the side. Q That road wasn't there at the time you first negotiated to purchase the lot? A No. Q As a matter of fact, wasn't there a track of the road, which you say was used by the people building the house. Wasn't that road there merely made by men driving in with lumber to build the house? A I can't say that. Q You can't say that. You wouldn't want to say that there was a sort of a track made by the men and teamsters coming in with material for your house, and then that place was subsequently widened and made into the proposed road? A I think so. I couldn't think they would make a road first. It was natural for things to come

10

20

30

40

*Mrs. Josephine L. Hanna, cross.*

in there. Things came in, boilers, bricks and so forth. They used that road. Q Isn't that your recollection, when they started to bring lumber and bricks and material, there was no road there? They drove over this level grass into your yard, thus making tracks which subsequently were made into a road? A Yes. Q  
10 And that those tracks, which had been made by the teams and so forth, are approximately the place where they afterwards put the proposed road, or started the proposed road? A Exactly. Q Now, when you took your deed, you still did your negotiating with Ernest Hinck, didn't you? A I never had anything to do with the father. All with Ernest. Q When the son brought along the proposed deed to you, to close the title, were you represented by a lawyer? A No. Q He simply brought it to the house? A Now, I am not positive about that.  
20 Q Didn't you have some lawyer search the title? A It may have possibly been Mr. Godell. Mr. Godell did the work when Mr. De Luca bought the house. Q At the time you took the deed, you say that you had this agreement with Mr. Hinck that either then, or some time in the future, he was to put through this road? A Yes. Q Why didn't you have that incorporated in your deed? A I didn't know. I had had no experience. I thought people were honest. Q Did you have any conversation with Mr. Godell, or Mr. Hinck, in Mr. Godell's presence in reference to it? A I don't think so. I can't be positive about that. Q This road, or proposed road, at that time was not built, of course? A No. Q Didn't you think it was  
30 necessary to have a contract with this gentleman to perform this rather big undertaking in the  
40

*Mrs. Josephine L. Hanna, cross.*

future? Q I understood you to say you had most of the negotiations? A It was my house; my land. Q Now, to go back to the question, subject to Mr. Kalisch's objection, didn't you think it was wise, prudent, or necessary to have a contract with Mr. Hinck, inasmuch as he hadn't built the road, to build the road in the future? A I didn't think anything about it. Q Now, how wide was this road to be, under your agreement with Mr. Hinck? A How wide? Q Yes. A I don't know. Q There was no agreement as to width. There was no agreement as to how long it should be there? A It was going to be a street. Q I am asking you the width of it. No agreement about grading it? No agreement about the nature of paving it? Was there any agreement it should go through to Ridgewood avenue? A It was said it would go through. He said it would go through. Q You knew Hincks didn't own back of it. You knew the Lindemeyers owned all back of that, between Ridgewood avenue and where the Hincks' property ended? A I didn't know it. Q During your years there? A I wasn't there very long. Q I thought you were there ten years?

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

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

"Q Do you know whether at the time that Mr. Hinck was telling you about this, that they didn't own all the property through to Ridgewood avenue? A I didn't know that. Q Now, after your house was built, did you or did you not

*Mrs. Josephine L. Hanna, cross.*

say to Mr. Ernest Hinck, 'How about that road you were going to put through there'? A I never said anything about it. Q How long did you live in that house? Up to the time you sold to De Luca? A Yes. Q That was, approximately, from '94 or '95 rather, to 1902. 1902 is the time you sold it? A Yes, I sold it. Q During all that time, approximately seven or eight years, you, of course, saw the Hincks frequently? A I lived in New York a good part of the time, after my husband died. Q You saw the Hincks frequently? They lived in your neighborhood? A Yes; once in a while. I saw the sister once in a while. Q Louise? A The oldest one. I suppose her name is Louise. Q Louise is also interested in the real estate? A I think so. Q In fact she studied law and was in the real estate business? A I don't think Louise. I think that was the other sister. There were two girls. Q It was Louise studied law, as a matter of fact? A I saw the oldest sister. Q Didn't you at any time, say to Louise, or Christopher, or Ernest, 'How about this road that you promised to put through?' A No. Q Never mentioned it? A Never mentioned it. Q There was no transient persons coming on through would use this road, coming to your back yard? A Only to the servants' quarters, the kitchen. Q As you understood it, your understanding was Mr. Hinck was to lay a public street from Grove street to Ridgewood avenue. Is that right? A Yes. Q And then, was subsequently this portion of the street which was laid, that was the beginning of that public street? A Exactly. Q And that you, together with any members of the public would have the right to that street? A Exactly. Q So that your rights

*Mrs. Josephine L. Hanna, cross.*

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

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

“Q That is true, is it? 10

“Mr. Kalisch: The same objection.

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

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

“Q That was your understanding at the time?

A Yes; it was to be a street. A common simple passageway to the house by the street. Q That

was the understanding you made known to your friends and neighbors, and anybody you had occasion to talk to about it? A Why, yes. Q 20

Now, as a matter of fact you had your negotiations with Ernest, and had agreed upon the price of the lot— A Yes. Q —before there was anything said about this street? A Yes. Q

And that subsequently Ernest told you about their plans for developing that property, and that such plans included putting through a public street, didn't they? A Yes. Q That was all that was said about it? A He said at the time 30

we bought this, he would make it a corner lot. That is why we paid \$4,000. For this corner

lot. We wouldn't have paid as much as that if it hadn't been a corner lot. Q I want to know

whether, in talking to Ernest, you had not purchased the lot first, and then subsequently he told you about his plans for developing the prop-

erty? A No. Q So that one had nothing to do with the other? A No, at the time it was to be a corner lot, if we paid \$4,000. Q At the 40

*Mrs. Josephine L. Hanna, re-direct.*

time he had no map of this property prepared?  
 A No. Q The exact location of this street  
 hadn't been determined? A No. Q Or the  
 course of the street hadn't been determined? A  
 No. Q Except in a general way; it was to run  
 to Ridgewood avenue? A That's all. Q I  
 10 understand you to say, during the period you  
 were there you didn't make any use of this road  
 at all? A None whatever. Q Yes. Your  
 friends, of course, used the one on the north?  
 A Yes. Q At that time they used horses and  
 carriages, I suppose? A Yes."

Mr. Kalisch: I will now read the re-direct  
 examination, which is as follows: "Q The road  
 which they afterwards put down south of your  
 property, ran about how near your rear line?  
 20 How far back; equal to your line, was it? A  
 I think so. Beyond the kitchen, anyway. Q  
 Beyond the kitchen, anyway? A Beyond the  
 kitchen, anyway. Q Did Mr. Hinck say to you  
 in any way, that any development of lots to the  
 south of this road, would in anyway, interfere  
 with the road itself?"

Mr. Jones: I object to that as leading.  
 The Court: The answer may be read.  
 30 Mr. Kalisch: The answer is no.  
 Defendant's counsel prays an exception to  
 this ruling of the Court.  
 Exception noted as ground of appeal.  
 Mr. Jones: I suppose the rest of that  
 testimony is stricken out?  
 The Court: Yes.  
 Plaintiff's counsel prays an exception to  
 this ruling of the Court.  
 40 Exception noted as ground of appeal.

*Harold H. Bowman, direct.*

Mr. Kalisch: I will now read the testimony of Harold H. Bowman. “Q You are a resident of New York City? A No, I live in Ossining, New York. Q And you are practicing law in the City of New York? A Yes, sir. Q Did you at any time about 1894 reside on Grove street, Montclair, New Jersey? A Yes; we started to live there on the 1st of May, 1894. Q And you continued to live there until about when? A On Grove street until the 1st of May, 1908. Q 1908? A In the same neighborhood, yes. Q And how old are you? A 48. Q Mr. Bowman, how old were you, about, the time this house was built? A About 18, about 18 years old. Q And you resided to the north or south of this property that was put up? A South. Q And between 1903 and 1908 you resided nowhere near this property? A Yes; we lived in the Inness house which was directly adjoining this property on the north. Q Did you know Captain Hanna and Josephine E. Hanna? A Yes; very well. Q About how old a woman is Mrs. Hanna now? A Oh, I should say, between sixty-five and seventy; possibly over seventy. Q Do you know Mr. De Luca? A Yes, sir. Q Do you know about when this road to the south of the Hanna property was constructed? A Why, the construction of it started before the beginning of the house started. They had to start a cut there before they could begin to build the house. Q Now, the house is erected on a bank; I mean, is it raised from the street level? A Yes; it was at that time a perpendicular terrace about six feet or more high. Q Yes, and the land to the south of this street, is that terraced? A Why, it was then. Q Some of these pictures will show it now. And what have you to say, as well as you

10

20

30

40

*Harold H. Bowman, direct.*

- can recollect, as to the difference in the height of the terrace upon which the house stood, as distinguished from the terrace to the south of the road? A They are substantially the same. Q Substantially the same. Now, do you recall the digging of this road? A Why, I recall
- 10 when they started to make the cut in the terrace so they could drive teams up there, very well. Q And after the building had been completed, do you recall the digging of the road itself? A Yes. They widened the road and levelled it and carried it back to about the end of the lot. Q Of the Hanna lot? A Of the Hanna lot, yes. Q And can you tell us whether during your residence in Montclair the width of that street varied at all? A Not that I remember, after it was finally widened? Q Yes. I mean, after
- 20 it actually became a street? A Yes. Q Do you remember whether when these wagons were going over for the purpose of bringing materials in, it was necessary to cut down that? A Yes; they had to make a cut-down practically to the level of the street. There was no sidewalk there at the time. Q It was afterwards made into a road? A Yes. Q And widened? A Yes. Q After the house was built, Mr. Bowman, can you recall whether there was any connection made between the driveway to the north of
- 30 the land and the road which was put down to the south of the land? A There was eventually. Q Yes, eventually. A Yes. Q But you don't know whether it was done—well, you know it was eventually? A Eventually it was made, yes. Q Do you know of any relation which Ernest C. Hinck had in the excavation of the cellar of the house? A Why, if my memory is correct, Mr. Kalisch, he either had an independent contract
- 40 to build the cellar, excavate the cellar, or else

*Harold H. Bowman, direct.*

he acted as a sub-contractor for the general contractor in excavating the cellar. I remember very distinctly his telling me he was doing the work, and I know he was there every day and superintended the doing of the work. Q Do you recall ever having any conversation with Ernest C. Hinck in connection with this street or road? A I do. 10

“Mr. Jones: I object to that.

“Q Will you please tell us what it was?

“Mr. Jones: I object to that.

“The Court: Why?

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

Mr. Jones: I press that objection. 20

The Court: I think that is proper.

Mr. Kalisch: The answer is “I did.”

The Court: It is understood that objections to conversations, whether with Mrs. Hanna or any of these other witnesses, on the subject of statements made by Hinck as to what he was going to do with reference to this road he included in the general objection and an exception noted. 30

Exception noted as ground of appeal.

Mr. Kalisch: (Continuing.) “Q And what, if anything, were the conversations you had with him in connection with this road? A Why, I saw him very frequently, practically every day, while the cellar was being constructed, because I was there every day. On a number of occasions he spoke to me about this road and told me, ‘I have promised Mrs. Hanna and Captain 40

*Harold H. Bowman, cross.*

Hanna that the road would be dug there and the lot should be made a corner lot and remain so,' that they had obtained an exceedingly high price for the lot and were very much pleased with that, because they would have to dig a road there anyway in order to bring the materials up, and the additional cost of completing the road was trivial, compared with the enhanced price they received for the lot. Q I want that understood. Was there anything said, any connection made by Mr. Hinck between the enhanced price for the lot and the making of the lot a corner lot? A I so stated."

Mr. Jones: I object to that.

The Court: I will overrule the objection because of his answer; he has not enlarged on what he said in the previous answer. The Court said, "He so stated."

(Mr. Jones reads cross examination as follows:) "Did I understand you, Mr. Bowman, that you lived to the south of this in 1894? A Yes; after the 1st of May, 1894. Q And how far to the south of this? A Well, it was just south of the corner, Chestnut street, I should think it was six or seven hundred feet, something like that. Q Do you feel sure enough of your memory, going back thirty years, to give conversations as accurately as you have given them today? A I most certainly do or I should not have given them. Q And do you recall conversations on other similar subjects outside of this one? A I most certainly do, further back than that. Q You had no interest in this particular thing, had you? A I don't know just what you mean. I was very much interested in

*Harold H. Bowman, cross.*

the operation; the whole neighborhood was. Q You were interested in having a street through there? A Not in the slightest. Q In what way were you interested, just curiosity? A I say, it was a matter of general neighborhood interest. At that time the only houses near this were the Inness house and the Hartley house to the north of it, and a place called the Pines. Q You mean you were interested in— (interrupted). A We had heard great stories about this house, which was going to be the most pretentious house in the neighborhood, and was going to be made by a Boston architect, and we were very much interested in it. That was George Inness, Sr. Q While you were there didn't you know that this place was excavated; that is, this road that you now speak of was excavated by Captain Hanna in order to get his teams in there? A No; I didn't know he did the excavating. Q You don't know, either, one way or the other, do you? A I simply know the road was put through. Q Yes. Simply know that before they started to actually construct the house, which was some time after the house was bought— A Yes. Q —you saw teams going in there and that they, in order to get up there, they had to cut down the terrace; that is all you know? A That is all I know. Q You don't know who paid for it or who constructed it? A Not the slightest idea. Q Now, your memory at the time you made this preliminary affidavit on February 1, 1924, was about as good as it is now, I suppose? A I presume so. Q At that time you said that, to the best of your recollection, this road was either about to be built or was being built, 1895 or 1896? A 1895, I think. Q That would be about right,

10

20

30

40

*Gertrude Miller, direct.*

yes. That was while the house was going up?  
 A It started in the spring of '95, if I remember correctly. Q That is, the fall? A The fall of 1894, yes. Q Was Mrs. Hanna client of yours? I notice these depositions are taken in your office. A Why, she has been a client  
 10 in our office some years ago. We haven't done any work for her in ten or twelve years, I think. Q Was this Mr. De Luca also a client? A I don't think I have ever done anything for Mr. De Luca except in this matter. I knew Mrs. Hanna and he asked me if I would get her affidavit for him. Q Did you live at the De Luca house at all? A Never. Q You were their next-door neighbor at the time? A Yes. Q For how long? A Well, we moved there the 1st of  
 20 May, 1903; I think they were there at that time. We lived there until the 1st of May, 1908."

(Mr. Kalisch reads testimony of Gertrude Miller.)

“Q Miss Miller, in 1894 did you live on Grove street, Montclair? A No. Q Where did you live? A I lived on Claremont avenue at that date. Q Did your father live on Grove street?  
 30 A Not at that date. Q When did he? A In 1898. Q You moved to Grove street? A We did. Q And with reference to this road, which is to the south of the De Luca property, where did you reside when you moved to Grove street? A Almost directly opposite the end of this road. Q As it empties out on Grove street? A Yes, sir. Q While you lived on Grove street, did you notice whether tradespeople, going to the house in question, to the north of the road, used the road? A They constantly used it. Q Do you  
 40

*Gertrude Miller, cross.*

recall whether in 1902 or 1903 your father purchased any property of the Hincks? A He did.”

Mr. Jones: I object to that. It is immaterial.

Mr. Kalisch: It shows a neighborhood use, namely, a public dedication. 10

The Court: There does not seem to be anything answered. I think that I will strike out everything from line 13, on page 56, down to line 30, page 57.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Kalisch: (Continuing.) “The road during your residence there, was open continuously? A Always; and is still. Q You still reside there? A Oh, yes. Q Across the street? A Yes. Q Your father subsequently bought that additional property? A He did.” 20

(Cross examination read by Mr. Jones.)

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

“Mr. Kalisch: One minute. I object to that as calling for a conclusion as to what the legal rights are. 30

“The Court: I will sustain the objection.

“Q I will put it this way. Everybody used that road, didn't they, as a matter of fact? A So far as I know. Q Well, you were there and saw them, didn't you? A Yes, but just what do you mean by 'everybody'? Q Anybody that saw fit to. A Therefore, I have to repeat as I did, 'so far as I know.' Q While you were there you felt free to use it, didn't you? A I 40

*Christiana Wainwright, direct.*

don't remember whether I ever used it or not.

Q You saw a lot of people using it, didn't you?

A Oh, yes. Q People who were not connected with the De Luca family and people that were?

A I have no idea who the people were who went up that road. Q Well, a lot of people.

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

Well, you know so, don't you, if you lived there?

A Yes; but I don't see—watch the people that come up that road. Q For a good many years

the people in the neighborhood used this street, didn't they? A It leads only to the De Lucas—

or, rather, around the De Lucas to their driveway, so I suppose most of the people who used

20 it had dealings with the De Lucas. Q You don't know whether the members of the public outside of the neighborhood used it or not? A I haven't

the slightest idea. Q Didn't you use it? A

Never, so far as I can remember. Q And the Millers used it, didn't they? A I am a Miller.

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

A I hardly think so. Q He was rather a militant gentleman?

30 (Mr. Kalisch reads the testimony of Christiana Wainwright.)

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

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

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

40 your residence there did you act in any

*Christiana Wainwright, direct.*

secretarial capacity to Colonel Miller? A Yes; I was in the same office. Q You were in his office? A Yes, sir. Q While you lived in Grove street, do you recall whether there was a road opposite your property and to the south of what is now the De Luca property? A There was. I think I have a picture here. Q And will you— (interrupted). A I— Q When you say there was a road, will you tell us whether— I am showing you the first picture of this Exhibit C. 1, and ask you whether that is the road, pointing to the one road that leads— (interrupted). A Yes; leads east from Grove street. Q From Grove street? A Yes.

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

“Mr. Jones: That is admitted.

“Q Do you recall whether during your residence with Colonel Miller, there were any negotiations for the purpose of increasing his holdings on Grove street? A Yes; there was. Q Did you take any part in them? A No; I didn't have anything to do with it. Q Were you present at any conversations between the Hincks and Mr. Miller's representative in connection with the purchase? A No; I think not. Q Did you ever have any talk with any one of the Hincks in connection with it? A No; I never had anything to do with it.”

Mr. Jones: All the rest of it is hearsay.

Mr. Kalisch: I will consent that it go out, beginning at line 26, down to line 10, on page 62.

*Christiana Wainwright, cross.*

Mr. Kalisch: (Continuing.) “Q Do you recall an incident in 1907 or 1908 when some trees were being cut down on the curb line of that road? A Were being cut down? Q Or were being planted? A Yes; I do. Q And they were being planted where with reference to the De Luca house? A Along that south side. Q  
 10 Along the southerly side and that is parallel to the road? A Parallel to the road, yes. Q Were they on the road? A Well, how do you mean ‘on the road’? Q Were they on Mr. De Luca’s terrace or were they out down there where the road originally was cut through the trees? A No; they were not down on the terrace; they were down on the road. Q During your residence do you recall whether Mr. De Luca planted  
 20 grass, or, rather, whether there was grass grown on part of this road and running along the depth of the De Luca lot? A Yes; there was grass. Q And where, with reference to this grass, the continuation of the lawn, were these trees placed on them or on the dirt part? A Why, I do not—I am not sure. I think on the grass. Q On the grass? A That is my recollection. Q Do you recall Colonel Miller saying anything—do not answer it—that is all.

30 (Mr. Jones reads the cross examination.)

“Q Miss Wainwright, you didn’t know exactly where the boundaries of the De Luca lot were, did you? A No; I have not said so. Q I didn’t think you intended to. So that when you say the grass was planted down this way or that a little further than a certain point, you are guessing, aren’t you?

40 “The Court: I understand what Miss Wainwright means. She simply means that at the

*George A. Miller, direct.*

end of the terrace there was grass and in the grass trees.

“The Witness: Exactly.

“Q You don’t know who planted the trees, do you? A Mr. De Luca planted the trees. Q Mr. De Luca himself? A No; not Mr. De Luca. I wasn’t acquainted with the men doing the work. As far as I knew, it was being done by Mr. De Luca. Q How do you know who was planting the trees, the De Lucas or the Hincks? A I can’t say that, but the general impression was that it was De Luca’s trees.” 10

(Mr. Kalisch reads the re-direct examination.)

“Q Did you notice whether the person who planted only planted there, or did he plant on the lawn also, on the terrace? A On the terrace also. Q At or about the same time? A Yes; at the same time. Q And this grass plot upon which the trees were planted, has that grass been grown over what had been any part of the road or not? 20

“The Court: No.

“Mr. Jones: I object to that.”

Mr. Kalisch: Line 7, on page 64, down to the bottom of the page, is out. 30

(Mr. Kalisch reads testimony of George A. Miller.) “Q Mr. Miller, where is your home? A Centerville, Mass. Q And have you at any time since 1898 resided on Grove street, Montclair? A I resided with my father from the time he purchased that property in 1898 until my own marriage in 1905. Q And you have lived at other times at 45 South Clinton street, in East Orange? A Yes, sir; I have lived at a great many places. Q Are you familiar with the 40

*George A. Miller, direct.*

house which is occupied by Mr. De Luca? A Well, very. Q And I show you Exhibit C. 1, consisting of several pictures, and as you whether the main house appearing on the first picture is the De Luca house? A It is. Q Did you at any time while you lived with Colonel Miller, your father, reside anywhere near this road which is to the south and appears to the south of the De Luca house on Exhibit C. 1? A Yes; almost immediately across. In fact, I think that picture is taken from our property. Q Now, at any time around 1902 or 1903, can you recall your father increasing his holding on Grove street?"

Mr. Jones: That is objected to.

The Court: The question may be answered.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr Kalisch: (Continuing.) "A In 1903 my father bought from Christopher A. Hinck 25 feet road frontage to the north of our property and 75 feet road frontage to the south of our property. Q Were you present at any of the conferences in connection with the sale of the— (interrupted). A I was. Q Now, with whom were the negotiations, that is, for the Hincks?"

Mr. Jones: I make the same objection.

The Court: The same ruling.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

*George A. Miller, direct.*

Mr. Kalisch: (Reading.) "Miss Louise A. Hinck, representing Christopher A. Hinck, her father. Q Were you long in coming to an agreement as to price?"

Mr. Jones: I object to that.

The Court: I will assume this testimony is introductory to the remaining testimony. 10

Mr. Kalisch: (Reading.) "A There was, as I remember it, no question about the price at all. I think Miss Hinck asked \$30 a foot and my father was willing to pay it—either twenty-five or thirty. Q Were there any differences at all in connection with the purchase of this property? A Yes, sir. Q Now, please tell us what they are, very briefly." 20

Mr. Jones: I object to that.

Mr. Kalisch: It has to do with the road.

The Court: If it has to do with the road it may be answered.

Mr. Kalisch: (Reading.) "A One of the difficulties— (interrupted). Q (By Mr. Jones.) Differences that were discussed in your presence? A Yes, sir. Q Oh, yes, confine yourself entirely to what occurred in this or these meetings. A I understand. There were only two questions outside of the price, which was quickly agreed upon. My father contemplated building an addition to the house and spending considerable money for landscape gardening there and he wanted to make sure that that road would exist as a road always, as it was of real value to our property. Q Which road is that? A The little road to the south 40

*George A. Miller, direct.*

10 of the De Luca property that we have discussed today. He asked Miss Hinck whether it was true, as neighborhood gossip had it, that that road was to remain a road, and she said, 'Yes, my father, Christopher Hinck, has promised Captain and Mrs. Hanna that that would always remain a road, and my father's word is as good as his bond.' There was another point discussed that I cannot explain very briefly, because it involves history before that. We had—(interrupted)."

Mr. Kalisch: I would like to have stricken out the answer at the top of page 67 until we come down to line 20.

20 Mr. Kalisch: (Reading.) "Do you know, Mr. Miller, of your own knowledge, whether Mr. Hinck at that time owned the property to the south of the road and running to what I think is now called Ardsley Road? A I never examined the tax plans, but I commonly understood they did own it. I think they owned all of that property. Q Now, Mr. Miller, do you know anything about the building of this road or not, the original building of it? A No, sir, I do not. It was built before I moved there. Q Do you  
30 recall whether, while you lived on Grove street, the surface of the lots to the south of the road was any lower or higher, apparently, than the surface of the bank upon which Mr. De Luca's house stood was any lower or higher, apparently, than the surface of the bank upon which Mr. De Luca's house stands? A The contour of that property has not changed since my acquaintance with it; it remains practically the same now as it did in 1898 when I moved there; the two banks  
40

*George A. Miller, cross.*

are approximately the same height and the road is depressed to the level of Grove street. Q Do you know about what the apparent depth or depression is? Do you know about— A I was going to say it is about as tall as I am. I am not quite six feet.”

Mr. Jones: (Reading cross examination.) “Q 10  
You said, I think on your direct, that this road would be a real benefit to your father, according to your father’s talk? A Yes; he did not want to put the extra investment into that property unless he was assured that that was going to remain there. He didn’t like to have the neighbors too close, and that left a vista across the street and showed the neighbors on either side. Q And he understood that the street was going—I mean, it was intended that that street 20  
was going to continue through to Ridgewood avenue? A I don’t think that point interested him. He wanted that open space in front of the house. Q What was said? A Just about what I told you. That is the reason I wanted to tell about the light pole, because those things were discussed together. Q And he was not interested in using that as a street? A No, sir.”

Mr. Kalisch: (Reading re-direct examination.) “Q 30  
Mr. Miller, do you recall the planting of any trees alongside of the De Luca house? A They were planted after I left my residence there. Of course, after I came back I saw them, but I know nothing about the planting of them. Q Do you recall about the way the road looked when you left Montclair; I mean, as to its apparent width, the open space? A It was approximately as it is now; a little planting may be different, but the open space is approximately 40  
the way it was in 1905. Q Is there any grass

*Harry P. Kreiner, direct.*

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

10 Mr. Kalisch: The next witness is Adolph Mertin. I produce him for the purpose of showing the style of architecture in this contract and to show that the house was a corner property, and not necessarily more extensive in the manner it was built than if it had been an inside property.

The Court: That is objected to by Mr. Jones?

Mr. Kalisch: Yes.

20 The Court: It is along the line of what the Court has stricken out?

Mr. Kalisch: Yes.

The Court: The entire testimony of Mr. Mertin will be stricken out.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 Mr. Kalisch: Now, I will read the testimony of Harry P. Kreiner.

Mr. Kalisch: (Reading.) "Harry P. Kreiner, sworn for the complainant. Direct examination by Mr. Kalisch."

Mr. Kalisch: The qualifications of Mr. Kreiner were admitted in the Chancery suit and I suppose they are admitted here?

Mr. Jones: Yes.

40

*Harry P. Kreiner, direct.*

Mr. Kalisch: (Reading.) "Q Mr. Kreiner, I show you a survey bearing your name, dated February 2, 1924, and ask you if you made this.

A I made this survey myself. Q And I show you Exhibit C. 1 and ask you whether the survey which you made had to do with the property which appears in the foreground of that picture? 10

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

"The Court: Is this the sixty-foot street? (Indicating.) 20

"The Witness: Yes, sir.

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

"Mr. Kalisch: I am coming into that.

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

A That is the driveway? Q The driveway itself on the southerly side of the building. A 11 feet. Q 11 feet. And from the northerly side 30

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

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

of that 24 feet will you please tell us how many feet and running north is there grass? Do I

make myself clear? A You make yourself clear, 40

*Harry P. Kreiner, direct.*

but this was made in February. Q Was there  
grass in February, 1924? A There was some  
grass there. Q Doesn't it show? A Oh, yes;  
limit of lawn and grass. That is my own figures  
so I can testify on that. The limit of the lawn  
and grass is shown as the northerly side of the  
10 driveway. As the northerly side of the drive-  
way is 24.8 feet from Mr. De Luca's southerly  
corner, it would be evident that the grass ex-  
tended 24.8 feet southerly from Mr. De Luca's  
southerly corner to the edge of the driveway. Q  
So there is running south and from the southerly  
line of Mr. De Luca's corner grass for how many  
feet? A 24.8 feet. Q And how far back does  
the grass—I mean, that is in the depth of the  
property—how far back does that grass approxi-  
20 mately 24 feet wide run? It continues back how  
far? A I do not feel able to answer that now,  
as I have not indicated on the driveway further  
back than a notation about thirty or forty feet  
back. Q Then you can testify to only forty  
feet back? A Yes. I am going up there again.  
Q I see. Now, on the southerly side, or, rather  
the bank on the southerly side, will you tell us  
whether you discovered any drain pipes or any-  
thing of that kind? A I discovered two drain  
30 pipes on the southerly side of Mr. De Luca's  
property, leading from his property onto this  
sixty-foot strip adjoining on the south. Q And  
on the sixty-foot strip adjoining on the south, as  
I understand you, twenty-four of it is now taken  
up with grass? A Yes. Q In front and run-  
ning back forty feet; is that correct? A Yes. Q  
Is there any cut there in connection with these  
leaders on the road? A Someone connected  
with Mr. De Luca's property uncovered them  
for me so that I could see them. Q And where  
40

*Harry P. Kreiner, direct.*

are they? A As to the location? Q Yes. A One drain is 46.5 feet eastwardly from the east-  
erly line of Grove street, and the drain is about  
forty feet east of the first drain. Q Could you  
tell from an examination of that drain whether it  
was built in order to connect with the roads and  
out on the roads? A They lead onto the road 10  
and seem to end there. Q It led onto the road  
and ended there. Is there any difference in level  
between the drain and road itself where the drain  
starts and the road itself? A The road is—  
I can testify, is lower than the lawn of Mr.  
De Luca's within his own property lines, as  
I show a terrace, the foot of which is on the  
sixty-foot strip and the top of it is on Mr. De  
Luca's lawn, within his own property, so that  
the drain, being below the lower level, would 20  
be lower, of course, than the lawn of Mr. De  
Luca. Q How deep is Mr. De Luca's lot? A  
Two hundred feet, average depth of two hundred  
feet. Q Now, did you notice any trees when  
you went and did you delineate them on the  
drawing? A I have. Q And will you tell  
us whether those trees are on Mr. De Luca's  
land or whether they are on what you described  
as the sixty-foot road? A They are on the  
sixty-foot road. Q And are they planted on 30  
the dirt part or are they planted along on that  
twenty-four foot strip of grass plot? A About  
the middle of the twenty-four foot grass plot. Q  
And about how far back do they run, these  
trees, on grass? A All that remains of the  
first tree is a stump, which is about 6.2 feet  
back from Grove street about the middle of  
this 24.8 lawn. The next tree is a living tree  
40.3 feet further east than the stump aforesaid;  
the next tree is 38.6 feet east of the second tree 40

*Harry P. Kreiner, direct.*

and there is another tree about forty feet further east than the last tree. Q All on grass? A Well, on this 24.8 foot lawn. Q So that the trees are planted on this 24 foot strip of grass within how many feet, approximately, of the depth of the whole lot? A About two-thirds.

10 Q Are the trees planted beyond the depth of the southerly side of the house itself? A There is one tree about forty-six feet beyond the last tree mentioned, which I did not testify to a moment ago. Q Yes. And that tree is almost at the very end of the lot, isn't it? A Yes. Q In the rear? A Yes. Q Now, does the sixty-foot road, as has been described as cut off by the grass plot, connect with anything in the rear? A Not that I could discover. Q Does it connect with any

20 continuation of another road, driveway? A Not that I can recollect; I can't recollect at this time. Q I show you on the picture, or on your sketch you have delineated driveway and driveway in the rear. A Well, I misunderstood you. That driveway, of course, does not enter this strip of land and proceeds to Grove street. Q And continues on to a driveway which enters the De Luca property to the north; is that correct? A To the north; correct. Q

30 So there is a continuous drive from a southerly point around the house and back again to Grove street on the north side of the house? A Yes, sir. Q Does the road on the southerly side appear to be kept up—did it appear to be kept up, rather? A Well, I think it has been left very much as it was first created. Q It has been—it was surfaced, wasn't it? A Yes; there was a terrace on the south side, showing there had been excavation work done

40 there at some former time. Q And the sur-

*Harry P. Kreiner, cross.*

face of the road and the continuation of the road back to Grove street on the north appears to be about the same? A Very much the same. Q As to the levels, Mr. Kreiner, can you tell us whether the level of the bank on De Luca's property is approximately the same as the level to the north of the road— 10  
to the south of the road, I mean, or didn't you take the levels? A I took no levels, and it would be better for me, perhaps, not to attempt to answer it. Q I don't want to ask you anything that you did not investigate. How does the land run, is it level in front, higher in the rear or vice versa? A I didn't take any levels. Q And where does this road end, this road that you have described as sixty feet wide and with a grass plot of twenty-four feet? 20

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

"Mr. Kalisch: I was going to offer it.

"The Court: That will show where it was.

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

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

"Q Have you got the scale? A Twenty feet 30  
to one inch.

Map marked Exhibit C. 2."

Mr. Jones: That is the map, of which this blue print is a copy?

Mr. Kalisch: Yes.

Mr. Jones: (Reading cross examination.) "Q Mr. Kreiner, those are young trees? A Yes, Q Saplings, aren't they? A Well, I wouldn't 40

*Harry P. Kreiner, re-direct.*

qualify as to their age. Q Do I understand your testimony correctly that the De Luca lot, one hundred feet front, and that they have actually taken possession of one hundred and twenty-four feet for their lawn; is that right? A That is right. Q And that is what you said? A Yes. Q So they apparently have run over into this land to the south, into the middle of that twenty-four feet which they do not own? A Yes, sir. Q They run up this line of trees? A Yes, sir. Q These drain pipes you speak of is where they get rid of their leader pipes, isn't it? A Possibly. Q I mean, that is what it is, when you say drain pipes, you mean water, rain? A Yes, I think that would be probably what they should be construed as carrying off, because my recollection is that they discharge right there and it would be unsanitary to put anything else in them than rain water. Q Nothing very permanent in that? A No, only I located them for what they are worth."

Mr. Kalisch: (Reading the re-direct examination.) "Q Didn't they throw a bucket of water through and didn't it come out? A Yes; I asked them to do that to prove there was a continual passage over from the De Luca property through these pipes.

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

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

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

"The Court: You offer the deed?

40 Paper marked Exhibit C. 3.

*Vincenzo De Luca, direct.*

“Mr. Kalisch: I also offer in evidence the deed or certified copy of the deed of Christopher A. Hinck to Josephine Louisa Hanna. Paper marked Exhibit C. 4.

“Mr. Kalisch: It is admitted Christopher A. Hinck, and his estate since, own to the south of this road in question running along the east side of Grove street to at least a depth of two hundred feet.” 10

(Mr. Kalisch reads the testimony of Vincenzo De Luca.) “Q Mr. De Luca, you are the owner of the house in question, in regard to which this suit is brought? A Yes, sir. Q Which is affected, rather, by this road? A Yes, sir. Q And you are the Vincent De Luca who purchased from Josephine L. Hanna, widow? A Yes, sir. Q How much did you pay for the property? 20

“Mr. Jones: I object; immaterial.

“The Court: I will sustain the objection.”

The Court: I will sustain the objection to the question at the top of page 80.

Plaintiff's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Mr. Kalisch: (Reading.) “Q You know this road from the south of your property; from what year are you familiar with it? A 1902, since I bought, but I knew the road long before that, because I was four years buying the property; before I purchased I used to take trips around to see and then make an offer and then next year make another offer, and finally 40

*Vincenzo De Luca, direct.*

I got it, the fourth year. Q This road south of your property, since you first purchased it has been maintained by whom? A By me. Q And did you spend any money on it? A Certainly I had to spend money; I kept it in repairs all the time and surfaced the road and seeded it and planted the trees. Q Now, 10 the road is not—the dirt road is not now sixty feet, is it? A Yes; the road is sixty feet but—(interrupted). Q The dirt part of it is not sixty feet? A No, the dirt part is about twenty-four feet. Q There is grass from the beginning of your bank running toward the southerly side of that road, is there not? Who put the road there? A Well, it was there first; Mrs. Hanna put it there and then I continued. Q What was your answer? 20 A I found it seeded and I continued. Q And how far back does the strip of grass run toward the rear of the house? A Why, it runs—the strip of grass runs all the way across the rear. Q Across the rear? A Yes; away. Q Or across the depth? A From west to east. Q Oh, it runs from across the street to the rear and runs to the end of your property? A Of my property, yes. Q And have you continued to seed this? A At times, yes, when 30 it was needed. Q Whenever it was necessary? A Yes, sir. Q And who put the trees there? A I did. Q When? A In 1907, October, 1907, or the latter part of September. Q Any of the Hincks ever see you during the time that you were either seeding or during the time that you were taking care of these trees?

“Mr. Jones: I object to it.

“Mr. Kalisch: Strike it out.

*Vincenzo De Luca, direct.*

“Q Do you know whether any of the Hincks, either Christopher A. Hinck or Ernest Hinck or Louise Hinck, saw you at any time when you were taking care of these trees? A The only time I talked to Mr. Christopher Hinck or her, I was planting trees and he stopped at the corner on account of the gas lines had killed some of the trees in front; he said, ‘I am very glad you are planting these trees on account of those killed by the gas company.’ Q Did he ever say you should not? A No, sir. Q Did you ever ask his permission to do it? A No, I didn’t ask nobody. Q Now, this road to the south runs down how far, about? 10

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

“The Court: The map is in evidence. 20

“Mr. Kalisch: Yes, sir.

“The Witness: I might say—

“The Court: No. Do not say a thing.

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

“Mr. Jones: If there was, I don’t know of it. 30

“Q Was there any material deposited on this road by anyone without your consent within the last year? A Yes, sir. About forty foot of the rear lot has been filled in—about last January, I think it was—then I stopped them and asked them for an injunction. Do you know who the man was? A I was told Mr. Melin, which I never met and I never met until this day.

*Vincenzo De Luca, direct.*

“Mr. Jones: Whatever operations were done we admit were done by Mr. Melin—what was done was done by him.

10 “Q Since you have been there who has used that road to the south? A I did; that is, my family, all the family. Q Tradespeople? A Yes; they come to the back. Q Your kitchen door is on the same side? A I think it is on the map thirteen or fifteen feet from the road. Q Your actual automobile entrance is around on the northerly road? A Oh, no; we enter on the south and go out on the north because the north is steeper. Q Now, did you have any conversation with Christopher A. Hinck, Louise Hinck or Ernest Hinck in connection with this road?”

20

Mr. Jones: I object.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 Mr. Kalisch: (Reading.) “A Yes, in October. Q Will you please tell the Court what it was, and the substance of the conversation and when you had it? A In October, 1922. Miss Hinck called me on the phone and wanted to know if I wanted to buy the piece of land on the south of my house, and I made an appointment and I went up to see her; with me was Mr. Sessa; when I got up to Miss Hinck's house Mr. Otto Hinck was there, and she said to me, ‘It isn't nice for the seller to get the purchaser to come to it, but,’ she said—she apologized for it. 40 I said, ‘It is all right.’ Q Just tell us— A

*Vincenzo De Luca, direct.*

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

Mr. Jones: I object to that.

The Court: It may remain.

10

Mr. Kalisch: (Reading.)

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

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

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

20

Mr. Jones: I object.

The Court: The objection will be overruled.

Defendant’s counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Kalisch: (Reading.) “Q What was said to you about your claim of that road? A The road came in—Mr. Otto Hinck then said to me, ‘If you take \$2,500 for halfway of the road and we take the other half, or otherwise,’ he says, ‘You buy this piece of land of ours for \$6,000.’ Q What piece of land? A The one on the south of the road. Q Oh, south of the road? A There were sixty or seventy feet south of the road and this lot in the back and he wanted \$6,000 for it. Q The \$2,500 that you were to get had

30

40

*Vincenzo De Luca, cross.*

to do with what? A Half of the road, one-half of the road. Q But you didn't consummate that agreement? A No.

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

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

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

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

(Cross examination read by Mr. Jones.)

20 "Q When you came there, there were already trees along the southerly boundary of your property, weren't there? A No, sir; not a tree. Q At the time you—I understood you to say that you had a conversation with Mr. Christopher Hinck? A Yes, sir. Q And he said the gas had killed the other trees? A On Grove street. You see, they are killed yet; they never was replaced. Q On Grove street? A Yes, sir. Q But you don't think there were any trees on the north-  
30 erly boundary? A I know there wasn't any. Mrs. Hanna said she was going to buy big trees and plant them there. That is why she didn't have them. Q So, you state that pretty positively? A Very positively; there was not a tree there, or a shrub. Q As a matter of fact, you don't need this road on the south particularly, do you, for entrance to your house; you have one on the north? A I can't get up to my house—"

"Mr. Kalisch: I withdraw the objection.

40 Mr. Jones: (Continuing.) "A (Continuing.) Because this wall is perpendicular on the north

*Thomas G. Sessa, direct.*

side it is almost perpendicular to get up there.  
 Q The Hincks lived in that general locality,  
 didn't they? A They did. Q For a good many  
 years? A Oh, yes, many years. (Re-direct ex-  
 amination by Mr. Kalisch.) Q Mr. De Luca,  
 have you spent any money on this house and on  
 the land in beautifying it since you purchased  
 it?" 10

Mr. Jones: I object.

The Court: I will sustain the objection.  
 Strike out everything on that page, that is,  
 after line 8.

Plaintiff's counsel prays an exception to  
 this ruling of the Court.

Exception noted as ground of appeal.

(Mr. Kalisch reads the testimony of Thomas  
 G. Sessa.) "Q Mr. Sessa, you are related to  
 Mr. De Luca? A Nephew. Q Nephew? And  
 do you recall ever having a conversation with  
 Mr. Melin in connection with this road? A Yes.  
 Q When did you have it? A On January 24th  
 of this year. Q And where did you have it? A  
 At Mr. Melin's house, 26 Grove street. Q And  
 what did he say to you in connection with this—  
 with his contemplated doings in and about this  
 road and to the south of the property? A He  
 told me he had already started to fill the road  
 in and I went there to object on behalf of Mr.  
 De Luca, told him Mr. De Luca claimed that  
 land, told him the circumstances— (interrupted).  
 A (Continuing.) He said he was going to fill in  
 the entire road and would construct three gar-  
 ages in that road and with the backs toward  
 Mr. De Luca's house, the entrance would be  
 from Ardsley Road. Q Ardsley Road is the 40

20

30

40

*Thomas G. Sessa, direct.*

road parallel to the road in question here and running parallel with it? A That is it. Q So, the road would face Ardsley Road and the garages— A Would be back towards Mr. De Luca. Q Would be back towards Mr. De Luca and covering this road? A Yes. Q Did you  
10 ever reside with Mr. De Luca? A Yes; I lived there all the time I was going to high school; lived in the house, and part of the time I was going to college. Q Do you recall whether Mr. De Luca ever seeded any part of this road? A Yes; he seeded and re-seeded many a time from the top of his terrace all the way to what might be called the driveway in that road. I helped him to do it, and cut the grass there myself. Q Are there trees there planted by him? A  
20 Yes; 1907 I think they were planted. Q Do you know who used this road? A All of the family and tradesmen, people that came to visit him, and so on. I wouldn't say the public used it. Q Do you know who kept up the road? A Mr. De Luca did. He re-surfaced the road with screenings wherever he re-surfaced the rest of the road, the rest of the driveway around the house; he cut shrubbery—not shrubbery, but scrub and stuff that grew there on the other side, kept  
30 this looking neat. Q Were you ever present at any conversation between Louise Hinck or Ernest Hinck, or both of them, and Mr. De Luca wherein—I meant Otto Hinck—I want to add Otto Hinck—wherein some reference of the payment of \$2,500 was mentioned? A Yes. Q (Question read.) A They offered to give him half a road or pay him \$2,500. Mr. De Luca refused them both. Q The banks to the north and south of this road are approximately the  
40 same, or are they different in height? A They

*Thomas G. Sessa, cross.*

are about the same. Q About the same. Do you know where the bedrooms are in this house?

A They are all— (interrupted). This so-called—the thing herein described as a road, is it a road; does it look like a road?

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

10

“Q Does it look like a road?

The Court: That is not answered.

(Cross examination by Mr. Jones.)

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

A Yes, sir. Q Practicing in this State? A No, I do not. Q Where do you practice? A Pennsylvania, Pittsburg. Q And do you represent

20

Mr. De Luca in this case? A I do not. Mr. Kalisch does. Q Now, this conversation that you speak of at which you were present, you were the one, you and Mr. De Luca were the ones that sought out the Hincks, weren't you; went down to their house? A No; Miss Louise Hinck called Mr. De Luca on the telephone. Q And you went down to the house pursuant to her request? A Pursuant to her request, yes.

30

Q Now, wasn't that proposition of your purchasing all of the property to the south of the De Luca house running down to Ardsley Road at a certain price—that was offered to Mr. De Luca? A Yes; by the Hincks. Q And that offer, he gave you the market price of the land and then deducted a certain amount for filling in that road, didn't he? A No.”

40

*Thomas G. Sessa, re-direct.*

(Re-direct examination by Mr. Kalisch.)

“Q You say you practice in Pennsylvania? You are not practicing law now, are you? A Why, once in a while. Q You are engaged in what? A In banking.”

10 Mr. Kalisch: There is a stipulation in connection with the ordinance of Montclair, vacating the public rights in this street of the town, whatever rights the public had. It was introduced in evidence.

The Court: Suppose you read the title to the ordinances.

20 Mr. Kalisch: Here is an ordinance to vacate, release and extinguish the public rights arising from a dedication, or purported dedication, as a street in the Town of Montclair, the County of Essex, 50 feet, more or less, in width, and 200 feet, more or less, in depth, easterly from the easterly line of Grove street, and lying adjacent and south of the southerly boundary line of premises now or formerly of Vincenzo De Luca, designated on the map of the said Town of Montclair for the year 1923 of  
30 Map 31, Block F, Lot 110.

The Court: Let me ask you whether or not there is anything in the testimony which escaped me as to who it was that cut down the embankment there where this road goes through?

Mr. Kalisch: It will appear in the case finally that Mr. Jones admits he did it.

Mr. Jones: There is nothing, so far.

40 The Court: Is there anything so far in your testimony that show you did it?

*Ernest C. Hinck, direct.*

Mr. Kalisch: Mr. Jones, if I remember correctly, in the record says that Hincks did it.

The Court: You may call my attention to it later on.

Mr. Jones: At this point I want to move for a non-suit on the ground that there is no legal testimony, based on legal evidence, that the defendant has any right in this road or easement in this road, either public or private. There is no evidence from which the Court could properly deduce that there has been a dedication of this road or strip of land so as to make it a public road. 10

The Court: I suppose you mean dedication to public use, although it has never become a public road? 20

Mr. Jones: Yes.

The Court: The motion will be denied.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Mr. Jones reads the testimony of Ernest C. Hinck.) (Direct examination.)

"Q Mr. Hinck, you are a son of Mr. Ray Hinck?" 30

Mr. Jones: That should be Christopher.

Mr. Kalisch: I make the same motion to strike out the answer.

Mr. Jones: I will consent that it be stricken out.

The Court: It will.

Mr. Jones: (Reading.) "Q And how long have you lived in Montclair? A I should 40

*Ernest C. Hinck, direct.*

judge about thirty-nine years. Q And you are a little over fifty? A I am fifty-two. Q You were formerly Mayor of Montclair? A Yes. Q Were the one that—Christopher Hinck owned in 1894 what property in this Grove street neighborhood? A He owned the property on the east side of Grove street from Grove street to Ridgewood avenue and also on the west side of Grove street, in that vicinity, in that neighborhood. Q Considerable property? A Yes, quite considerable property. Q And did you act as broker on this property? A Which property do you mean? Q This Hanna property. A Yes; I was the broker in the matter. Q Will you tell the Court—will you tell us the dealings you had with Mr. and Mrs. Hanna? A Mr. and Mrs. Hanna came out to my office in the broker's business and wanted to rent a house, and I rented them a house on Christopher street. After that I took them over—the same day—I took them over and showed them property on Grove street because they stated they were going to build a house, and I showed them this property on Grove street that they bought, eventually bought. Q What conversation, if any, did you have in reference to the inducing cause to purchase the property?

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

Q They were together, weren't they? A They were together, yes. Q Was any conversation had with him, or did they have any conversation with you as to why you wished to sell them this property or they wish to buy this property? A Captain Hanna and Mrs. Hanna were looking for a well-drained piece of property

40

*Ernest C. Hinck, direct.*

and instead of taking them up to the mountain-side, I showed them the property on the west side of Grove street, which is a knoll; it is a stretch of property of about four or five hundred feet, which was the cream of the property in that neighborhood, and the view of New York, the view of the mountain induced them to buy the property. Q Was that the conversation? 10  
A Those are the facts; the conversation, word for word.

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

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

“Q What was the conversation that led you to believe that? You can only learn somebody’s intentions from words that they said. A I told them that I had a knoll and took them to the knoll and then sold them the property on the strength of that. Q It was testified by Mrs. Hanna that you said, ‘This will be a corner lot,’ and that she purchased that lot, paid the price, because you said it was to be a corner lot. Did you have such a conversation? A I positively did not have a conversation of that kind with her before she got the deed to the property or before she made a contract for the property. Q Did you have any conversation with her at any time about your plans for a street? A The property grew out of the general—(interrupted). 20 30

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

“A Yes. Q What was the conversation? A The property in general, the layout and the plan of the property in general, was discussed with Mrs. Hanna and in that conversation I 40

*Ernest C. Hinck, direct.*

10 stated to her—it was our intention of laying the street between Grove street and Ridgewood avenue. Q Did you tell her where? A No. Q Was this before she bought or after? A This was after she bought. Q At the time you talked to her were you in a position to put a street through from Grove street to Ridgewood avenue? Did you own the land, in other words? Christopher, did he own all the land between Grove street and Ridgewood avenue? A Not in the section where this property is located. Q When you talked to her, had you been authorized by your father to make any provisions whatsoever?"

20 Mr. Kalisch: I still object. The abandonment of it in no way could deprive the public of right or interest in the road.

The Court: Starting with line 10 to line 26 will be stricken out.

30 "Q When was the road begun at the south of the De Luca property, south of the present De Luca property? A I should judge a year or a year and a half after the Hannas started work on the house. Q And that was in pursuance of this plan of putting a public street through to Ridgewood avenue? A It was. Q Some years later that plan was abandoned, apparently, subsequently abandoned? A It was. Q Do you know the reason for that?

"Mr. Kalisch: Answer yes or no, please.

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

"Mr. Kalisch: I object.

"The Court: Why?

*Ernest C. Hinck, direct.*

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

10

(Argument.)

“The Court: I will allow the question.

“A The plan turned out impossible on account of not owning the entire properties that would be affected by the vague plan which father had intended to carry through at the time when he had this road dug out. Q There is testimony by Mr. Bowman to the effect that about in the year 1895 or in 1896 that he was present while you were assisting in either erecting a cellar for the Hannas or working around the house at the time, speaking with reference to this road, and that you said to him, Mr. Bowman, that you had promised Captain Hanna that this would be a corner lot. Did you have such a conversation? A Indeed I did not. Q It was testified that this road, which subsequently became this portion of the public road, excavation was started on that and the men used it when they were building the house. Did you excavate it at that time? A No. Q Who did? A One of the contractors must have. Q Was he working for you or for Mr. Hanna? A No; he was not working for me. Q That was one of the contractors for Hanna? A Yes.

20

30

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

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

40

*Ernest C. Hinck, cross.*

“Q There is testimony by Mr. De Luca—by Mr. Sessa that there were a row of trees planted by them and that there were no trees on that street south of that property prior to that time. Is that, to your knowledge, a fact? A I know there were trees there before the time that Mr. De Luca testified that he placed his in there. Q  
 10 And who put them there? A Father had them put there. Q You have lived around that neighborhood for a good many years? A Yes. Q Has that street been used right along during that period? A Yes. Q From the time of the sale of the property to Mrs. Hanna right down to date, or, right down to date was there any request made of you or to your father, to your knowledge, to complete the street, Grove street to Ridgewood avenue? A No. Q Anything  
 20 more said about that street than the conversation that you had related? A No. Q Was it ever referred to? A No. Q Are you positive that that was after the deed had gone through? A That—I don’t know what you mean, whether I am positive. Q Well, you are sure? A You mean the conversation? Q Yes. A Yes.

(Cross examination by Mr. Kalisch.)

30 “Q Was there any objection made by you or your father when the road was started to the south of Mr. De Luca’s place? A When the road was started? Q Yes. A Father started the road. Q Oh, your father did? A My father had the work done. Q Now, was there any grass running from the southerly line of where the De Luca property now is, running over part of the dirt road which your father had started to build at the time he planted these trees? A No. Q There was not? A  
 40 No. Q So after your father planted the trees,

*Ernest C. Hinck, cross.*

the place—the grass was grown running into the sixty feet and running from the front, or Grove street side, back almost to the depth of the whole property, wasn't it? A No; that I couldn't say. Q You couldn't say? A No. Q Did you put any trees on the other side of the street? A The trees were generally—they were placed on Grove street on this opening there and also throughout the property in general; I suppose we placed about two thousand trees at the time. Q And your father, to your knowledge, had this street dug along the southerly side of the De Lucca property, in accordance with what you were told by Mrs. Hanna? A No. Q You told her that you intended to do it, didn't you? Put a street through? A No. Q Can you explain how it was that before her house was finished your father had his road started? A Before the house was finished? Q Yes. A You mean dug the excavation? Q Started to dig the road, yes. A Yes, it was started, as I say, a year or a year and a half after that land was sold to the Hannas. Q Will you answer the question? Do you know how it was that the road was started to be dug by your father before the Hanna house was completed? A No; I couldn't say that I do. Q You sold some property to the Millers across the street, didn't you? A I? No. Q Who did it, your sister? A I don't know. Q You only know from hearsay? A I only know from hearsay. Q Now, you say that the Hannas asked you for a well-drained lot? A High lot, yes. Q And, to your knowledge, the drains were put in to the southerly side of the house and emptied on this road that your father had started to build before the house was completed; isn't that correct? A To my knowledge, Captain

10

20

30

40

*Ernest C. Hinck, cross.*

Hanna laid the drains over the ground; laid the  
 leaders over the ground; he had stones going  
 to the bottom of the leaders and ran it over the  
 surface of the ground; Captain Hanna had no  
 drains. Q You mean to say that Captain  
 Hanna or Mrs. Hanna when that house was  
 10 built put no drains to that house? A I mean  
 to say just exactly what I said before, they put  
 stones there and led the water over the top of  
 the ground. Q Over the grass? A Over  
 the grass. Q Weren't there drains on the  
 southerly side of their line, which drains emptied  
 the water at or about the place where the road  
 was dug by your father? A No. Q You  
 know there is a drain there now, don't you? A  
 No, I do not. Q Do you know how it was that  
 20 if you were not going to build a road there—do  
 you know whether there was any conversation  
 why Mrs. Hanna should take an irregular shaped  
 lot? A Yes, because it was square—it was at  
 right angles with Grove street. Q Was the  
 width in the rear the same as in the front? A  
 I am quite positive it was not. I mean, she got  
 the benefit of that because it was squared off  
 with Grove street so she could build a house  
 parallel with the road. Q And the road which  
 30 you started to dig was right at the point where  
 the southerly line—where their most southerly  
 line ended; is that correct? A Well, that I  
 couldn't say. Q You sold the property, didn't  
 you? A I sold the lot, yes. Q Don't you  
 know, as a fact, that you started—that the con-  
 tractor for your father and under his instruc-  
 tions, started a road at the most southerly line  
 of their property and running at least as far as  
 the depth of their property? A I know it is  
 there. Q Well, you know it was put there, don't  
 40 you? A I know it is there, so I know it was

*Louise C. Hinck, direct.*

put there. Q And you know it was put there by your father? A Oh, sure. Q Do you know why it was not put further out? A No, I do not. Q Wasn't it because you—(interrupted).

“The Court: No; he says he doesn't know.

(Re-direct examination by Mr. Jones.)

“Q Where was your father's northerly boundary of this property? A The northerly boundary was along the Inness line. Q And the Inness property is where? A The Inness property is north of this Hanna property. Q Right next north? A Next north, yes. Q So the lot in question was your father's most northerly property? A Yes, sir. Q The Inness property was not sold, was it? A No. Q Innesses owned that property, didn't they? A Yes, always, before we did ourselves. 10 20

(Re-cross examination by Mr. Kalisch.)

Q But you did own all the front lots south of the southerly line of that road that was dug and running as far as where Ardsley Road is now cut through? A Oh, yes. Q You are one of the executors? A No; I am not. Q Of the last will of Christopher A. Hinck? A No; I am not.” 30

(Mr. Jones reads testimony of Louise C. Hinck.)

(Direct examination by Mr. Jones.)

“Q You are a sister of the last witness? A I am. Q Of course, a daughter of Christopher Hinck? A I am. Q And one of the executors of the estate? A I am. Q Who is the other? A Otto H. Hinck. Q That is your brother 40

*Louise C. Hinck, direct.*

who is sitting there? A Yes, sir. Q Did you have anything to do with the selling of this property to Mrs. Hanna? A No; I did not. Q And had no conversations with her in reference to it? A None at all. Q That street was laid out by whom? A I don't know. Q The street in question was laid out by whom? A I don't know. Q It was testified by Mr. Miller that in 1903 or thereabouts he purchased property on the other side of Grove street, Colonel Miller had a conversation with you in his presence? A Colonel Miller had the conversation with me. Q He testified that in that conversation—(interrupted). A Mr. Miller was not present. Q Wait until I get through the question. He testifies that he, George Miller, was present at a conversation between you and Colonel Miller in which, in response to a question by Colonel Miller as to whether this little road was to remain open, you said, 'Yes; because my father promised Captain Hanna that his lot would be a corner lot.' A Mr. George Miller was never present when Colonel Miller discussed the purchase of that lot with me. I never mentioned the opening next to the Hanna property to Colonel Miller. Colonel Miller said he wanted additional land on the north side of his home to build a library and on the south side of his house for planting trees. Q And did you say any time either to Mr. Miller or to—(interrupted). A Never. Q George Miller say anything about this being a corner lot or any promise made by your father to you— A I did not. Q Did you know of such a promise? A I did not. Q Mr. Sessa and Mr. De Luca testified that some time October, 1922, pursuant to a telephone conversation from you, they came to your house; is

*Louise C. Hinck, direct.*

that right? A They did. Q And that a conversation ensued in which you offered them \$2,500 for one-half of the lot—one-half of that road next adjoining them on the south. You did take the other half? A I did not. Q Was there a meeting at that time? A There was a meeting. Mr. De Luca and Mr. Sessa and Otto H. Hinck and I were present. I told Mr. De Luca that I was cutting through this street, Ardsley Road; that I would sell him the land south of his house to Ardsley Road at a depth of two hundred feet on Ardsley Road for \$6,000, that I could sell it for him at \$8,000, thinking that he might need \$2,000 for filling in of that opening. Mr. De Luca said he would give me \$7,500. My brother, Otto H. Hinck, said, 'Well let us split the difference; sell it to him for \$2,500, then we will really—let us sell it to him for \$5,500; then we are giving you \$2,500,' because we knew we could sell the land for \$8,000. Q Ardsley Road is a new road that you built at right angles to—(interrupted). A It is new road. Q (Continuing.) —at right angles to Grove street and further south than this little—(interrupted). A Exactly. It is south of Ardsley Road. I don't know whether it is exactly right angles; I mean, it is south of the opening. Q Was that the entire conversation at that time? A That was the—(interrupted). Q With reference to this street? A Exactly. Q Mr. Sessa says he was present at that conversation and that you made an out-right offer of \$2,500 for half the road? A I did not. Q Or anything approaching that? A I did not."

(The Court thereupon took a recess for one hour.)

*Louise C. Hinck, cross.*

AFTER RECESS.

(Cross examination by Mr. Kalisch.)

“Q Did you ever have a title policy on your property there?

“Mr. Jones: I object to that.

10 “The Court: What is the object?

“Mr. Kalisch: I will withdraw that question.

“Q Didn't you make any attempt, after Mr. De Luca told you that he claimed that road and wouldn't pay you anything, to have one of your Montclair title companies guarantee your title and weren't you refused the title?

“Mr. Jones: I object to that.

20 “The Court: What is the object, Mr. Kalisch?

“Mr. Kalisch: To indicate clearly that what we testified to of our claim that that road was the subject of conversation, topic of conversation that prompted them to make application to see if they could pro-rate those.

“The Court: I will allow the question.

30 “A No; nothing of that kind was mentioned at the meeting. Newton H. Porter suggested a— (interrupted).

“The Court: Just answer question.

40 “Q Didn't you make application to some title company for a title guarantee? A I did not. Q And weren't you refused, either you or one of the other executors? A I did not. Q Haven't you now got an application pending? A I have not. Q (By the Court.) Has the other executor? Q Has the other executor? A He has not. Q Didn't you make one on behalf of Mr. Melin, who purchased from you? A Mr. Melin made

*Louise C. Hinck, cross.*

it himself. Q Oh, he did make it himself? And was that by reason of the fact— (interrupted).

“The Court: No, no.

“Mr. Jones: I object to that.

“The Court: Mr. Melin made it; that is enough.

“Q Did you not, before Mr. Melin made application, tell him of Mr. De Luca’s claim on that road? 10

“Mr. Jones: I object to that.

“A I did not.

“Mr. Jones: I object to that.

“The Court: Well, it is useless now.

“Q Do you know why a price was fixed at forty dollars a front foot for Mrs. Hanna’s property in 1894 as against thirty dollars a front foot some years later for Mr. Miller’s property across the street? 20

“Mr. Jones: I object to that. She testified she had nothing to do with it.

“Mr. Kalisch: I asked whether she knew why it was done.

“The Court: If you want to make your objection, make it in proper form.

“Mr. Jones: I object to it on the ground that she has said that she had nothing to do with the Hannas—yes—nothing to do with the negotiations at any time. 30

“The Court: I will allow the question.

(Question read.)

“The Court: Now, you can say yes or no.

“A No. Q The offer to sell, as made by you or by your principal, had reference merely, did it not, to the balance of property south of this road, running back to the rear, and a part of the property in the back, and had no reference 40

*Louise C. Hinck, re-direct.*

to the road; is that correct? A It had a reference to 200 feet on Ardsley Road. Q But your offer to sell had nothing to do with the road to the south of Mr. De Luca's property, did it? A You mean the opening? Q Yes. A Nothing. Q (By Mr. Jones.) Do you understand that last question? A He said whether the opening had anything to do—if the opening was considered as land, I considered it. Q Did you make a suggested plan to Mr. De Luca when you made him the offer of the property? A Probably drew the lines. Q Yes, and didn't you file such a plan with the Building Department? A I intended to have the opening vacated. Q (By the Court.) Did you file it? A File the plan? Why should I file it? Q (By the Court.) The answer is no. A No. Filed; what do you mean, 'file' where? Q Didn't Mr. Crane make such a plan for you? A Oh, he made several plans. Q Didn't he make such a plan for you? A He did; he made plans. Q He did. And didn't you start to say that you intended at that time to have the road vacated? A Exactly. Newton H. Porter said—Q I am not interested in that. A Exactly. Q And you did thereupon make application to the Board of Commissioners to vacate that road, or you or one of the other executors? A Exactly. Q To vacate the public rights in that road? A Yes; exactly.

(Re-direct examination by Mr. Jones.)

“Q Miss Hinck, in that conversation you had with Mr. DeLuca, at which I think Mr. Sessa was present, the proposition was to sell from Ardsley Road along Grove street, northerly up to what point? A Well, as far as Mr. De Luca's

*Louise C. Hinck, re-cross.*

land. Q Up to Mr. De Luca's land? A Up to De Luca's land. Q So you included this road? A Exactly. Q In it? A (No answer.)

(Re-cross examination by Mr. Kalisch.)

"Q How could you have sold that if Mr. De Luca— (interrupted).

10

"The Court: No, no, no.

"Q The street had not been vacated yet, had it? A We always paid taxes on it. It was never considered a street. Q And yet you applied to have the city vacate? A We were advised by Newton Porter— (interrupted). Q Didn't you draw for Mr. De Luca a diagram showing the land beginning at Grove street on Ardsley Road, on the northerly side of Grove street, running back 200 feet, and then some lots running north and south in the rear, and also indicate on that plan that the road was an open road? A I had a general plan. Q Didn't you? A I showed him the map. Q Where is that map? A Oh, I don't know where; the map is probably similar to this; I mean, I made a drawing. Q What did you do with Crane's drawing? A I have Crane's drawing. Q Have you got it here? A No; I didn't bring it here. It is similar to that, and I offered to sell him 200 feet. Q It is similar to this. A I have my own map similar to that. It is because it is a general development and I offered him 200 feet here for \$8,000—for \$6,000, because he would use some money to fill in that opening."

20

30

40

*Otto Hinck, direct.*

(Mr. Jones reads the testimony of Otto Hinck.)

(Direct examination by Mr. Jones.)

10 "Q You are a son and one of the executors of Christopher Hinck? A I am a son of Christopher A. Hinck. Q And you are one of the executors? A I am one of the executors. Q It was testified to by Mr. De Luca and Mr. Sessa that October, 1922, in pursuance to a conversation, they came down to your house or Louise's house, and that at that time there was a conversation about this road. Is that true? A They did. Q And that— A About the property. Q About the property, and that time— and Mr. Sessa testified that at that time you or Mr. Hinck made an offer of \$2,500 for one-half of that road. Is that true? A No. Q Mr. De Luca testified that you offered a certain sum for them to release their rights to the road; is that right? A No. Q What conversation did you have, if any? A Mr. De Luca and Mr. Sessa were there on two occasions at the house and we offered them a piece of property with 200 feet front on Ardsley Road, running back to their line, both on Grove street, and on the rear of the lot, and we told him that we could sell that property at forty dollars a foot, which would make the property worth \$8,000, and the first evening we had a long discussion about it and we wouldn't sell for less than \$6,000; so, after some time, and thinking it over, we decided we would sell it for \$5,500, and then Mr. Sessa and Mr. De Lucca came over to the house again and at that time they offered us \$5,000 for the property, but we told them we wouldn't sell it for less than \$5,500."

20

30

40

*Otto Hinck, direct.*

(Examined by the Court.)

“Q Has property increased by the front foot up there in the last twenty years or thirty years, do you think? A Well, the property lay idle there for about thirty-six years. Q Well, what do you think it has increased in value in the last thirty years?”

10

Mr. Jones: I object to that. I think that is absolutely immaterial.

Mr. Kalisch: I think it is material to this question, and it tends to contradict—

The Court: I think it is proper cross examination on the preceding question. Otherwise I do not see its relevancy, but it shows an increase of valuation of the property by reason of this general development by reason of the building of this road. The objection will be overruled. The testimony beginning on page 112, line 29, and ending on line 26, on page 113, will be stricken out.

20

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Examined by Mr. Jones.)

30

“Q And did you give any reason for that price, or was there any discussion about that price, how it was arrived at? A No; there was no definite—no discussion about how it was arrived at. We were willing to allow him \$25 so as to clean up the corner. Q (By the Court.) What corner? A Well, this is—there is a corner lot that is 200 feet on Ardsley Road and about one hundred and some odd feet on Grove

40

*Otto Hinck, cross.*

street. Q (By the Court.) I see. Do you mean this one here (indicating on map)? A From here to here, I mean (indicating).

“The Court: I see.

“Q Was there anything said that evening about this open road? A I don't remember  
10 that. Q What is your business? A Cotton goods broker. Q Always been in that line? A Always. Q Never been in the real estate business? A Never.

(Cross examination by Mr. Kalisch.)

“Q The reason why you suggested that plan was because by selling him on Ardsley Road and using the direction of north and south as your length, you were selling three lots or four lots  
20 whereas if you sold with a Grove street frontage you only had one lot to sell. Wasn't that the reason? A No. We figured we had—all that property belonged to us. Q You did figure that? A Yes. Q Then, how is it that you went down to a lawyer to find out what claims there were against that road?

“Mr. Jones: I object to that.

“The Court: State your objection.

“Mr. Jones: There is no basis for such a  
30 question. It would be incompetent even if there were.

“The Court: There is not any basis for the question because it has not appeared that he did what you say.

“Mr. Kalisch: Withdraw the question at this time.

“Q Did you or another of the executors go down to a lawyer with regard to this road? A  
40 Yes, sir. Q And it was only after you went

*Otto Hinck, re-direct—re-cross.*

down there that this vacation by the Board of Commissioners was accomplished; is that correct? A Yes. Q Did you sell to Mr. Miller, Sr.; Colonel Miller? A No. Q Who did? A I don't know who did. The testimony is brought out that my sister has. I don't know who sold it. I was at college at that time. Q Did you make out a plan showing the four lots, I mean at the time Mr. De Luca was there, showing this lot facing on Grove street and Ardsley Road and running north and south in the rear, and then have Mr. Crane make a diagram of some kind for you? A I don't know. We had some map there; what the map was I don't remember. Q And didn't the map you had there show this road as an open road and continue as such? A I don't know; I don't think so. Q Did you make such an offer of \$2,500 to Mr. De Luca, or was that amount mentioned? A The amount of \$2,500—\$2,500 was mentined, but I said, 'It is like making you a present of \$2,500.' Q How long after this conversation with Mr. De Luca was it that you went down to the attorney? A I don't know. Q Well, was it a short time after? A It must have been. I couldn't tell you how long it was, because I didn't handle it."

(Re-direct examination by Mr. Jones.)

"Q Was it before or after? A The original conversation was before we made— (interrupted). Q Was it before or after you went to see the lawyer? A The conversation with Mr. De Luca? After."

(Re-cross examination by Mr. Kalisch.)

"Q Didn't you just testify it was only a short time after Mr. De Luca was there that you went

*Louise C. Hinck, further cross.*

down to see the lawyer? A Well, we saw him the second time then to get the proceedings started, yes. Q You saw whom a second time? A I didn't see anybody. Q Well, who was to see someone a second time? A My sister was to see about the vacating. Q Was anything  
10 discussed by Mr. De Luca about the vacating of the street? A No. Q How was it your sister was to come to see somebody about the vacation of it if it was not discussed at your conference with Mr. De Luca, do you know? A Why, no.

“Mr. Kalisch: (Reading the testimony of Louise Hinck, recalled for further cross examination by Mr. Kalisch.)

“Q Miss Hinck, do you know how it was—  
20 how you or your father or Otto Hinck sold to Millers for thirty dollars, twenty-five or thirty dollars a front foot in 1903 as compared with the price of forty dollars a front foot which you had sold to the Hannas some years before?

“Mr. Jones: I object to that.

“A The land on the east side is higher. Q Higher? A The land on the east side is more desirable. Q The land on the east side only  
30 had one other house when you sold to the Hannas, hadn't it? A Oh, no, no. Q Eh? A No; that was developed for the Hartleys and the Innesses. Q And who else? A We lived there. Q On what side? A On the east side. The Millers did not live on the west side. Q You say that— (interrupted). A And Bowmans. Q (Continuing.) —when you sold to the Hannas that was developed on the east side of the street? A Why, no, I didn't say that.  
40 You asked me— (interrupted). When you sold

*Motion for Direction of a Verdict.*

to the Hannas at forty dollars a front foot, it was not developed? A No, it was a high knoll.

Q Yes; but when you sold to the Millers on the opposite side of the street at thirty dollars a front foot, a street had already started to be developed, hadn't it? A Exactly."

Mr. Jones: I move for the direction of a verdict for the defendant on the first count because there is no legal evidence to show that they had possession or had a right to an easement; that any evidence on that subject was by Mrs. Hanna or Mr. Bowman, and those were conversations, or alleged conversations, which tended to enlarge a written instrument, and contrary to the Statute of Frauds and contrary to the line of cases as to the admission of the evidence. 10  
20

The Court: The objection to their right to recover on the second count is that interference with the rights of the public in a street does not give a right of action by a private individual, but only by the town or the attorney-general.

The motion will be denied.

Defendant's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Mr. Jones sums up in behalf of the defendant.

Mr. Kalisch sums up in behalf of the plaintiff.

*Decision of Trial Judge.*

The Court: This is an action brought by the plaintiff, Vincenzo De Luca, the owner of a tract of land on the easterly side of Grove street, in the Town of Montclair, against Berger Melin, the owner of an adjoining tract, to the south of his, alleging that Melin is a trespasser on lands which the plaintiff is entitled to use.

10

The first count of the complaint, after stating the ownership and description of the plaintiff's property, and the ownership and description of the defendant's property, says that the defendant wrongfully and unjustly contriving and intending to injure the said plaintiff, and deprive him of the use and benefit of the said right-of-way, and at the various times mentioned in the said complaint wrongfully and injuriously placed and deposited a large amount of dirt and other obstructions in and across said right-of-way and easement. The first count, therefore, is, in terms, for violation of a private right-of-way. The second count, alleges the dedication and donation to public use of this same easement or right-of-way.

20

30

It is insisted on behalf of the plaintiff that it is material to their contention in this case that their private right-of-way has been violated to show that at the time the conveyance was made, or at the time the agreement to convey was made, it was stipulated that this lot should be a corner lot and that there should be a street extending through from Grove street to the next street on the east, and that, therefore, the defendant, and the defendant's grantor, would be estopped to deny to the plaintiff the right to use this driveway. I do not think the plaintiff has shown an estoppel, nor do I think that such a grant can be created by parol. The deed to the plaintiff's grantor says nothing about

40

*Decision of Trial Judge.*

a right-of-way, nor is it bounded by any street or driveway or right-of-way. These conversations may be quite important as showing the attitude of mind, the intention of the grantors, the Hincks, with reference to a dedication of this strip of land or right-of-way to public use but cannot enlarge the scope of the deed.

10

The testimony on the part of the plaintiff is that at the time the agreement was made, or at the time the deed was made, or at the time the lot was conveyed, it was stated that this was to be a corner lot—there was no street there at the time. It is denied on behalf of the Hincks that there was this conversation at that time, but it is admitted that such a conversation was had subsequent to the conveyance of the property. On the subject of intention, it seems to me it makes little or no difference whether the conversation was had and the intention arrived at prior to the conveyance, or shortly after the conveyance, as Mr. Ernest Hinck suggests. So it is an established fact, it seems to me, that it was the intention that there should be a street in this location. Whether there was a dedication to public use, which was accepted by the town, is not clear, unless acceptance by the town is indicated by the later vacation by the town of the rights of the public in the street. That would seem to imply a previous acceptance of the street either by some act of the governing body of the town or by use by the public and the care of the street by the municipality, neither of which is shown, however, in this case, that there was an express acceptance or an acceptance by taking over the repair and maintenance of the street. The evidence in the case is quite persuasive that the

20

30

40

*Decision of Trial Judge.*

Hincks intended, that this street should be a public street. The land itself was six feet above the level of the road, and they themselves cut in there to a considerable width, as shown by the photographs.

10 The blue print introduced in evidence shows the width of the road to be sixty feet.

20 The Hincks themselves cut that land down all the way to the rear of the lot now owned by the plaintiff, and the reason they did not go further appears to be that they did not own the land all the way through to the next street, and, consequently, could not do so. The Hincks lived in the community, or, at least, were frequently there. They owned considerable land around there, and, after the land was cut away, it appears by the photographs that the north side of this road was terraced, trees were planted, not only by the owner of the property to the north, Mr. De Luca, but Mr. Ernest Hinck says that his father planted trees along there. It appears by the testimony of one of the plaintiff's witnesses—denied by one of the defendant's witnesses—that drains go underground from plaintiff's house to the street. Defendant's witness says that they go overground, but whether  
30 they go over or underground, they come from the house out into this street, this right-of-way. All of these things could not have been done by the Hincks themselves, and by the owners of the property, without the knowledge of the Hincks, and lead as I have suggested, to a conclusion that there was intended to be a dedication to public use. The Town of Montclair has attempted to, and, apparently has, so far as the public rights in the street are concerned vacated it; but that fact would not destroy the  
40

*Decision of Trial Judge.*

rights of this plaintiff if he used it for the statutory period under such circumstances as would amount to adverse user, and deprive him of his rights in that street or right of way. The conveyance to the Hannas occurred the 1st day of October, 1894, almost thirty years before this suit was brought. This street was put in there before the house was completed, which was in 1895, so at the time this suit was commenced that street had been there almost thirty years. It is suggested as to the private right of way the Court should not find in favor of the plaintiff because that user was a permissive one, consequently, not adverse. I do not so regard it. After this street was put in there it does not appear that the Hincks ever said to the owners of that property, "You may have permission to use that street." They used it without any permission and under an apparent claim of right. It is true that Mrs. Hanna said, "We never used it," but that one statement of hers must be taken in connection with her other testimony, which is that the tradespeople, coming to their house, and their servants, constantly used that driveway. Another witness said they used it to get in with their automobile particularly in the winter time, because they could not get in any other way, and there is no question that in the construction of the house it was constantly being used by those who had business there and to bring materials to the house; so that for almost thirty years, at the time the suit was brought, this right-of-way or street had been used in such a way as to indicate that its use possessed all the elements of adverse use, and if it did, for that length of time, over twenty years, which is the

10

20

30

40

*Verdict.*

10 statutory period, then there is no question but that under the principle of tacking of titles, beginning with the title of the present owner's predecessor, and ending with his title, that a period of adverse use longer than that required by the statute has been exercised over it. I do not know that in a suit for trespass it is necessary for the Court to find the extent of the right-of-way. It is very persuasive that the extent of the right-of-way would be the width to which the Hincks had excavated it, but it is not necessary to find that in this case, because it is admitted that the right-of-way, the trespass of which is the subject of this suit, has been committed and that the defendant has trespassed upon the right-of-way.

20 That being the view of the Court, the verdict will be in favor of the plaintiff and against the defendant, and the damages of the plaintiff will be fixed at six cents, and counsel for the plaintiff will prepare, as is required in such cases, a finding of law and fact to be filed with the verdict of the Court.

30

40

*Reasons.*

**REASONS.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

VINCENT DE LUCA, <i>Plaintiff-Respondent,</i>  <i>vs.</i>  BERGER MELIN, <i>Defendant-Appellant.</i>	}	<i>On Appeal from Essex County Circuit Court. Reasons.</i>	10
--	---	--	----

To Kalisch & Kalisch,  
Attorneys of Plaintiff-Respondent.

Sirs:

PLEASE TAKE NOTICE: That the following are 20  
the reasons set forth by the defendant-appel-  
lant as ground of appeal in the above-entitled  
cause:

1. Because the Court refused to grant de-  
fendant's motion for a non-suit at the end of  
plaintiff's case.

2. Because the Court denied defendant's mo-  
tion for a direction of a verdict for defend- 30  
ant.

3. Because the Court admitted, over objec-  
tion, illegal evidence.

4. Because the Court admitted, over objection,  
oral testimony tending to enlarge plaintiff's title,  
contrary to the Statute of Frauds.

5. Because the Court admitted over objection,  
oral testimony to establish an easement or other  
interest in lands.

*Reasons.*

6. Because the Court admitted over objection, oral testimony which it otherwise conceded illegal, on the theory that it might be competent to show a public street; and when said testimony proved incompetent and immaterial for that purpose, used the same to establish a private  
10 easement.

7. Because the judgment is based on the second count of the complaint—the interference by defendant with a public right-of-way; and plaintiff as a private individual, has no standing to bring such suit.

8. Because the Court found that this street was opened as a public street, and an individual cannot recover damages by reason of the closing of a public street, in the absence of special  
20 legislative provision.

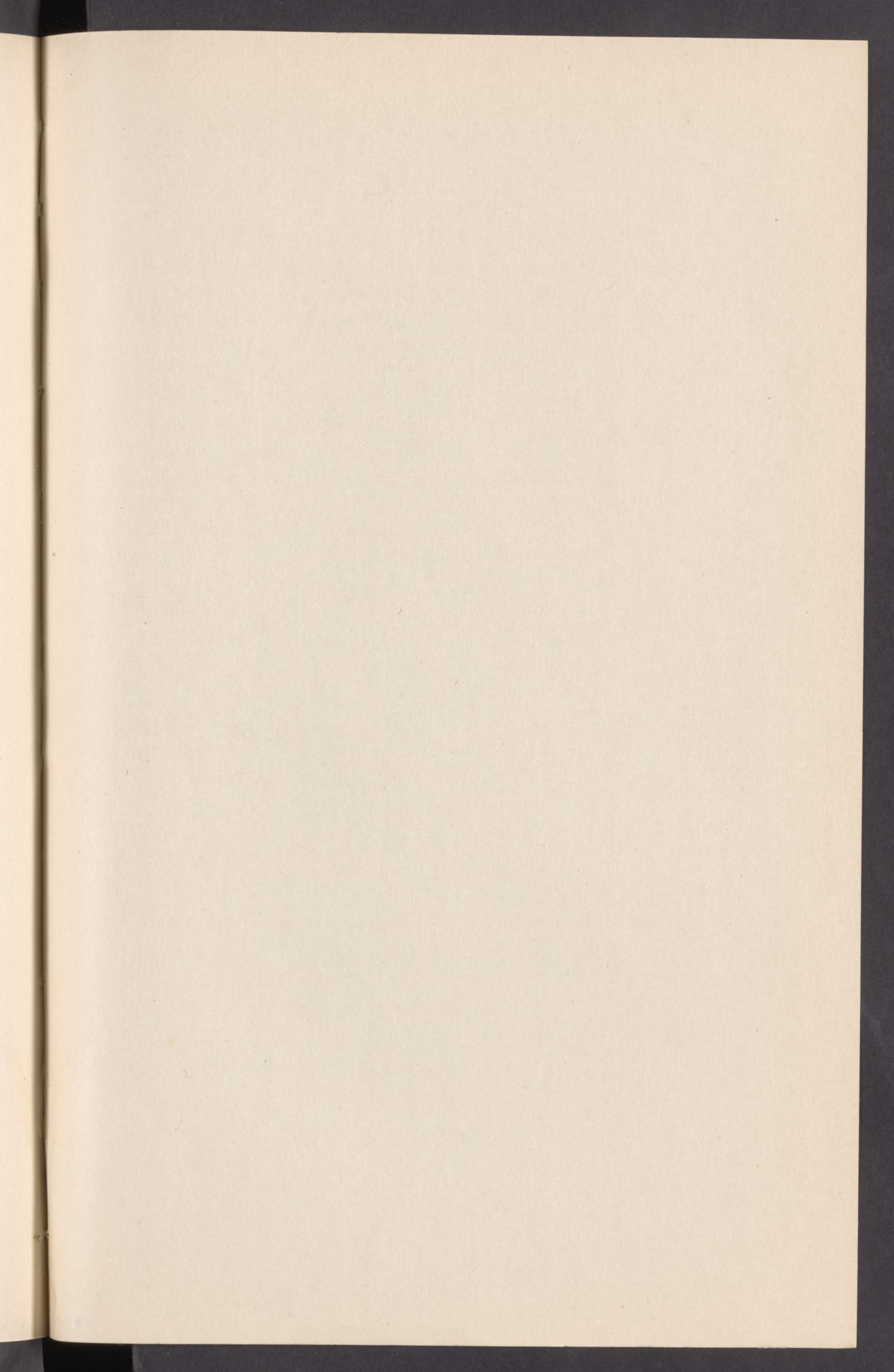
9. Because the proofs show that the original user of the alleged right-of-way was permissive, and this can never ripen into an easement.

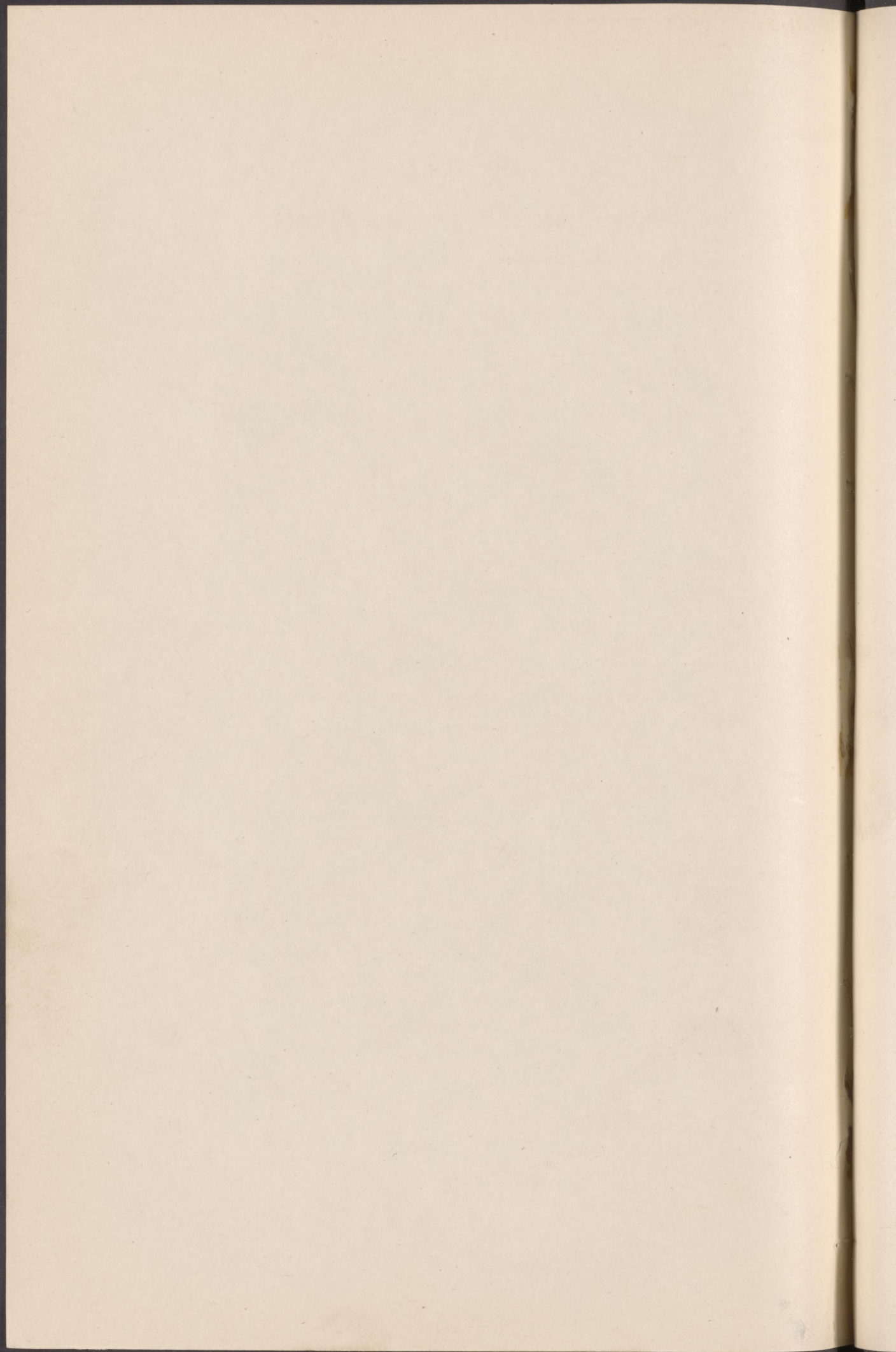
Respectfully,

CHARLES JONES,  
Attorney of Defendant-Appellant.

30 Service of above reasons acknowledged as of time.

KALISCH & KALISCH,  
Attorneys Plaintiff-Respondent.





Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

VINCENZO DE LUCA, <i>Plaintiff-Respondent,</i>  <i>vs.</i>  BERGER MELIN, <i>Defendant-Appellant.</i>	}	<i>Action at          Law.</i>  <i>On Appeal          from Essex          County          Circuit Court.</i>
---	---	--

### BRIEF FOR DEFENDANT.

#### Facts.

The defendant below was sued for damages by reason of his alleged interference with the exclusive rights which plaintiff claims in a certain road. Plaintiff sues on two counts—in the first, he alleges the right-of-way interfered with is a private right-of-way or easement; in the second, he says it was a public road.

On the main facts, there is not very much dispute.

Prior to October, 1894, Christopher A. Hinck was the owner of a very large tract of land, both east and west of Grove street—one of the main arteries of Montclair, running in a northerly and southerly direction. About that time, Hinck conveyed a plot of land, having a frontage of 100 feet on the east side of Grove street by 200 feet in depth, to one Josephine Hanna. The printer has omitted to set up the deed as an exhibit, but I have my adversary's permission to say that it is the ordinary form of warranty deed, and no reference whatever is made to this street or right-of-way in dispute, or to any proposed street or right-of-way.

About a year or a year and a half after this sale to Mrs. Hanna, Mr. Hinck started the construction of a public road about 60 feet wide, which was intended to run from Grove street east to Ridgewood avenue, a long street running parallel with Grove street. This road or street thus started, was made immediately adjoining this Hanna plot on the south. The land on each side was high, and it required considerable excavating to reach the level of the other public streets. When the road had been dug, and extended 200 feet or more on its way towards Ridgewood avenue, it was found that the owner of the land near Ridgewood avenue would not give his consent, or co-operate with Mr. Hinck in laying out this road, and the work was suspended. The road lay thus as a sort of *cul de sac* for many years. Five or six years ago, the Hinck estate opened a new road some 70 feet or more to the south of the southerly line of this street; this new road now runs from Grove street east to Ridgewood avenue, and is known as Ardsly Road.

About 1923, pursuant to power given by the Laws of 1917, page 406, the Town of Montclair, by Ordinance duly passed, vacated the rights of the public in the first-mentioned road—this road in dispute.

The defendant Melin, bought land at the northeast corner of Grove street and Ardsly Road, and commenced the erection of a house or houses facing Ardsly Road, and threw some dirt on the road now in dispute; in fact, after the public rights were extinguished, the defendant owned all the land in this road.

De Luca, the present plaintiff, on May 15, 1902, purchased the premises which Mr. Hinck

had conveyed to Josephine Hanna, first-above mentioned. No reference whatever was made in his deed, either directly or by inference, to this road or right-of-way in question. When Mr. Melin commenced the erection of his house about two years ago, DeLuca filed a bill in Chancery to enjoin this defendant from interference with the road, alleging that his predecessor in title, Mrs. Hanna, had bought the land on the promise that this road would be opened as a public street, and that her lot would be a corner lot, and he based his case on the theory of equitable estoppel. Defendant, after urging dismissal of the bill, because it presented "A substantial dispute over a private legal right in land"; went to trial on the facts; the Chancellor dismissed the bill on the ground that no equitable estoppel had been proved, and of course, no easement could be proved by parol. De Luca then appealed to this Court. This Court sustained the dismissal, but placed it on the other and narrower ground urged by the defendant, that the Chancellor should have dismissed the bill, because there was "A substantial dispute over a private legal right in land," and that the case should be tried at law.

The present action was thereupon commenced by the plaintiff in the Essex County Circuit Court. Counsel waived trial by jury, and the case was tried before Judge Dungan; no witnesses were called, but the printed record of the former Chancery case, as it appeared in the record submitted to the Court of Errors, was read. Either counsel had the privilege of objecting to any question, whether such objection had been made before or not, and Judge Dungan thereupon ruled. The Court below found a verdict for the plaintiff of six cents.

The defendant has filed several reasons why this judgment should have been reversed, which are set forth on pages 97 and 98 in the State of the Case. They will be discussed somewhat out of order.

#### REASON 7.

The judgment is based on the second count of the complaint—the interference by defendant with a public right-of-way; and plaintiff as a private individual, has no standing to bring such suit.

Judge Dungan found that this was a public street. He says, on p. 13, l. 30,

“So it is an established fact, it seems to me, that it was the intention that there should be a street in this location. Whether there was a dedication to public use, which was accepted by the town, is not clear, unless acceptance by the town is indicated by the later vacation by the town of the rights of the public in the street.”

Again on p. 14, l. 5,

“*The evidence in the case is quite persuasive that the Hincks intended that this street should be a public street. The land itself was six feet above the level of the road, and they themselves cut in there to a considerable width, as shown by the photographs.*”

On p. 14, l. 37,

“All of these things could not have been done by the Hincks themselves, and by the owners of the property without the knowledge of the Hincks, and lead, as I have suggested, to a conclusion *that there was intended to be a dedication to public use.*”

But after clearly finding as a fact, that this was a road opened as a public street, and after

citing parts of the evidence that lead into that conclusion, he finds that the plaintiff had acquired rights therein by adverse user. In other words, a private easement in the public street, beginning concurrently and running concurrently.

The proofs show that the land under the road always belonged to the Hincks, or to the defendant, and not to the plaintiff, or his predecessor in title.

If, therefore, we follow Judge Dungan's reasoning, and find that this is a public street, then clearly, plaintiff has no standing to maintain this action. In fact, count two, as pleaded, does not set up a cause of action, inasmuch as no special damage to the plaintiff in his individual capacity is alleged, nor is there any proved.

In *H. B. Anthony Shoe Company v. West Jersey R. R. Co.*, 57 Eq. p. 607 (Court of Errors), it says,

"1. Where the abutting owner of land on a street owns the fee to the middle of the street, he may maintain a bill to enjoin an unlawful erection on the street in his front."

"2. Where he does not own the fee of the street, he cannot maintain a suit to restrain a nuisance which injures him only in a right enjoyed by him as one of the public."

And Judge Garrison, writing a separate opinion, says (p. 619),

"If complainant must stand on the public right, it is not seen how that is drawn in question in a suit to which no one representing the public or even the municipality, is a party."

This leading case was followed by a case in the Law Courts, *Young v. Pennsylvania R. R.*

*Co.*, 72 N. J. L. p. 94, (Swayze, Judge), the facts were that the railroad company had dedicated to public use, a crossing at Sixth street, Harrison, and that that street, as well as New Jersey Railroad avenue, had been obstructed by the plaintiff. Young had some rights as an abutting owner, or some sort of easement by reservation. The Court found it necessary to determine, 1. Whether the plaintiff has shown any right to maintain an action by reason of the obstructing of the crossing at Sixth street.

“1. The first question is settled adversely to the plaintiffs, citing, *H. B. Anthony Shoe Co. v. West Jersey Railroad Co.* (*supra*).

“It was there held that the injury sustained by the owner of land immediately abutting upon a public highway from an obstruction of the street was not different in character from that which every other citizen sustains. *A fortiori*, the injury sustained by those who are not abutting owners, as in the present case, is not different in character from that of the public, and cannot be redressed by a private action for damages.”

See also, *Camden v. Amboy R. R. Co.*, 4 C. E. Green, p. 277; *Morris & Essex R. R. Co. v. Newark*, 51 Eq. p. 379, (affirmed by Court of Errors); *Halsey v. Rapid Transit*, 47 Eq. p. 380 at p. 386).

It would seem, therefore, that if it was a public street, that the Town of Montclair, or somebody representing the public, and not De Luca, should have been the plaintiff.

**REASON 8.**

The Court found that this street was opened as a public street, and an individual cannot recover damages by reason of the closing of a public street, in the absence of special legislative provision.

If defendant's theory in this case is correct, plaintiff had no greater rights in this road than any other member of the public. As shown in the testimony (p. 70, l. 18), this road, or the public rights in the road, were extinguished by an Ordinance of the Town of Montclair, passed pursuant to the Laws of 1907, p. 406. This took place somewhere around 1923. Even as against the public, it would appear that plaintiff would have no cause of action for damages for the closing of this road, because his house faced on Grove street, another public street, and this road was not in the slightest degree necessary, *Newark v. Hatt*, 77 N. J. L. While, of course, it is conceded that the vacation of the street does not in the least impair any private right or easement, inasmuch as any rights that plaintiff or his predecessors in title obtained to go over this road, were obtained as members of the public, and began with the dedication of this street as a public street, it is hard to see what possible private rights he could have therein.

**REASON 9.**

The proofs show that the original user of the alleged right-of-way was permissive, and this can never ripen into an easement.

The Court finds first that this way was opened as a public street. That the Hincks always

intended it as a public street. It then proceeds to find that the defendant had at the same time acquired a public right-of-way by adverse user. That adverse user must have run concurrently with the rights of the public.

A rather novel legal proposition is thus presented. The Hincks, the Court finds, dedicated this street to public use (bottom p. 14, top p. 15),

“All these things \* \* \* lead, as I have suggested, to a conclusion that there was intended to be a dedication to public use.”

The public right to appropriate the street thus dedicated at any time when it wants, or convenience requires it, could not be defeated by any act of the dedicator. The land could only be released from the public servitude by the State itself.

*South Amboy v. N. Y. & L. B. R. R. Co.*,  
66 N. J. L., p. 623; *McAndrews & Forbes Co.*  
*v. Camden*, 78 N. J. Eq. p. 244 at 248.

In opening this street, the Hincks, by their very action, said in effect, “Mr. Hanna, Mr. De Luca, Mr. Melin and all the public—here is a piece of my land; use it; travel over it; I have opened it for all.” That certainly sounds *permissive*. It was with Hinck’s consent; it was by his invitation that the road was used. Even the plaintiff’s own witnesses seem never to have suggested that their use was adverse. The gist of Mrs. Hanna’s testimony (pp. 24, 25 and 26) and Mr. Bowman’s testimony, is that Hinek sold this lot, and told Mrs. Hanna he was going to put a public road adjoining her property on the south, that she could use; that he would make her lot “a corner lot.” She said, “I will call it Waverly avenue,” and then they put this street in.

On p. 52, l. 1,

“He asked Miss Hinck whether it was true, as neighborhood gossip had it, that that road was to remain a road, and she said, ‘Yes, my father, Christopher Hinck, has promised Captain and Mrs. Hanna that that would always remain a road, and my father’s word is as good as his bond.’”

Irrespective of whether this is the fact or not, this gives an indication of how plaintiff’s main witnesses felt about it. As to the use of the road, on p. 38, l. 9, testimony of Mrs. Hanna,

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

and she had previously explained that there was a driveway to the north of the house, which they used.

The only shred of evidence is that of the interested party, De Luca, who says, in a rather casual way, that he and his family have always used the road. Where? Admittedly not 60 feet; admittedly not the whole length; certainly, the 24.28 feet he calmly incorporated in his lawn, he does not hope to acquire by adverse user. As to that, he is merely a squatter. Under such a theory, any man may acquire a foot or two of his neighbor’s lawn, by simply mowing it, while his neighbor was in ignorance of where his exact line lay. That is not adverse user. There is not one shred of evidence of any *exclusive use*.

Let us look at some of the evidence (p. 24, l. 3) Mrs. Hanna’s testimony,

“Mr. Hinck said at the time, they were going to put a street through there.”

(Line 32)

“I said, ‘I will call it Waverly avenue.’

Q What will you call Waverly avenue?

A That street they were going to put through.”

(p. 33, l. 7) Mrs. Hanna’s testimony,

“Q Now, as I understand it, he showed you a lot on the east side of Grove street, which is the lot in question, and I understand you to say he promised you some time in the future, he would put a road next to it, on the south? A Yes, a street through it. Q He would put a street through it? A Yes. Q That street, he told you, would some time in the future go through— A To Ridgewood avenue. Q From Grove street to Ridgewood avenue. Is that right? A Yes. Q It was? A I was to name the street. Q You were to name the street? A I named it at once Waverly avenue.”

(p. 36, l. 32)

“Q As you understood it, your understanding was Mr. Hinck was to lay a public street from Grove street to Ridgewood avenue, is that right? A Yes. Q And then, was subsequently this portion of the street which was laid, that was the beginning of that public street? A Exactly. Q And that you and any member of the public would have the right to that street? A Exactly.”

(p. 74, top) Ernest Hinck’s testimony,

“I stated to her—it was our intention of laying the street between Grove street and Ridgewood avenue.”

(p. 74, l. 24)

“Q When was the road begun at the south of the De Luca property? A I should judge a year or a year and a half after the Hannas started work on the house. Q And that was in pursuance of this plan of putting a public street through to Ridgewood avenue? A It was.”

(p. 76) referring to a row of trees planted along this public street,

“Q Is that, to your knowledge, a fact?  
A I know there were trees there before the time that Mr. De Luca testified he placed his there. Q And who put them there? A Father put them there.”

(p. 76, l. 30)

“Q Was there any objection made by you or your father when the road was started to the south of Mr. De Luca’s place? A When the road was started? Q Yes. A Father started the road. Q Oh, your father did. A My father had the work done.”

It can be readily seen from the above, and the rest of the testimony, that Mr. Hinck not only opened this road for the public to use, but that subsequently, by planting trees, he continued his interest in it as a public road, some time to be finished down through to Ridgewood avenue.

Every case of adverse user on which an easement was founded, begins with a *trespass*. The use or occupation must be *hostile*, to the owner. It must be made under such circumstances that the owner can see when an *adverse* right is claimed, and yet, he *acquiesces* in that use for the statutory period.

“The original entry in the land being permissive, this can never ripen into an easement. The permission to use may be either express or implied.” *Corpus Juris*, Vol. 19, p. 87, Sec. 53d.

In the note to 44 L. R. A. (N. S.) p. 89

“It is a well-settled principle that the use by the express or implied permission of the owner, no matter how long, continued, cannot ripen into an easement, by prescription, since one of the elements essential to the acquisition of such an easement—namely,

user as of right as distinguished from *permissive user* is lacking."

In the case of *Penn. Railroad v. Hulse*, 59 N. J. L. p. 54, is the following headnote:

"Where the plaintiff's use of a way was, at its inception, permissive, its mere continuance for the statutory period will not ripen into a hostile right."

In *Cobb v. Davenport*, 32 N. J. L. p. 369:

"A user to be adverse must be under a claim of right against the true owner, with such circumstances of notoriety as to afford an indication to the owner that a right is claimed against him. The theory of law is that the owner *knew* that they were claiming a *hostile* right and acquiesced in it."

Corpus Juris, Vol. 19, p. 898, Sec. 76 d.

"The mere use of a right of way in common with the general public, although it may establish a public road, cannot establish a private right of way. Such use is regarded as being under an implied license and is not adverse."

The case of *Myers v. Folkman*, 89 N. J. L. p. 390 (Swayze, Judge), shows how intention to claim adversely must appear.

On p. 392 he says, quoting from Chief Justice Beasley,

"It is the existence of an intention to claim the fee, and the *doing of some act indicative of such intention*, which convert the occupation of land into an adverse possession; and this is the doctrine on which the decision of every case proceeds."

Further down, speaking of Justice Depue's decision in another case, he says,

"So he speaks of an intention to assert ownership as evidence of adverse possession and of the necessity that the nature of the

possession should be such that the real owner must be presumed to know that there was a possession adverse to his title, under which it was *intended* to make title against him."

(p. 393)

"To constitute an adverse possession from which a grant will be presumed, it must have been under a claim of title exclusive of any other right, and it must have been definite, exclusive and notorious, and for a period of twenty years uninterruptedly."

In the case of *Coombs v. Atlantic City R. R. Co.*, 96 Eq. p. 709. This case, while not direct to the point, is somewhat similar to the facts and throws an interesting side light on the law. The plaintiff in that case had, however, *previous* to the dedication of this road, a private easement therein. The public rights in this street were after many years vacated by the public, and the question was whether the private right of this man holding an easement was merged in the public right or whether it was merely suspended or abandoned. The manifest difference is that any rights in our case started as public rights, and the question is rather whether, when a street is opened and dedicated to the public, and there is a continued offer of dedication, whether accepted or not, this adjoining owner, who has no title whatsoever, could obtain an easement.

---

*REASONS* 3, 4, 5 and 6 can be argued together. They relate to the illegal admission of evidence.

On p. 24, ll. 20 to 30, after making several separate objections, by agreement with the Court, it was agreed that any questions intended to elicit from witnesses statements, which would

enlarge her title, were objected to. These conversations were let in over objection.

The Court said, on p. 23 that he was letting in this testimony not to establish a right-of-way, but to indicate whether there was a dedication to public use.

On p. 23, l. 20

*“but I am admitting this testimony only on the subject of dedication to public use. I think that makes it admissible.”*

If it was to prove it was a public road, then it was *immaterial*, for if it was a public road, then the plaintiff would have no right to sue.

It is respectfully pointed out that plaintiff would not be in a position to make his present contention before the Court were it not for the introduction of illegal evidence. Without the introduction of what we conceive to be illegal evidence (and strongly objected to at the time) no color of representation of any kind could have been made out.

In the case of *Dewees v. Manhattan Ins. Co.*, 35 L. 366, equitable estoppel was relied upon by the plaintiff on an insurance policy. Chief Justice Beasley, in deciding the case, and in criticising a New York case which had been cited, says at (p. 375):

“It is idle to say that estoppel, if permitted to operate, will prevent a fraud or inequitable result; most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties. \* \* \*  
The mistake of the court appears to have been in regarding simply the legal effect of

the facts which were proved by parol. Receiving that testimony into the case, a clear estoppel was made out; but the *error consisted in the circumstance that such oral evidence was, on rules well settled, inadmissible.*"

How, for instance, without doing violence to our leading case of *Naumberg v. Young*, 15 Vr. p. 331, could the testimony of Mrs. Hanna be possibly admitted to enlarge her title. I know of no case except where there is a direct attack on the instrument, such as in a case of reformation or rescission where testimony of this nature could on any theory be admissible, and I think, if this one point stood alone, it is strong enough in point of merit, to defeat plaintiff's claim.

I submit, that upon reflection, and upon considering again such cases as *Naumberg against Young* and *Deweese v. Manhattan Ins. Co.*, the Court will feel that to allow complainant to attempt to enlarge his title by verbal testimony, and by verbal representations alleged to have been made, either prior or subsequent to the delivery of the deed, is illegal and does violence to the plain rules of evidence and the Statute of Frauds.

## REASON 2.

**The Court denied defendant's motion for a direction of a verdict for defendant.**

At the end of the case, it appeared clearly from the undisputed facts, that the road was a public road, and that to find a judgment, it would have to be found under the second count of the complaint. Defendant urged that his verdict be found for the defendant because plaintiff had no standing, as he did not represent the

public. Furthermore, it appeared clearly, that there was no private easement by grant, and that plaintiff could not have acquired the easement adversely, because his original entry was permissive.

### ESTOPPEL.

Plaintiff's main contention at the trial, and which he may try to insist upon in this Court, is that the plaintiff had acquired rights by equitable estoppel. The Court found on the facts presented, that the plaintiff did not show an easement by estoppel, or by a grant created by parol. It is either rightly or wrongly the understanding of defendant's counsel, that in a suit at law, these findings of fact of the Judge, if there is any testimony to support them, are not reviewable. *Blackford v. Plainfield*, 43 L. 438; *Columbia Bridge Co. v. Geisse*, 38 L. p. 39. As the Court found against them on the facts, so too, the law seems to be against them.

Plaintiff undoubtedly realizing that his title by adverse user is of little account; realizing, as he must, that he is claiming an interest in lands, without a writing, as required by the Statute of Frauds, insists that he has a right by estoppel. That by reason of something that he alleges Ernest Hinek said to Mrs. Hanna thirty years ago, control of the plot 60 feet by 100 feet vests in plaintiff.

There is nothing unfamiliar about the doctrine of estoppel, but in every instance, in any well considered case, it will be found to involve fraud—a misrepresentation of an existing fact. Or, with full knowledge of existing facts, the party maintains silence, when it was his duty to speak.

In the present case, Mrs. Hanna's testimony is clear on one point in her conversation, whether that took place before the sale, as she vaguely said it did at times, or after the sale, as Hinck said it did. She is quite clear that it referred only to a promise at some future time to put down a road (p. 33, ll. 13-33). The road was not there. There was no map, no stakes, nothing indicating a road. Christopher Hinck meant to put through a road sometime, to Ridgewood avenue, but the fact that he could not get Lindenmeyer's permission made him change his plans.

In the leading case of *Insurance Co. v. Mowry*, 96 U. S., p. 544, at p. 547, the Supreme Court of the United States, speaking through Justice Field, says that estoppel cannot be based upon an agreement for something to be done in the future.

"If the representations relate to something to be afterwards brought into existence, it will amount only to a declaration of *intention* or of opinion liable to modification or abandonment upon a change of circumstances, of which neither party can have knowledge \* \* \* estoppel cannot arise from a *promise as to further action*, with respect to a right to be acquired upon an agreement not yet made."

In Professor Pomeroy's justly famous work on Equity, 4th Ed., Vol. II, Sec. 808, on page 547, he says:

"The facts represented or the concealment must in general be either existing or past, or at least represented so to be. A statement concerning future facts would either be an expression of opinion or would constitute a contract, and be governed by rules applicable to contracts."

In the case of *Musconetcong Iron Works v. D., L. & W. Railroad* (a Court of Errors case), 78 N. J. L., at the bottom of p. 718 and top of p. 719, five elements that must be present in order to create an equitable estoppel in this State are carefully set forth.

I submit that the first and second elements are entirely lacking, and there is certainly grave doubt as to whether the fifth is present.

Element No. 1. "The party against whom the estoppel is urged must have made a representation or concealment of a material fact inconsistent with the facts forming the basis of his present claim." But both agree that Hinck told only of plans or promises for the future. Whatever he said was absolutely honest, but circumstances prevented their being carried out.

Element No. 2. "He must know that such facts are otherwise than as represented."

Hinck couldn't know the facts were otherwise, because they were but plans for the future, and even complainant does not for a moment contend that Christopher Hinck (well knowing that he never intended to build a road) sent Ernest Hinck over to represent that he was.

It is submitted that these two of the five elements (all of which the Court of Errors says must be present), being lacking, complainant's theory of equitable estoppel must fail.

Nor does it appear that there is the slightest proof that anybody relied on what complainant alleges were representations. Plaintiff says the house was built as a corner house, but he utterly fails to prove it.

In the case of the *Mutual Life v. Norris*, 4 Stewart, at p. 585:

“In other words, it must be a fact which is misrepresented.”

In the case of *Banghart v. Flummerfelt*, 43 L., p. 29—this is an important case—the facts were that the defendant agreed with one Albertson to convey to him a certain mill and lands; before the delivery of the deed, it was mutually agreed between the defendant and Albertson, by word of mouth only, that in the place which apparently separated the two premises, the defendant was to dig a new channel for the creek and construct a new dam and embankment thereon. Moreover, defendant also verbally agreed to keep this ditch in good repair.

Defendant *actually built* the creek and constructed the dam and embankment. The suit arose over a failure to keep up repairs. The great Chief Justice Beasley delivered the opinion. On page 31 he says:

“If the defendant should tear down this dam and fill up this aqueduct, it seems quite clear that the plaintiff could have no redress for the damage that would ensue, founded on this unwritten agreement. The most cursory reference to the books will raise a conviction that the law on this subject is entirely settled. ‘An easement in the land of another,’ says one of the text writers, ‘is by common law grantable only by deed, and, of course, no verbal agreement which amounts to conferring an easement or a right in the nature of one can be, as such, available to either of the parties to it.’ The law on this point is too well settled to require any detailed citation of authorities.”

In the leading case of *Lawrence v. Springer*, 49 Eq., p. 289 (a Court of Errors case), Chief Justice Beasley holds that an easement cannot

be imposed by parol. The head-note is as follows:

“It would seem that an easement cannot be, in this state, imposed on land by the force of parol evidence.”

The Chief Justice, on page 292, takes occasion to call attention to the fact that where in some jurisdictions the strict enforcement of the Statute of Frauds has not been observed, it has proved disastrous.

“The statute,” says Lord Redesdale, “was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed the result would probably have been that few instances of parol agreements would have occurred. Agreements from the necessity of the case would have been reduced to writing. Whereas, it is manifest that the decisions on the subject have opened a new door to fraud.”

The Chief Justice made it very clear where the Court of Errors stood on the subject in this State in 1892. This date is significant, as this is a decision of the Court of Errors. The case of *Bechtel v. Carslake* was decided in 1858 and never appealed. The case of *Dill v. The Board of Education* was decided in 1890, and was never appealed. Neither of these cases have been recognized by the Court of Errors in any subsequent case.

It is respectfully submitted that the judgment of the Essex Circuit Court should be reversed with costs.

CHARLES JONES,  
Attorney of Defendant-Appellant.

## New Jersey Court of Errors and Appeals

VINCENT DE LUCA,  
*Plaintiff-Respondent,*

*vs.*

BERGER MELIN,  
*Defendant-Appellant.*

### BRIEF OF PLAINTIFF-RESPONDENT.

#### Facts.

The undisputed facts in this case are that in October, 1894, the land and premises of the plaintiff was deeded to Josephine L. Hanna, plaintiff's grantor, by Christopher A. Hinck, now deceased, and subsequently on May 15, 1902, Josephine L. Hanna deeded the same premises to the plaintiff herein.

During the month of October, 1923, the estate of Christopher A. Hinck deeded to the defendant herein, the remaining property owned by the estate and fronting on Grove street, Montclair, and beginning at the most southerly line of plaintiff's property running south to a street known as Ardsley Road, and then running west on Ardsley Road, at least to the depth of plaintiff's property 200 feet. The survey and photographs introduced in evidence will show that that is the depth of plaintiff's property, and the photographs will further show that Ardsley Road runs parallel to the road involved in this suit, which latter road begins at the most southerly line of plaintiff's property and as originally built was 60 feet wide.

It is admitted that the defendant intended to execute dominion over the road in question and to the south of plaintiff's property and to the exclusion of the plaintiff (p. 64, top). The testimony of witness, Sessa, who corroborates *in toto* the testimony of the plaintiff, shows that the defendant told him on or about January, 1924, that he intended to fill in the entire road involved in this suit and in addition would construct three garages on the road in question, so that the rear of the garages would be at the southerly line of the plaintiff's property (pp. 67-68). It also will be disclosed that the defendant had started to fill in the road and that the purpose of Mr. Sessa's visit to the defendant was to object to this work being done.

It cannot be denied that the house built by the plaintiff's predecessor in title, Mrs. Hanna, as will be seen by an examination of the photographs which are exhibits, is an imposing-looking home and that the architecture indicates clearly that it was built as a corner property. There can be no doubt that the side of the house toward the road in question is plainly visible from Grove street and that the family necessarily obtained light and air through the numerous windows on this side of the house and the large windows and French doors which open on the porches on this side of the house.

The complaint (p. 3) involved in this suit consists of two counts: the first count alleges a right of way or easement by the plaintiff in the road in question and the second count alleges a dedication to the public, and a public right of way over the road in question, and that the defendant obstructed and closed up the right of way.

The first action instituted by this plaintiff was a bill in Chancery to enjoin the same defendant from in anywise interfering with this plaintiff's use and possession of the road or any part thereof, which bill was dismissed by Vice-Chancellor Church on January 31, 1925, and upon appeal to this Court the dismissal of the bill was affirmed, but not for reasons assigned in Chancery, and this Court in affirming, held that this plaintiff was obliged to go into a court of law to establish his right in the land in question (129 Atl. Rep., p. 144).

This case was tried before Judge Dungan at the Essex Circuit by a reading of the testimony taken in the Court of Chancery, as will be seen by an examination of this record (pp. 19 and 20). The picture of the *locus in quo* was introduced in evidence (Exhibit C. 1, p. 21, top). The map of the *locus in quo* and prepared by Surveyor Kreiner was introduced in evidence and marked Exhibit C. 2, page 59, both of which exhibits are being sent by us with this brief to the sergeant-at-arms of this Court, this Court having granted us ten days' extension of time in which to file our briefs.

There are three questions which arise in the argument of this case; dedication to public use and estoppel, which may be argued together and adverse user by plaintiff. Judge Dungan tried this case on the question of title (p. 19, l. 26), and by stipulation of counsel the Court was to pass upon the law and the facts (p. 19, bottom; p. 20, top).

This plaintiff has been cast out of the Chancery Court to establish title at law and is now here, after having his title established by Judge Dungan after a careful consideration of all the facts in the case.

**ARGUMENT.**

It is a noteworthy fact that the defendant at the trial only introduced the testimony of the members of the family of Christopher A. Hinck. Two of them are executors of his will, and have executed a warranty deed to the defendant herein of the remainder of Hinck's property, directly to the south of the plaintiff's facing on Grove street. Therefore, their interest in freeing the road in question from any claim of the plaintiff is great. On the other hand, the plaintiff introduced the testimony of Mrs. Hanna, a lady now over the age of seventy years, who at this time of life would not be inclined to misstate facts, and Mr. Bowman, an attorney of New York, whose testimony alone would support the claim made by the plaintiff (p. 41).

It is further to be noted that the defendant in the case did not take the stand; it may well be that his reason for so doing was fear of being questioned as to what his knowledge was or what was told him in connection with the plaintiff's claim in the road here involved.

Mrs. Hanna's testimony regarding the agreement of Mr. Hinck, Sr., that the road as shown on Exhibits P. 1 and 2, would be a corner property and so remain is clear and convincing, and Mr. Bowman's testimony regarding this road is similarly so. Her testimony was that Hinck said that if she bought the lot her house would be a corner because they would put a street through (p. 28). The defendant's only witness produced in connection with this question was Ernest Hinck.

Mrs. Hanna testified that after the road was built and subsequently when her house was fin-

ished, her tradespeople used the road now in question (p. 29). Her negotiations were with Ernest Hinck. On cross examination, in referring to her conversation with Ernest Hinck, she said, "He said at the time we bought this he would make it a corner lot. That is why we paid \$4,000 for this corner; we would not have paid as much as that if it had not been a corner lot" (p. 37). That when she bought lot it was the only house there (p. 31). Conversation about road was before she paid for it (p. 25).

That the road referred to was to be opened at least to the depth of her lot, and was so opened by Hinck (p. 28, bottom, to p. 29, l. 10). She also explained why she did not have Hinck's agreement put in the deed. That she had no experience and that she thought people were honest (p. 34). She further stated that Hinck told her the road would finally go through to Ridgewood avenue (the latter street being parallel to Grove street), and that in the meantime she could name road and that she did name it Waverly avenue (p. 33). That Hinck said nothing in connection with the limitation of the use of the road (p. 30). That at that time she thought the Hincks owned all the property to the rear of what she purchased (p. 26). That after the road was built the land to the south of the road in question was even with the terrace on which her house was built. In this she is supported by the testimony of Bowman (pp. 39-40) and George Miller (pp. 52-53). That the road was depressed to the extent of about six feet (p. 39). Bowman further refers to the building of the road (p. 40).

It appears that Mrs. Hanna acted upon the agreement of Mr. Hinck subsequently carried

into effect by the building of the road and that the road has been there for over thirty years, and was to remain open, and since this defendant takes through the Hincks, so his duties can be no greater or less than would be Hinck's if he were alive and still owned the property. (*Central R. R. v. McCartney*, 68 Law, p. 165 at 175; *Central R. R. v. State*, 32 Law, p. 231; *Sumner v. Seton*, 47 Eq., p. 102.)

Bowman lived near the premises involved herein from 1894 to 1908. He is now forty-eight years old and recalls the facts distinctly (p. 39). That the road was actually started before the house; that they had to start to cut through before the building operations on the house could begin (p. 39, l. 30). That after the house was finished the road was widened somewhat and carried back to the end of plaintiff's lot, and finally this road connected by way of the rear of the house with the driveway to the north of plaintiff's house, which also may be seen by the exhibits referred to. That Hinck was doing the excavating for Hanna's house (p. 41). He further testified as to his conversation with Hinck wherein the latter told him about the agreement regarding the road, making the lot a corner one, and that it would remain so and that Mrs. Hanna had paid an exceedingly high price for the lot and that Hincks were very much pleased as the expense of digging the road was little additional to what they had to expend anyway to bring up the materials (pp. 41-42). He further stated why his memory was so clear on the subject (p. 42).

If this Court is not satisfied of the correctness of Judge Dungan's findings that the doctrine of adverse possession applies, then we maintain that the doctrine of dedication to public use will

sustain our position (*N. Y. & L. B. R. R. Co. v. South Amboy*, 57 L. 252.)

This testimony becomes important in considering the fact that the Hincks, some seven years after the sale to Mrs. Hanna sold Colonel Miller property on approximately the same point on the street for \$30 a foot (pp. 50-51-83), whereas as hereinbefore shown Mrs. Hanna's 100-foot frontage cost her \$40 a foot. This circumstance speaks more loudly than any argument we can make, because it showed that the Hincks charged the premium based upon the fact that Mrs. Hanna's house was erected on a corner lot, and therefore, its value was enhanced.

Mr. Bowman testified that the building of this house created a great deal of interest in the neighborhood, because it was to be the most pretentious there (p. 43). And it was the interest created by the building of this wonderful home which caused a deeper impression to be made upon him when Mr. Hinck told him it was to be a corner lot, etc. The road was built under the order of Christopher A. Hinck, Ernest A Hinck's father (Appellant's counsel admitted this p. 29, top). That the road was being built in 1895, and before the house was erected (p. 43 bottom, p. 44, top). The agency of Ernest Hinck is unquestioned in view of all the negotiations having been conducted by him, and the ratification of all his acts by his father even to the extent of building the road. The Trial Court so concluded (p. 41), when defendant's counsel attempted to limit the authority of Ernest Hinck.

The testimony of Miss Gertrude Miller, a sister of witness George Miller, and daughter of Colonel Miller, who, in 1902, purchased some land from the Hincks and opposite to this road in question, is to the effect that in 1898, the

Miller family moved to Grove street, opposite the road in question, and that the tradespeople constantly used this road and that it was always open, that these tradespeople always had business in plaintiff's house as the road ended there (p. 44, l. 38; ~~p. 57, ll. 32-33; p. 56, top of page; p. 58, bottom of page; and p. 59, top~~).

The testimony as to the road is also corroborated by Miss Wainwright, who resided with Colonel Miller, during some years (pp. 47-48). She also testified to planting of trees in 1907 and 1908 by plaintiff along the southerly side of this house, and also the grass seeding by him of what was originally part of the road in question; complainant corroborates this.

Witness George Miller testified that he lived with his father from 1898 to 1905 (p. 49, ll. 35 to 37). He testified regarding an agreement in 1903 between the Millers and the Hincks, when the Millers were purchasing from Hincks to increase the frontage of their property, 25 feet to the north and 75 feet to the south, their house being across the street from the road in question, and for which increased holdings Miller paid Hinc \$25 to \$30 a foot (pp. 50-51). Miss Miller and Miss Wainwright corroborated his testimony regarding the additional purchase of land (pp. 45-47), and he said that Miss Hinc at the time of the deal stated that her father promised that the road opposite to the Miller property would always remain (p. 52). The road was depressed as hereinbefore referred to the level of Grove street, leaving the banks on each side even. He further testified on cross examination that the Millers would not purchase more property unless the road in question would remain (p. 53, ll. 13 to 22).

The survey is clear and demonstrates all descriptions referred to in this brief, but we shall refer to a few excerpts of the testimony of Mr. Kreiner, a well-known surveyor of Newark, in connection with certain dimensions on his survey, which is an exhibit. That the roadway is reduced in width by the planting of trees and grass, running back to the very end of plaintiff's property (p. 58, ll. 10 to 16). That there are drains from the house into the road in question (p. 57, ~~ll. 5 to 14~~), and that there is a continuous drive through the road in question around the rear of the house and connecting with the roadway on the north side of the house, which driveway has been kept up (p. 57, ~~ll. 22 to 27~~). These drains indicate that they were so placed and entered into the road, because the road was to remain. This use was also adverse to the right of any other person in this road.

This plaintiff testified that he has kept up the road to the south of the property, spent money on it, surfaced the road, seeded it and attempted to stop him (~~p. 63~~<sup>62-63</sup>). That an injunction was asked by the plaintiff when the defendant started to fill in the road (p. 63). That he and his family and their tradespeople used this road (p. 64). He, thereupon, refers to certain attempts on the part of the Hincks to release his interest in and to this road. He testified of Hinck's offer to sell him land to the south of the land in question (p. 65). An examination of the pictures and the survey will show that from the southerly side of the road Ardsley road, is only about 70 feet. This becomes important for it will explain why the defendant preferred to have his new houses face on Ardsley road, where he had 200 feet frontage <sup>with</sup> and the garages to the ~~planted trees~~ (p. 62). That the Hincks never

*Hincks never*

*rear,*

~~road~~, instead of only having 70 feet front, the garages then interfering with what he formerly could sell as front lots on Ardsley road. Plaintiff's testimony was to the effect that he was offered \$2,500 in connection with his interest in this road (p. 65). That this roadway is of great value to him, because as he says, I cannot get up to my house in the winter time unless I have that road, since the road on the north side of the house is so steep (p. 64).

The first witness produced by the defendant was Ernest Hinck, who admittedly was the only member of the family who negotiated with Mrs. Hanna for the sale of the property in question. This witness did not deny the statement that the road was to be built to the south of the plaintiff's land, but attempted to avoid legal responsibility by stating that his statement to that effect to Mrs. Hanna was made *after* he gave her the deed (p. 74). In other words, he admits the truth of Mrs. Hanna's testimony to a large extent, but merely differs with her as to the time. When he made the statement he admitted further that the road was actually built (p. 74). We have heretofore shown that Christopher A. Hinck had the road built. As to his testimony on this phase of the case we refer the Court's attention to the evidence of Mr. Bowman, Mrs. Hanna and George Miller, which testimony flatly contradicts his statement; the road was actually built before the house was completed and has remained for over thirty years, and these facts tend to contradict the testimony of Mr. Hinck. He admitted that the Hincks owned the balance of the property to the south of the road, which was built as far as the point where Ardsley road was cut through (p. 79, ll. 22-25). He is further contradicted when he says that the drains from the Hanna house ran over the surface of the land.

(p. 77, top of 78), on the south side because the survey showed that they ran under the ground to the road in question, and manifestly that must have been done before the lawn was completed.

This witness further could not explain how it was that the road was dug before the house was finished (p. 77, ll. 19 to 21). It is also to be noted that this road was built by the Hincks beginning at the very southerly line of plaintiff's property (p. 78), and the balance of the property to the south was owned by the Hincks (p. 79).

~~Louise Hinck testifying to the contrary.~~ It is, noteworthy that the figure of \$2,500 in the testimony of Louise Hinck accords with the figure testified to by the plaintiff and Mr. Sessa, and which they say was offered to DeLuca for his interest in the road in question (p. 81). It is further noted that the price of \$8,000 as testified by Miss Hinck was reduced to the extent of \$2,500, viz.: to \$5,500, and for this price plaintiff was to receive the balance of Hinck's property to the south of the road, and as far as Ardsley road, and then running along Ardsley road. We do not refer to this as an offer of compromise, but as evidential of the truth of Mrs. Hanna's testimony regarding the building of the road and that its use would never be limited.

Directly after the conversation with Mr. DeLuca, the defendant here, applied for a title policy (p. 82). It may be that the information the defendant obtained from the title company was the reason that the defendant failed to take the stand. Louise Hinck apparently knew nothing of the original transaction between Ernest Hinck and Mrs. Hanna (p. 83). She admitted that when she offered the *balance of the property to Mr. DeLuca for sale, it had nothing to do*

*with the road in which he claimed an interest* (p. 83, bottom of page; p. 84, l. 8), and, therefore, she corroborated the testimony of DeLuca and Sessa that the \$2,500 was mentioned to cover a release of Mr. DeLuca of such claim as he might have to the use of the road.

Defendant's counsel attempted thereafter to avoid the effect of Miss Hinck's testimony of this point (p. 83). This witness further testified that after her conversation she immediately obtained the advice of an attorney as to the vacation of this road by the town (p. 84).

Otto Hinck, another defendant's witness, and son of the original grantor, testified that they fixed a value of \$40 a front foot for the property which they wanted to sell to Mr. DeLuca (p. 86, l. 22 to bottom). The Court thereupon questioned him as to whether the land in the neighborhood had increased in value since the Hincks sold to Mrs. Hanna, and up until the proposed sale to the complainant, and the witness for some time attempted to avoid a positive answer (p. 87, top). In other words, they were willing to sell to DeLuca with a deduction of \$2,500, the balance of the property facing on Grove street, and to the south of the road, and thence running on Ardsley road, at \$40 a foot, and after this street had developed into a wonderfully built-up section, and yet they attempt to argue that when Mrs. Hanna thirty years ago paid \$40 a front foot for her lot, and when there was very little building on the street, she did not pay an increased price, based upon the road that was to be built to the south of her land. Of course, it is advantageous to the defendant to sell with frontage on Ardsley road, where he has 200 feet, rather than on Grove street, where there is only 70 feet frontage south of the road in question (p. 87, bottom).

This same witness said they went to a lawyer in regard to the title of this road (p. 88, bottom), and it was decided to apply to the Board of Commissioners to vacate the public rights in the street, and that he knew nothing about the arrangement of the sale to Colonel Miller, which increased the latter's holdings on Grove street (p. 89, top). This witness and his sister, Louise Hinck, admitted that a plan or map was shown Mr. DeLuca at the time of their conference regarding the additional purchase of land by Mr. DeLuca. This map was not produced at the trial and no doubt the reason was because it showed the road in question an open way (p. 89, ll. 18 and 19).

Suffice to say that a short time after the conversation with DeLuca, a lawyer was consulted (pp. 89, bottom, 90, top). Louise Hinck upon being recalled for further cross examination did not testify in a very satisfactory manner, when she attempted to explain how it was that Mrs. Hanna paid \$40 a front foot on Grove street, in 1894, and yet seven years later and after the property had developed in the neighborhood, Millers paid \$30 a front foot (pp. 117-118). All of this is corroborative of Mrs. Hanna's testimony.

Defendant here argues that the plaintiff is attempting to enlarge his title by parol evidence and suggests the case of *Naumberg v. Young*, 15 Vr. 331, as authority therefor.

In the first place there is no attempt to enlarge the complainant's title by parol evidence. The deed executed by the defendant's predecessor in title had to do with the land upon which Mrs. Hanna built her house. Complainant has the land and has the house. Complainant says that he has a right to use this road and that the defendant standing in the same legal position as

the original grantor has no right to limit that use.

The parol evidence which has to do with the testimony of Mrs. Hanna, Mr. Bowman and Mr. George Miller, relates to an agreement collateral to the purchase of the land as indicated by the deed. The road built by the Hincks was not to be and was not built on the land sold to Mrs. Hanna, but had to do with property to the south and owned by the grantor. Among exceptions to the general rule laid down in the cited case ~~appears~~, are one, whether fraud or illegality has been set up, and two, whether the party concluding the agreement, which is reduced to writing, have, at the same time and on the same consideration, made by parol another agreement which is collateral to a subject distinct from that to which the written contract relates; if exception is present, evidence of such agreement is held to be competent. The agreement to build the road on other property of the defendant's predecessor in title, was collateral to the main agreement.

To permit the defendant because he stands in the shoes of his predecessor in title to successfully object to the introduction of this parol testimony would be a fraud on the rights of this complainant, particularly in view of the fact that we are not now asking that the road be built, *but are merely asking that the road having been built, should remain.* The cited case refers to several opinions which apparently have the approval of the Court rendering the opinion, and it would serve no useful purpose to quote at length from these exceptions to the general rule as they are fully set out in the opinion beginning at page 335. See also *Newton v. Middleton*, 127

Atl. Rep. 580; also *Cooper v. Colson*, 66 Eq., page 328.

The vacation of this road by the Town of Montclair by ordinance and referring to a previous attempted dedication, no doubt extinguished the public rights of this road, but not so easily may private rights obtained by agreement carried into effect, and upon which plaintiff's predecessor in title acted, be extinguished. By analogy this plaintiff's rights extend to the right of passage to and from other premises over the road wholly distinct from and independent of any right of passage acquired by the public, which latter rights may have been extinguished through the vacation by the Board of Commissioners.

The *private* rights of plaintiff could not be so extinguished. *Booraem v. No. Hudson, etc., R. Co.*, 40 Eq. 557. This view is supported by case of *M. E. Church v. Hoboken*, 19 Eq. 355. See *Fessler v. Union*, 67 Eq. 415.

The value of complainant's home will be gone, the prospect of it being a high piece of ground, one of the reasons why Mrs. Hanna purchased it, according to Mr. Hinck, will be absolutely lost. After the road is filled in the garages will stand even with the house and on this road, in question.

Chief Justice Beasley in *Banghart v. Flummerfelt*, 43 L., page 28 at page 33, suggests the rule that an easement ordinarily cannot be created by parol. In the cited case there was a verdict for the plaintiff, based upon the following facts; that the defendant entered into a parol agreement with the then owner of a mill property subsequently owned by the plaintiff to substitute an artificial aqueduct and a dam for a

certain embankment, which by an article of agreement under seal, the defendant before that had covenanted to build; and that it was one of the terms of such parol agreement that the defendant and his heirs and assigns would keep such substituted aqueduct and dam in repair. These works thus referred to were to be made on the lands of the defendant, which were contiguous to the mill property of the plaintiff. The Court in reversing a judgment for the plaintiff held that an interest such as the plaintiffs was not recognized in a law court.

The case of *McCartney v. C. R. R. Co.*, 68 Law, page 165 at 175, holds that the law courts will follow the doctrine of equitable estoppel.

This conclusion is important in connection with five requisites of estoppel referred to in *Musconetcong Iron Works v. D. L. & W. R. R. Co.*, 78 Law, page 717 at 719.

The testimony for the plaintiff satisfies these five requisites.

1st. Because the defendant's predecessor in title made a representation of fact regarding the road, which is not consistent with the position of the defendant at this time.

2nd. If their representation was honest then there would have been no mental reservation as to what they would do in the future in limiting the complainant's right to use the road, and if there was a mental reservation, then the facts as represented to the purchaser of the land they knew to be otherwise than the representation, viz: that later on perhaps as long after as thirty years they would attempt to close up the road.

3rd. That the testimony distinctly shows that the representation was made to induce Mrs. Hanna to pay an enhanced price for the land.

4th. That Mrs. Hanna, had no reason to disbelieve the representation made to her, but on the contrary would believe the representation as to the continuance of the road, since the road was actually built, even before the house was completed.

5th. That an imposing looking home was built upon the representation as to this road, and the architecture was different from a house in the middle of a block, and if the defendant who holds through Hinck is now permitted to repudiate, the damage will be irreparable.

It, therefore, can immediately be observed that the doctrine of equitable estoppel applies. What is to become of this beautiful home if this rule does not apply? A mere glance at the pictures which are exhibits will disclose the result.

As we have hereinbefore shown, the evidence is clear, convincing and without serious contradiction; and the rule contended for by us would apply, even though the testimony of Mr. Hinck who sold to Mrs. Hanna were uncontradicted, viz: that he only spoke about the building of this road in question after Mrs. Hanna had purchased. As a matter of fact, the testimony of Mrs. Hanna, Mr. Bowman and Mr. Miller, is to the contrary.

Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law affecting the land of another and to which his consent is necessary, and where such consent is expressly proved or necessarily implied from the circumstances (and in our case the circumstances are that the road was built before the house was completed) and the improvements have been made in good faith upon

it, equity will not permit advantage to be taken of the form of the consent although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon a proper bill filed, enjoin the licensor from accomplishing his fraud, etc.; and further, an equitable estoppel will affect a subsequent purchaser to the same extent as his grantor, when he had had actual notice of the condition of things upon which it is based, or when the circumstances are such as to put him upon inquiry to ascertain the facts. (*Raritan Power Co. v. Veghte*, 21 Eq. p. 463.) This rule applies equally here.

The defendant in this case could not have escaped seeing the road. It had been there for over thirty years, and no doubt his reason for failing to take the stand was fear lest he be cross examined on this phase of the case. The last cited case is also authority for the principle that *even assuming it to be a mere license*, that, when it has been executed upon the lands of the licensor to the extent of permanent works and improvements in pursuance thereof at great expense, equity will not permit its revocation, at least to the extent of its execution. The cited case in the Court of Appeals has been quoted as authority in subsequent cases.

We have argued the question of equitable estoppel, although the trial court concluded that the evidence was not sufficient on that score. The reason for our so doing is, that if the trial court's conclusions are correct, then this court will sustain them even though they rest upon improper grounds. (*Gillespie v. Ferguson Co.*, 78 L. 470.) We maintain that the doctrine of equitable estoppel warranted a verdict in favor of plaintiff altho Judge Dungan did not agree

with us in this score. This doctrine alone will support his conclusions that plaintiff was entitled to a verdict.

The testimony in connection with the agreement made by Hinck, Sr., with Mrs. Hanna and the several admissions regarding that conversation would certainly be evidential as the trial court suggested (p. 93) on the question of Hinck's intention to dedicate this road to the public, and if the evidence establishes the truth of those statements, and that further the road was so used under the dedication for over twenty years, that then the road was abandoned to the public. (*Wood v. Hurd*, 34 Law, p. 88.)

The mere fact that the Town of Montclair attempted to vacate all rights which the town might have in the road in question would not interfere with the public rights obtained through use for a period of twenty years.

Reasons 3, 4, 5 and 9 assigned by the appellant are improperly assigned, because they are blanket assignments and do not set out for review any judicial action of the trial court. (*Burgess v. Noteboon*, 124 Atl. Rep. 762.)

We have argued this phase of the question because we feel that this plaintiff after thirty years of use of the road must have some rights, which will be protected either in a court of law or equity, and if this court concludes that it is unwilling to adopt the above reason for establishing a right against the defendant, then we pass on to the reason upon which the trial court concluded the case favorably to this plaintiff.

**THE DOCTRINE OF ADVERSE POSSESSION HAS ESTABLISHED A COMPLETE RIGHT IN THIS PLAINTIFF TO THE USE OF THE ROAD IN QUESTION.**

Much of the evidence already referred to, applies to this point but it would serve no useful purpose to repeat it here.

The appellant suggests that there was no evidence at the time of the motion for non-suit, as to who cut this road through, this is unwarranted because appellant's counsel admitted Hinck did it (p. 29), but even assuming that to be so, this evidence *did* appear in the defendant's case (p. 76, l. 30 to bottom). Therefore, any error by Court on question of proof was cured by evidence in appellant's case.

Plaintiff, DeLuca, since 1904, kept up the road in question, repaired it, spent money on it for that purpose and seeded and planted trees (p. 61 bottom, p. 62 top). He grew grass from his lawn and continued it over 36 feet of the road so that the size of the road was reduced to 24 feet (p. 62, l. 15), and continuing on page 62 and top of page 63, he testified to his exclusive use and control and possession exercised over this property. Witness, Kreiner, who is a surveyor, corroborated DeLuca in every particular regarding the use of the road (pp. 57-58), and all of which may be certainly observed by an examination of the map prepared by Kreiner (Exhibit P. 2). It appears that DeLuca asked no one for permission to reduce the size of the road, nor regarding the manner in which he kept it up. We again refer to plaintiff's testimony that, in the winter it is impossible to use the road to the north of his house, because of it being so steep.

Witness, Wainwright, also corroborates DeLuca regarding the planting of trees (p. 48 bottom to p. 49, l. 30). She also corroborates plaintiff as to his exclusive control and possession of road (p. 46).

Assuming for the sake of argument that this Court will conclude that the evidence introduced at the trial regarding the several conversations alleged to have taken place between the Hincks and one or more of the plaintiff's witnesses, were inadmissible in evidence, we still maintain that the evidence of Mr. DeLuca, Mr. Sessa, the Millers and Miss Wainwright in connection with the use of the road by Mrs. Hanna, the plaintiff's predecessor in title, and Mr. DeLuca is convincing that the use and possession by Mrs. Hanna and particularly by Mr. DeLuca was open, notorious and adverse to the defendant's predecessor in title.

*The Hincks knew of Plaintiff's use of road, adverse to their title. P. 67 top, P. 63 top.*

Even assuming that the doctrine laid down in *Banghart v. Flummerfelt*, 43 Law, page 28, at page 33, controls this case, that an easement may not be created by parol, the case of *Wood v. Hurd*, 34 Law, page 87, is authority to support the trial court's conclusions that the statements by Hinck regarding the road in question was evidential of *intention* to dedicate, and directly that appears, and the trial court found as a fact that it did, irrespective of equitable estoppel and the rights of the general public, Mrs. Hanna and Mr. DeLuca might acquire their right to the use of the land in question by adverse user. (*Wood v. Hurd*, 34 L., page 91.)

This situation is important in view of the further statement in *Wood v. Hurd*, as follows on page 91:

"That the user by the public must be of right for the whole period and not by per-

mission; that it is a contradiction in terms to say that a gift rests upon adverse user—that it would be an unwilling intention, an extorted gift. This criticism would be just if applied to user *before any intention to dedicate*, but the presumption being that the intention existed at the beginning of the use, the public use it thenceforth of right, and adverse to the owner—in other words, as soon as the vital intention exists the public no longer use it by assent or acquiescence of the donor, but of right.”

This rule, should apply with equal force where the individual uses it after the intention is made manifest, although we maintain that the adverse user by Mrs. Hanna and the plaintiff appears in this case without the application of the rule above cited.

Without repeating the findings of Judge Dungan as a part of this argument, we beg leave to refer to it in the argument of the facts and law appearing in this case (pp. 12 to 16 inclusive).

An examination of the record will disclose (p. 11) stipulation of counsel that Judge Dungan decide the disputed questions of fact, and a further stipulation after Judge Dungan became disabled and went to California for his health, which latter stipulation provided for the signing of the findings of fact and order for judgment by Judge Mountain with the same force and effect as though Judge Dungan had signed it (p. 11). This stipulation was acceded to in order to permit the appellant to get his appeal heard as soon as possible.

This Court will note that the finding of facts and judgment as filed (pp. 12 to 16 inclusive), are identical with the findings of Judge Dungan

rendered at the close of the trial (pp. 92 to 96 inclusive).

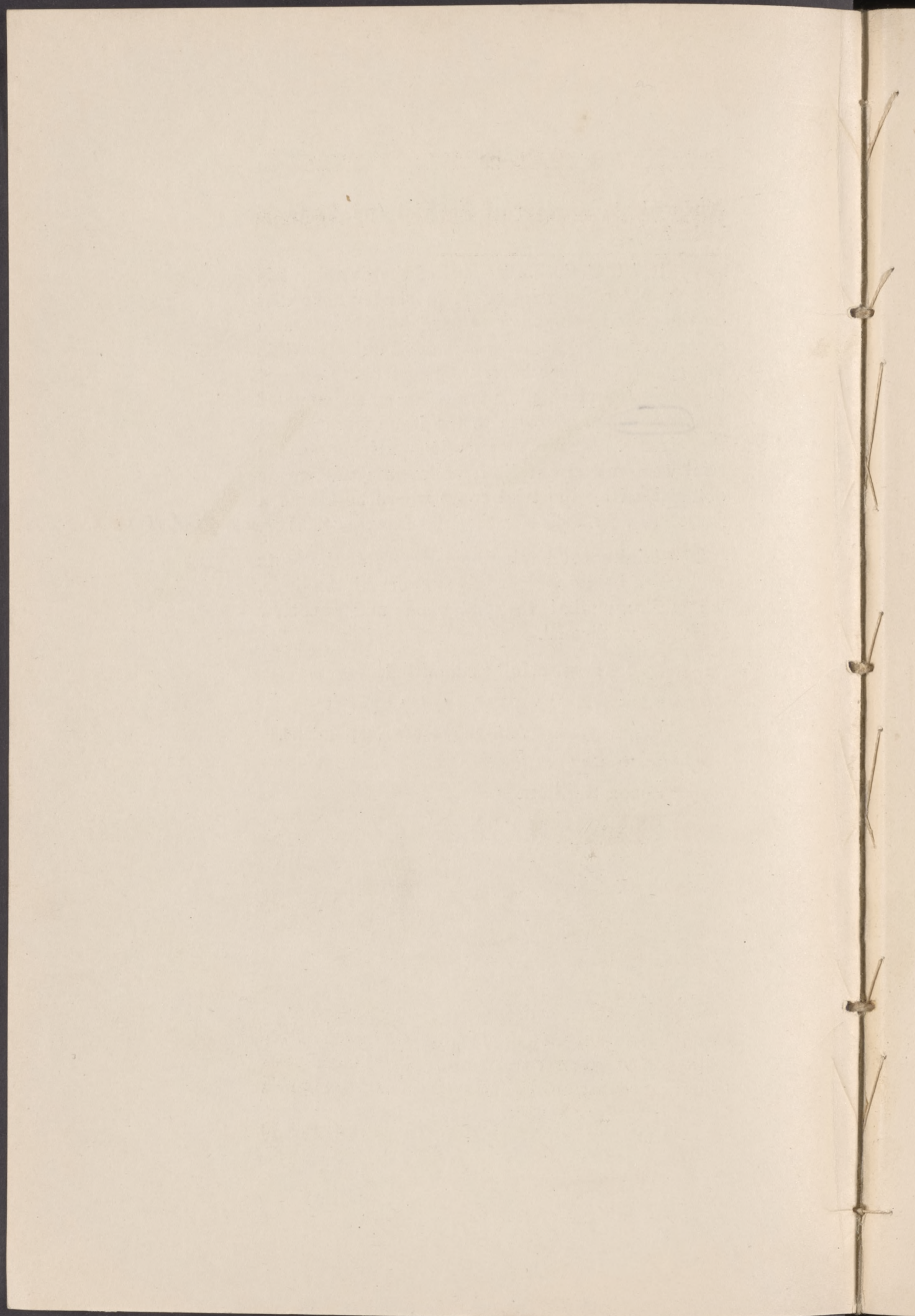
We feel that the first count of the complaint is sufficient for the trial court to render a verdict on the question of adverse user, but if we are in error then since the case was tried out upon this theory as well as others, we respectfully submit that this Court should permit an amendment of the findings to conform to the issue tried out at the circuit. That the questions arising at the trial were mixed questions of law and fact to be determined by the trial court where he sat as a jury. (*Fox v. Atlantic City*, 99 Law, p. 420.) *Page v Gaskill 84 Law p. 61*

The trial court having considered all the facts and there being evidence to support his findings, we maintain that the judgment under review should be affirmed.

Respectfully submitted,

KALISCH & KALISCH,  
Attorneys of Respondent.

On the Brief,  
ISIDOR KALISCH.



111 MAY 7. 1926

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

VINCENT DE LUCA,  
*Plaintiff-Respondent,*

*vs.*

BERGER MELIN,  
*Defendant-Appellant.*

### REPLY BRIEF OF DEFENDANT-APPELLANT

Respondent seems to argue in his brief as though this were an appeal from the Court of Chancery, and that this Court reviewed the facts as well as the law. It is defendant's understanding that the Court below sat as a judge and jury, and that his findings on facts where supported by legal evidence will not be reviewed here.

An intimation is made in respondent's brief that if this Court did not agree with the Court below on the question of adverse user, then this Court could base its decision on estoppel. It would appear that the Court having on disputed facts and adequate evidence found there was no estoppel, this Court would hardly feel at liberty to sustain the judgment on that ground, if it did not agree with the reasons on which the Court below actually found the judgment.

The larger part of respondent's brief is devoted to showing that his client had acquired his alleged rights by estoppel, in the face of the decision of the Court below that on the question of fact, there was no estoppel.

On page 15 of respondent's brief, he says that "the *private* rights of the plaintiff could not be so extinguished" and cites *Booraem v. No. Hud-*

*son R. R. Co.*, 40 Eq. 557; *M. E. Church v. Hoboken*, 19 Eq. 355; *Fessler v. Union*, 67 Eq. 415. In each of these cases an *easement* was created by *deed*, either by specific words or by direct and specific reference to a filed map. These cases have no application here. The case of *M. E. Church v. Hoboken* can give the respondent but little comfort.

“A private right of way,” says that case on page 18, “cannot be created by dedication,” citing Washburn on Easement.

And on the same page it says:

“We do not see how the principle of dedication to the public can be applied to a private way, for the very evidence which would tend to show a dedication would disprove it as a private way.”

Respondent attempts to justify the admission of the evidence of Mrs. Hanna that this road went with the property and differs with defendant on the interpretation of the case of *Naumberg v. Young*, 15 Vr. 331. The objection, however, was not only based on *Naumberg v. Young*, but also on the Statute of Frauds, which had been pleaded. Respondent seems to contend that in selling this lot in question, oral testimony could be introduced to show that there was an agreement that the road in question went with it; that this was the kind of collateral agreement which is especially excepted from the rule of *Naumberg v. Young*. Our understanding of the exception is that oral testimony may be introduced concerning an agreement made at the same time as the main agreement, but on a subject of an *entirely distinct nature* from the main transaction. See *Lindley v. Lacey*, 17 C. B. (NS) 578, cited in the case of *Naumberg v. Young*.

Respectfully submitted,

CHARLES JONES,  
Attorney for Defendant-Appellant.

