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BILL OF COMPLAINT.

Filed July 11, 1924.

In Chancery of New Jersey

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

Complainant Albert Oeding of the Township of West Orange, in the County of Essex and State of New Jersey, respectfully shows that:

1. On April 21, 1919, Mathias W. Parsons and Emelyn W. Parsons, his wife, conveyed to complainant, for a full and valuable consideration, by warranty deed, in fee simple, the following described lands and premises in the Township of West Orange, in the County of Essex and State of New Jersey: 20

BEGINNING in the Northerly line of Northfield Avenue at its intersection by the Westerly line of the premises conveyed by William J. A. Fuller and wife to Jacob Wick, Jr., by Deed dated March 31st, 1879, and recorded in the office of the Register of said County in Book F 20 of Deeds at page 112; running thence North fifteen degrees three minutes West along said Westerly line of said premises and the Westerly lines of premises conveyed by said William J. A. Fuller and wife to Otto W. Loeffler and to Rose Eytinge Butler respectively, by two Deeds dated respectively September 30th, 1879 and April 7th, 1877 and respectively recorded in said Register's office in Book P 20 of Deeds on page 384 and Book I 19 of Deeds on page 30 to the Southerly line of 30

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Bill of Complaint.

10 Benevenue Avenue; thence running Westerly along said Southerly line of Benevue Avenue following the several courses thereof to the intersection of said Southerly line of Benevenue Avenue by the Easterly line of the premises conveyed by said William J. A. Fuller and wife to George W. MacMillian by Deed dated February 1st, 1878 and recorded in said Register's office in Book Q 19 of Deeds at page 309; thence South fifteen degrees three minutes East along said Easterly line and the Easterly line of premises also conveyed by said William J. A. Fuller and wife to said Otto W. Loeffler by said Deed dated September 30, 1879 and recorded in said Register's office in Book P 20 of Deeds at page 384 as aforesaid to the North-
 20 erly line of Northfield Avenue; and thence Easterly along said Northerly line of Northfield Avenue following the several courses thereof to the place of beginning, being part of the premises conveyed to said William J. A. Fuller by William W. Hurlbut and wife and Joshua Sayer and wife by Deed dated November 20th, 1874 and recorded in said Register's office in Book W 17 of Deeds at page 575. Being the same premises conveyed by Leon Abbett and others, as executors of and trustees under the Last Will and Testament of William J. A. Fuller, to Charles A. Soper, by Deed dated December 12, 1892, and recorded in the office of the Register of Essex County, New Jersey, on the 17th day of December, 1892, in Book G 27 of Deeds on pages 314 and 136.

40 Also in and to ALL that certain lot, pieces or parcel of land, with the buildings and im-

Bill of Complaint.

provements thereon erected, situate, lying and being in the Township of West Orange, in the County of Essex, and State of New Jersey; bounded and described as follows:

BEGINNING at the Southeasterly corner of land late of William J. A. Fuller, deceased at its intersection with the land formerly of W. W. Hurlbut, deceased; thence running Southerly along the Westerly line of land late of said Hurlbut, South fifteen degrees three minutes East eighty feet more or less to the Northerly line of land formerly of Jacob Wickes, Jr.; thence Westerly along the said Northerly line of land formerly of said Wickes South seventy-four degrees fifty-seven minutes West one hundred and twenty-five feet; thence parallel with the first named line North fifteen degrees three minutes West eighty feet more or less, to the Southerly line of said land late of said Fuller; thence Easterly along said Southerly side of said land late of said Fuller North seventy-four degrees fifty-seven minutes East one hundred and twenty-five feet to the point or place of BEGINNING. Being a portion of the same premises conveyed by Pierce J. Murphy to Stephen J. Willets by Deed dated July 28, 1884, and recorded in Liber H 22 of Essex County Deeds, pages 320 and 321, and conveyed to the said Charles A. Soper, deceased, by Isabella W. Willaims, widow, by Deed recorded in the office of the Register of Essex County on April 2, 1886, in Book X 22 of Deeds, pages 584 and 585.

TOGETHER with all right, title and interest, if any, of the parties of the first part of, in and to any land lying in the bed of any

Bill of Complaint.

street, road or avenue opened or proposed in front of or adjoining said premises to the center line thereof.

10 The said deed, having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was, on June 7, 1918, duly recorded in the Register's office of the said County of Essex in Book T 61 of Deeds for said county, on pages 110 to 115.

2. Complainant has, ever since the recording of said deed, been in the peaceable possession of the lands therein described, and has always claimed and does now claim to own the same.

20 3. Complainant's title to said lands or to some part thereof is denied and disputed by Josephine N. Schweinler, Edward E. Williams, Wilfred White and Harriet White, Stephen Riddle and Virginia Riddle, Joseph H. Tyms and John O. Olstead, who claim to own the same or part thereof, or some interest therein, or to hold some lien or encumbrance thereon.

4. No suit is pending to enforce or test the validity of the title, claim or encumbrance of the parties named in paragraph three (3).

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

1. That Josephine N. Schweinler, Edward E. Williams, Wilfred White and Harriet White, Stephen Riddle and Virginia Riddle, Joseph H. Tyms and John O. Olstead named in paragraph three (3) who are the defendants in this suit, may answer this bill of complaint and each statement therein made.

40 2. That the said defendants may set forth and specify their several titles, claims or encum-

Answer.

brances to or upon the lands and premises hereinbefore described and how, and by what instrument the same is derived or created.

3. That the rights of all the parties to this suit, in and to the lands hereinbefore set forth may be fixed and settled by this court, and that complainant may be decreed to have a perfect title thereto, and the said defendants can have no estate, interest, or right in, or encumbrance upon said lands or any part thereof. 10

4. That a writ of subpoena may issue, commanding the said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

ANSWER. 20

Filed August 18, 1924.

The joint and several answer of the defendants Josephine N. Schweinler, Edward E. Williams, Stephen Riddle and Virginia Riddle and Joseph H. Tyms.

These defendants jointly and severally answering the bill of complaint in the above cause, say that: 30

1. Paragraph one is admitted.

2. Paragraph two is admitted insofar as it relates to the tract of land secondly described in the complaint, but denied as to the first described tract in said complaint.

3. Paragraphs three and four are admitted.

4. William J. A. Fuller through whom the title of the complainant and defendants is de- 40

Answer.

10 rived, became the owner of a tract which included premises now owned by the complainant and the defendants, in the year 1874, and the said William J. A. Fuller did, on or about the said date, proceed to sell and convey lots lying to the northeast and the southwest of the tract first described in the bill of complaint leaving a strip of land in the center of the said tract having a width of 100 feet and running from Benvenue avenue to Northfield Road, which said strip of land consists of the land described in the first tract of the complaint.

5. The defendants are each severally seized of lots adjoining the said tract of land first described in the bill of complaint.

20 6. On or about the year 1874, the said William J. Fuller dedicated to the public and granted to the predecessors in title of the defendants, rights of way over and through two streets, running from the said Benvenue avenue to the said Northfield Road and being on either side of the said strip of land described in the first tract, which said streets have been continuously used by the public, by the defendants and their predecessors in title ever since the date of the laying out of the said tract which was in the year 1874.

30 7. The defendants and the public, by reason of the said dedication, are entitled to pass and repass at will over and through the lands described in the first tract.

40 8. The said streets have been continuously used since the date of the laying out of the same, openly, notoriously and adversely and the right of the defendants and of the public to use the same has never been questioned or disputed by anyone.

Opinion.

SPECIAL REPLICATION.

Filed October 2, 1924.

The special replication of the complainant filed by leave of court.

1. Paragraph six is denied. 10
2. Paragraph seven is denied.
3. Paragraph eight is denied.

The defendant joins issue on each and every allegation of the answer of the defendant.

OPINION.

Filed August 12, 1927. 20

CHURCH, V.-C.

Appearances:

Merritt Lane, Esq., for complainant.

Grosso, Brundage & Anderson, Esqs., for defendants.

This is a bill to quiet title to two tracts of land therein particularly described situated in the Town of West Orange. 30

The answer admits the allegations as to the second tract described, but denies complainant's peaceable possession as to the first tract. The answer then continues: "4. William J. A. Fuller through whom the title of the complainant and defendants is derived, became the owner of a tract which included premises now owned by the complainant and the defendants, in the year 1874, and the said William J. A. Fuller did, on or about the said date, proceed to sell and convey 40

Opinion.

lots lying to the northeast and southwest of the tract first described in the bill of complaint leaving a strip of land in the center of the said tract having a width of one hundred feet and running from Benvenue avenue to Northfield Road, which said strip of land consists of the land described
10 in the first tract of the complaint.

“5. The defendants are each severally seized of lots adjoining the said tract of land first described in the bill of complaint.

“6. On or about the year 1874, the said William J. Fuller dedicated to the public and granted to the predecessors in title of the defendants, rights of way over and through two streets, running from the said Benvenue avenue to the said Northfield Road and being on either side of the
20 said strip of land described in the first tract, which said streets have been continuously used by the public, by the defendants and their predecessors in title ever since the date of the laying out of the said tract which was in the year 1874.

“7. The defendants and the public, by reason of the said dedication, are entitled to pass and repass at will over and through the lands described in the first tract.

30 “8. The said streets have been continuously used since the date of the laying out of the same, openly, notoriously and adversely and the rights of the defendants and of the public to use the same has never been questioned or disputed by anyone.”

A plotting was introduced in evidence which shows Plots A, B, C, D, E, F, G, and H. In 1874, the entire tract was owned by one Fuller. In that year he erected eight houses—four on each
40 side of tract H, and opened two roadways on

Opinion.

either side from Northfield Road to Benvenue avenue. These roadways are still there. Fuller died in 1888. In 1892, his executors gave a deed to “H” to Charles A. Soper, which recites “and the intention of this deed being to convey to the said party of the second part all the remaining
10 right, title and interest of the said William J. A. Fuller to and in said last mentioned premises that he had at the time of his death.” Soper died in 1895, and the property passed by mesne conveyances to complainant in 1919.

The denial of complainant’s peaceable possession is clearly substantiated by the testimony. For at least six years last past, residents on either side of the tract have used the streets running through it. Two of the defendants, Tyms and Riddle put letter boxes in front of
20 their houses. To this complainant objected. The testimony says: “Well, he objected to those letter boxes being in there. They were only put in there recently for they claim an easement. They have no right whatever to put anything permanent in the road, or what they claim is their easement to travel in and out of their places.” Defendants refused to remove the letter boxes. There are signs which indicate that the roadways are known as “St. Cloud Place.” 30

Defendant Williams owns two houses on the west side of the middle tract. His mother purchased them in 1884. The owners of cottages fronting on tract H get to and from Northfield Road and Benvenue avenue over these roadways, running through tract H. They have done this for many years, and there is no other way to reach their homes. In 1886, Charles Soper, the then owner, erected a fence at either end of the tract. This fence remained in place about two
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Opinion.

weeks. It was torn down by Williams, or his mother. Williams cultivated the tract lying between the roadways for five or six years. In 1905, four hundred and sixty-four feet of two-inch pipe was laid in the roadway by a water company on petition of the people residing on either side of the tract. Cinders were placed on the roadways to make them passable by the Town of West Orange between 1916 and 1921. Grading with ashes was done in 1917. Defendant Tyms has owned his property on St. Cloud Place, one of the roadways, for eleven years. He has always used the roadway and can in no other way reach his house. He testifies that the roadways have been open for forty years to his knowledge. Without going into the testimony any further, it is apparent that these roadways have been used by the abutting property owners and the public for at least forty years.

Is the possession of complainant "peaceable" in order to sustain the jurisdiction of this court?

In *Shepard v. Nickson*, 43 New Jersey Equity, 627, Justice Depue, speaking for the Court of Errors and Appeals, said: "Under this statute, possession in fact, as distinguished from that constructive possession which in ejectment suits arises in virtue of the legal title, is essential to the jurisdiction of the Court. The bill contains the necessary jurisdictional averment. But the defendant having in his answer made denial of the possession by the complainant, it was incumbent on the complainant to establish that fact by proof. There being no proof upon that subject, I agree with the Chancellor that the suit for that reason, cannot be maintained under the statute. I also agree with the Chancellor that this act was designed for the relief of a class of

Opinion.

persons who being in peaceable possession, had no means of contesting the adverse claim by a suit in due course of law."

"Peaceable possession," under the statute, is defined in *Allaire v. Ketcham*, 55 New Jersey Equity 168, as follows: "Has the possession been peaceable under the statute. If by peaceable is meant quiet and peaceable as to every trespasser whether claiming title or not, then the possession cannot be said to have been altogether peaceable, for the trespassers whom complainant ordered off, disturbed this peaceable possession. But, I think the true construction of the statute is that the possession must be peaceable as against the defendant and further it seems to me, that in determining whether the possession as to the defendant is peaceable, the test must be whether the defendant setting up a claim of title, has interfered with complainant's possession by an act which is suable at law, and suit upon which will or may involve the title of the defendant. This is the test applied by the courts to the term 'peaceable' as connected with the acquiring of easements by continued and peaceable possession for twenty years."

In the case of *Barry v. Tunick*, 3 New Jersey Advance Reports, on page 477, a bill was filed to quiet title to a certain tract of land in the City of Orange. Its averments exhibited a case within the statute. To the bill each of the defendants filed a separate answer severally averring that he had an easement of way over the land of the complainant and that he and his predecessors in title had continuously used this way for a period of more than thirty years next preceding the filing of the bill as an appurtenant to a tract owned by him and adjacent to the land owned by

Opinion.

the complainant. A replication was filed by the complainant to the several answers, denying the existence of these easements of way. A decree was entered establishing the validity of the respective claims of the several defendants and perpetually restraining the complainant from interfering with the defendants in the enjoyment thereof. Complainant appealed from the decree. Chief Justice Gummere, speaking for the Court of Errors and Appeals said: "Where there has been such interference by an act which is suable at law, then the possession of the complainant is not peaceable within the meaning of the statute. The statute is not operative and the Court of Chancery is without jurisdiction in taking over the subject matter of the litigation. Jersey City *v.* Lembeck, 31 New Jersey Equity, pages 255, 277.

"In the present case, the continued user of the alleged way by each of the defendants, if without legal justification, constituted a series of trespasses, for which actions at law would lie in favor of the complainant and the judgments in such actions would settle the question of the right of complainant to hold his land free from the further use thereof by the respective defendants. The complainant's possession, therefore, not being peaceable within the meaning of the statute and he having a complete remedy at law for the alleged illegal acts of the several defendants, Court of Chancery was without jurisdiction to try and determine the legal title to the easement in dispute and the bill of complaint should have been dismissed for this reason." Penrose *v.* Absecon Land Company, 94 New Jersey Equity, page 436.

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Final Decree.

My conclusion is that as to the tract described as "First" in the bill, the complainant's possession has not been peaceable and therefore this court has no jurisdiction and the bill should be dismissed.

I will advise a decree accordingly.

10

FINAL DECREE.

Filed September 13, 1927.

This matter coming on to be heard in the presence of Merritt Lane and Richard M. Glassner, of counsel with the complainant, and Grosso, Brundage and Anderson, of counsel with the defendants, Josephine N. Schweinler, Edward E. Williams, Stephen Riddle and Virginia Riddle, Joseph H. Tysms and John O. Olstead, and final hearing having been had on the bill, answers and replication, and the arguments of the respective counsel having been heard, and the Chancellor having considered the same and it appearing to his satisfaction that the complainant has not been in peaceable possession of the lands and premises firstly described in the bill of complaint;

And it further appearing that complainant has been in peaceable possession of the lands and premises secondly described in the bill of complaint and that complainant's title to the same is not denied or disputed; all of which is admitted in the answers of the defendants filed in this cause.

It is, therefore on this 13th day of September, 1927, ORDERED, ADJUDGED and DECREED that as

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Final Decree.

to the lands and premises firstly described in the bill of complaint, this court has no jurisdiction, and that with respect to the same, the bill of complaint be and the same is hereby dismissed.

10 And it is further ORDERED, ADJUDGED and DECREED that the said defendants have no estate or interest in or encumbrance upon the said lands and premises secondly described in the bill of complaint.

20 It is further ORDERED, ADJUDGED and DECREED that costs in favor of the answering defendants be taxed against the complainant herein and that Messrs. Grosso, Brundage and Anderson, solicitors of the defendants, Josephine N. Schweinler, Edward E. Williams, Stephen Riddle and Virginia Riddle, Joseph H. Tyms and John O. Olstead, be allowed a counsel fee of \$500, all of which costs, counsel fee and disbursements shall be paid by the complainant herein.

E. R. WALKER,
Chancellor.

Respectfully advised,

ALONZO CHURCH,
Vice-Chancellor.

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NOTICE OF APPEAL.

Filed November 2, 1927.

The complainant hereby appeals from so much of the final decree made in this cause on the 13th day of September, 1927, by his Honor, Edwin Robert Walker, upon the advice of his Honor, Alonzo Church, Vice-Chancellor, as orders, ad- 10 judges and decrees that as to the lands and premises firstly described in the bill of complaint the Court of Chancery had no jurisdiction, and with respect to the same the bill of complaint be and the same is dismissed, and as orders, adjudges and decrees that costs in favor of the defendants be taxed against the complainant and that there be allowed a counsel fee of \$500 to defendants' counsel, to the Court of 20 Errors and Appeals in the last resort in all causes.

Dated, November 2, 1927.

RICHARD M. GLASSNER,
Solicitor of Complainant.

MERRITT LANE,
Of Counsel.

I conceive there is good cause for appeal in 30 the above-stated cause.

MERRITT LANE,
Of Counsel with Complainant.

40

PETITION OF APPEAL.

Filed November 7, 1927.

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

10 The petition of Albert Oeding, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 13th day of September, 1927, in a cause wherein Albert Oeding was complainant, and Josephine N. Schweinler, *et als.*, were defendants, in this respect, to wit: that the said decree orders, ad-
 20 judges and decrees that as to the lands and premises firstly described in the bill of complaint the Court of Chancery had no jurisdiction and that with respect to the same the bill of complaint be and the same is hereby dismissed; and in this respect, to wit, that the said decree orders, adjudges and decrees that costs in favor of the answering defendants be taxed against the complainant, and that there be allowed a counsel fee of \$500 to defendants' counsel, and your peti-
 30 tioner humbly appeals from those portions of the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous for that the Court should have held that the Court of Chancery had jurisdiction to settle the rights of the complainant and defendants in the lands and premises firstly described in the bill of complaint, and the said court should have fixed and determined the rights of the complainant and the rights of defendants, if any, in said
 40 lands and premises and if the Court had de-

Petition of Appeal.

termined that the complainants were entitled to any easement or right of passage over said lands and premises, then the Court should have determined the extent of said easement and right of way or passage and should finally have settled all of the rights of complainant and defendants in, to or against said lands and premises, and, in any event, the Court should have determined the right of said complainant in and to so much of said lands and premises firstly described in the bill of complaint in which defendants claimed no right, title or interest, and your petitioner submits that the Court erred in holding that the possession by the said complainant of the said lands and premises first described in the bill of complaint was not sufficient to confer upon the court jurisdiction to settle and determine the rights of complainant and defendants in said lands and premises or in some portion thereof.

And your petitioner further submits that the order and decree of the Court adjudging that costs be taxed against the complainant in which taxed costs should be included a counsel fee of \$500 to defendants' counsel is erroneous for that the decree should have settled the rights of the parties and no costs or counsel fee should have been allowed to defendants, but, on the contrary, costs and counsel fee should have been allowed to complainant.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that the record may be remitted to the Court of Chancery to fix and determine the rights of complainant and defendants in and to the lands and premises firstly described in the bill of complaint in manner as

Petition of Appeal.

10 this court shall direct, or that this court, upon
the record, shall determine said rights and in-
terests and that the case be remitted to the Court
of Chancery to carry the opinion of this court in-
to effect, and that costs in the court below and
in this court be allowed to complainant, together
with a reasonable counsel fee in the court below.
And that your petitioner may have such relief
in the premises as to this Honorable Court shall
seem meet.

RICHARD N. GLASSNER,
Solicitor of Appellant.

MERRITT LANE,
Of Counsel with Appellant.

20 Formal answer filed.

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30

40

*Albert Oeding, direct.***TESTIMONY.**

IN CHANCERY OF NEW JERSEY.

Monday, November 3, 1924.

Between

ALBERT OEDING,

*Complainant,**and*

JOSEPHINE N. SCHWEINLER,

Defendant.

10

Transcript of shorthand notes of testimony
taken in the above-entitled cause before his
Honor, Alonzo Church, Vice-Chancellor, at the
Chancery Chambers, Newark, New Jersey, in the
presence of Richard M. Glassner, Esq., for com-
plainant; Alfred J. Grosso, Esq., for four de-
fendants.

20

ALBERT OEDING, sworn for complainant.

Direct examination by Mr. Glassner.

Q Mr. Oeding, you are the complainant in
this suit? A Yes, sir.

30

Q And you are the owner of land described
in your bill of complaint? A Yes, sir.

Q I show you what purports to be a deed from
Matthias W. Parsons and others to Albert Oed-
ing, dated April 21, 1919, and recorded in the
office of the Register of Essex County on June
7, 1919, and ask you whether that is your deed
to the property? A Yes, sir.

40

Albert Oeding, cross.

Mr. Glassner: I offer that.
Deed marked Exhibit C. 1.

Q In that deed you have conveyed to you the entire tract, both the center portion and the portion that sets on the side; is that correct?

10 A Yes, sir.

Q Are you in possession of both those parts?

A Yes, sir.

Q In peaceable possession? A Yes, sir.

Mr. Glassner: That is all.

Cross examination by Mr. Grosso.

20 The Court: This bill sets forth these two tracts, the first tract, I presume, is what is called H here.

Mr. Grosso: No. The first tract is this piece in here (indicating). E, I believe that is the first.

Mr. Glassner: Yes; that is correct; E is first and H is second.

30 The Court: The recital says "all right, title and interest, if any, of the parties of the first part, by, in and to any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining said premises to the center line thereof."

Mr. Grosso: That has reference to Benevue avenue and Northfield avenue, your Honor, please.

The Court: How do you know that?

40 Mr. Grosso: That is the usual form of conveying land that lies alongside of the street. If a man conveyed this middle tract, I think he would convey all rights.

Albert Oeding, cross.

Q Mr. Oeding, you say that you have been in peaceable possession of both of these tracts. Didn't you attempt to erect a fence on the tract which is described in that sketch as H? Did you attempt to erect a fence there at any time? A No.

Q You did not? A No.

10

Q You have stored some lumber on that tract described as H? A Yes.

Q And have, in fact, people in the neighborhood objected to your doing that? A Yes.

Q So you have not been in peaceable possession?

Mr. Glassner: I object to that as a leading question.

The Court: That is a conclusion.

20

Q What is the physical character of the property at the present time? I just want to confine my questions to this piece which is shown on the map as H? A What is the meaning of that?

Q I mean, are there any streets there? A No; I wouldn't call them streets. I would call them lanes.

Q You call them lanes? A Yes, sir.

Q And is there one on each side of this tract H? A Yes, sir.

30

Q And are those lanes used? A They are; yes.

Q They are used? A They are used.

Q How long have you lived there, Mr. Oeding? A About six years.

Q And have those lanes been used during those six years that you have lived there? A Why, before I answer that question, I would like to know—

40

Albert Oeding, cross.

The Court: No; just answer the question, yes or no.

A Yes; used by the people on both sides of the lot.

Q Had they been used by anyone else, by the public? A Yes; perhaps so.

Q Have you ever objected to the use of the streets to anyone? A Yes.

Q To whom? A To the public at large.

Q In what way, in what manner have you objected to the public at large? A I have erected two signs that these were private roads, no thoroughfare.

Q Where are the signs erected? A On both ends of the streets.

Q Now, in the street or in this center portion? A They were on my ground, on both ends.

Mr. Glassner: Your Honor, please, I object to this line of questioning on the ground that all that is necessary in order to maintain every bill to quiet title is ownership and possession. I move that the question be stricken out.

The Court: I will overrule your motion, because the act "*Quia timet*" expressly says that the bill won't lie unless the complainant alleges and prays peaceable possession—peaceable possession. Now, the whole theory of a bill to quiet title is that this man is in peaceable possession but because he fears to translate the Latin words—because he fears that somebody may challenge his title he brings them into court and says, "Now tell the Court what your complaint is so that it may be settled," and

Albert Oeding, cross.

peaceable possession is jurisdiction of fact on a bill to quiet title.

The Witness: Your Honor, please—

The Court: No, no. Answer the questions of counsel.

The objection is overruled.

Q Now, you say that you put two signs there? A Yes, sir.

Q And in spite of the fact that you put the signs there, the public and the people in the neighborhood continued to use those lands? A No.

Q They did not? A It happened this way: I was summoned to court down in the Town of West Orange—

Q Answer my question. A Yes.

Q Did the public continue to use those streets, in spite of the fact that you put signs there? A No.

Q They did not? A No.

Q Aren't the streets being used now? A Yes.

Q Oh, they are? A They are.

Q And are the signs still there? A No.

Q Oh, they are not there?

The Court: Why aren't they there?

Q Why aren't they there? A I was summoned to court in the Town of West Orange to show what it meant. The first thing that happened the letter carrier stopped coming through there. I built a bridge there and the signs were erected for the purpose of warning the public that they were trespassing on private grounds. The letter man stopped delivering mail—wanted

Albert Oeding, cross.

to know what those signs meant. The postmaster of Orange, Mr. Moriarity, came up to find out what the signs meant, and I told him it meant what it said, that this was my ground. Well, he said, "You are stopping the United States mail." I said, "No." Well, he said, "If it is private
 10 ground, then you are stopping the mail, if you put up any signs." I said, "No; I haven't stopped you; the roads are still open, no fence across there." In fact, I built the bridge so I could get in and out. I couldn't get in and out that cut before. I was summoned to court to show what the signs meant and I told them they meant what they said. I was paying taxes for one hundred feet across, which takes the entire tract from house line to house line, and I asked
 20 him who made the charge and the Recorder of West Orange told me that there was not any specific charge just now, but he says, "I want you to take down the signs," and I asked for what reason and he said, "Well, they don't mean what they say." "Well," I said, "I won't be responsible for anybody that is hurt in that property." So he said, "Well, I want you to take them down." I says, "Well—" I asked him the authority he had to tell me to take the
 30 signs down, which was only meant for a warning. He says—and I said that Mr. Timms and Mr. Ridell put in letter boxes in my ground, five feet or six feet away from the house line, and I says, "Well, I object to those letter boxes being in there. They only were put in recently, for they claim an easement; they have no right whatsoever to put anything permanent in the road, or what they claim is their easement, to travel in and out their places." "Well," he said, "this is just a gentleman's agreement." Either—
 40

Albert Oeding, cross.

"You take down the signs and they will take out their letter boxes." I said, "All right; I can always be a gentleman." As soon as I came up, I took down the signs. The letter boxes are there today. They absolutely refused to take them out.

Q Now, you say those signs were just put there as a warning, because you were afraid somebody might get hurt going over those streets. Is that why you put the signs there? A Yes. Because I have to come in and out, also.

Q Yes. You were afraid someone might be hurt on the street? A Yes, sir.

Q And didn't you assert your rights that those streets belonged to you and that no one has a right to traverse them? A Yes, sir.

Q Then why did you take the signs down, if the property belonged to you? A Why, I thought it was not necessary, as long as we agreed that it was a gentleman's agreement, to take the signs down.

Q Gentlemen's agreement between whom? A Between the Recorder of West Orange and the neighbors that live on St. Cloud Place and myself. In fact, he said, "I want you to take them down."

Mr. Grosso: I object to that.

Q Where is the St. Cloud Place, that you speak of, Mr. Oeding? A Why, presumably that lot up there.

Q And that is the name of those two streets, then, supposed to be streets? A I don't know who named it that way.

Q But it is known as St. Cloud Place? A Yes. In fact, that is the way the sign reads on the post.

Albert Oeding, re-direct.

Q There is a sign which would indicate that this is the St. Cloud Place? A Yes, sir.

Q When you first bought the property, Mr. Oeding, that center portion was not being taxed, was it? A It was.

10 Q Are you sure about that? A Yes, positive.

Q Did you go to the tax collector for the Town of West Orange and say, "Why didn't I get a tax bill for this center portion"? A Why—

Q Didn't you ask the tax collector to give you a bill for it? A I only asked for a bill when the taxes were due.

20 Q What I want to find out is this: Did you go to the tax collector and tell him you owned that property and that regardless of the fact that it was being used as a street, you wanted a tax bill for it? A No.

Q You didn't go there and demand a tax bill? A No.

Re-direct examination by Mr. Glassner.

Q One more question, Mr. Oeding. A Yes.

30 Q What ever came of that dispute which you had with the postal department? A Well, Mr. Moriarity says, "Well, all right, we will see about this," because the letter man used to come through on Williamses side of the street, and on account of the condition of the street—(interrupted).

Q I want to know what became of the dispute. Did a government inspector come there? A Yes. I will explain that.

40 Q All right. Yes. Go ahead. A So when I made the bridge, he came through on our side of the lot because that street was in a better con-

Albert Oeding, re-direct.

dition, so, immediately upon the letter man coming through on our side, Mr. Timms and Mr. Ridell put their letter boxes about five or six feet out from their house line so he could deliver mail into those houses, in front of the house. Then about a week after, or so, Mr. Moriarity came up and said, "Mr. Oeding—" 10

Mr. Grosso: Your Honor please, I object to this. I object to these questions. I think they are immaterial and irrelevant.

The Court: I will allow it.

A (Continuing.) Mr. Moriarity showed me a letter which he had gotten from Washington, saying—

The Court: No. Do not— 20

Mr. Grosso: I object.

The Court: Do not say what is in the letter. We cannot extend this indefinitely.

The Witness: That is what he told me. So it said—

The Court: No. Do not say what was in the letter.

30 Mr. Grosso: I object to what was told to him.

The Court: He showed you a letter and then what happened?

The Witness: He told me that—

Mr. Grosso: I object.

The Court: Yes; I will sustain the objection.

The Witness: It said in the letter—

40 The Court: I don't want to know what is in the letter.

Albert Oeding, re-direct.

Q Just say what termination came of the dispute. Was your right in the lands admitted by the post office department, or wasn't it? A No. He told me that the only way he could go through there was by permission of Oeding.

Q Didn't they admit possession of the land?
10 A Yes.

Mr. Grosso: I object and ask it be stricken out.

The Court: Yes. Strike it out.

Mr. Glassner: I want to prove by Mr. Smith the chain of title.

Mr. Grosso: If you will let me look at the title. Is it for the purpose of proving the title in Oeding?

20 Mr. Glassner: For the purpose of proving the title in Oeding, and the fact of the taxes being paid right straight along for a good many years and rebutting some of the statements you made of your intentions.

The Court: Have you a search, Mr. Grosso?

Mr. Grosso: I have a search, but I haven't the title. I am still looking over the search to see if it is— I will consent to the admission of this abstract into evidence.
30

Mr. Glassner: I will offer it.
Abstract marked Exhibit C. 2.

William S. Wensley, direct.

WILLIAM S. WENSLEY, sworn for the complainant.

Direct examination by Mr. Glassner.

Q Where do you live, Mr. Wensley? A 288
Park avenue, Newark. 10

Q Were you at one time an owner of this property in question? A I was an owner of one-sixth of the property.

Q And when was that? A In June, 1907, I became the owner there and was part owner until—

Q Mr. Wensley, what are you reading from? A I am reading from a memorandum because I do not want to trust to my memory. I prefer the memorandum, which is absolute; it is not a question of memory; it is a question of fact. 20

Mr. Grosso: I object to reading from any memorandum.

The Court: I will sustain the objection.

Q Mr. Wensley, can you tell us accurately, of your own recollection, exactly what date you became one-sixth owner? A June, 1907. I can't tell the date in June. It is a matter of record. 30

Q And from whom did you get your title?

The Court: That is also a matter of record. Isn't it in the search?

Mr. Glassner: I think it is.

The Witness: The search has been introduced in evidence.

Q For how long were you the owner? A
Until 1918. 40

William S. Wensley, direct.

Q Until 1918? A When I sold it to Mr. Oeding.

Q Now, did you, during that period, pay the taxes on the property? A I personally paid the whole tax, at least one year; my wife paid the whole tax, at least one year and some others
10 and then collectively it was paid. May I explain what was said by the other side, sir?

The Court: No.

The Witness: As to how the tax was not paid?

The Court: No.

Q Do you know whether or not the tax had been paid for the year preceding the year that
20 you acquired the title? A It had not.

Q It had not been paid? A No, sir.

Q Do you know why? A Through the omission of the tax office. I went— I wrote to the tax office—

Mr. Grosso: I object to that, your Honor.

The Court: I will sustain the objection.

Q During the time that you were the owner
30 what use was that land put to? A I think— while I was owner?

Q Yes. During the time that you were the owner? A There was none, so far as I know. It was used previously. After Mr. Soper became possessor of it—

Q Mr. Soper was the owner before you? A Mr. Soper was the owner before me.

Q Do you know what use it was put to then?
40 A Yes. Two years it was used to plant potatoes. I took a lease, or, gave a lease by the

William S. Wensley, direct.

authority of the owners to a man named Bowman, I think the name was, or Bowden, some such name, for one dollar to use the center plot for potatoes, and I don't know whether he used the whole plot or not. He used part of it, anyhow.

Q And did he plant potatoes there? A He
10 planted potatoes.

Q Did Mr. Soper ever use that himself for any other purpose? A No.

Q During the time that you were the owner, did you permit the adjoining owners to— I will reframe the question. He was the owner of an undivided one-sixth interest, having gotten it from the estate of Charles A. Soper. Did you at that time permit the adjoining owners to use two
20 passages on both ends to pass and repass, going to and from their homes? A Yes.

Q Do you know whether or not Mr. Soper permitted them to do that? A He had a fence up there and it was taken down during the night, or partly taken down during the night by some one.

Q When was that? A I think I would have to state now from guess or recollection.

Q Give us your best recollection? A About a year, or possibly two years after he bought the property.
30

Q That was in 1892, wasn't it? A Yes, 1892.

The Court: The deed will show.

Q When was the last time that you saw that property up there? A I don't recall positively but I think about two or three years ago.

Q Do you recall how wide each of these tracts or lanes on both sides of this land were when
40 you last saw it?

William S. Wensley, cross.

The Court: You cannot expect this witness to repeat everything that is in that search. That is in the search.

Mr. Glassner: That wouldn't be in the search, the width of the lanes that the neighbors were permitted to use in going to and from their homes.

The Court: He can approximate. About?

The Witness: A convenient wagon road.

The Court: About—

The Witness: Seven or eight feet, something like that, is the best guess I can make at it.

Mr. Glassner: That is all. Cross examine.

20 *Cross examination by Mr. Grosso.*

Q Mr. Wensley, were you related to Charles A. Soper? A I was his son-in-law.

Q And you say that he put a fence up? A Yes.

Q Where did he put the fence? A He put the fence around the plot. He had it across—as I recall it, he had it across all of the road except possibly over toward what we call the Macmillan side, that is the Williams side. It ran from Benevue avenue to the old Northfield Road. It was taken practically most of the front.

Q And with relation to this sketch, could you show me on this sketch about where the fence was? A He had the fence down here (indicating), as I recall it, possibly right there (indicating).

40 The Court: Indicating Benevue avenue.

William S. Wensley, cross.

The Witness: This is Benevue avenue, and running along up to here; I recall that about here somewhere there was a cross road.

The Court: That does not mean anything on the record.

10

Q Were there fences along here, across here (indicating)? A As I recall it, the fence was up here, not necessarily on this road. There was a space, as I said a little while ago—(interrupted).

Q Was there a fence up here (indicating)? A There were two fences up here.

The Court: What the witness means is that the fences included the grass plot, but they did not include the two roads, which were about eight feet wide. Is that right? 20

The Witness: That is true, sir; except there was a gate here, as I recall it, shutting off the whole thing, except part of that—

Q That driveway was open? A Well, so far as I know. I think it was open.

Q And you say those fences were taken down? A In the night, by someone adverse to him, and he put it up the second time. 30

Q How long did the fence stay there? A I don't know, but probably for some months.

Q (By the Court.) And both times the fence was taken down? A Yes. He never took it down.

Q Do you know who took it down? A No; but the family had very grave suspicion.

Q Do you know Mrs. Williams? A I do. 40

Herbert W. West, direct.

Q And Mrs. Williams was related to Mr. Soper? A Yes, sir.

Q Do you know whether she took the fences down? A She probably did not. She had two sons, though.

10 Q Do you know whether she ordered—

The Court: I do not think this is important. (To witness.) There were no fences after that time were there—after the second tearing down, no other fence was erected, was there?

The Witness: I believe not.

20 Q You say that you are a son-in-law of Mr. Soper's and that you had an undivided one-sixth interest in the property? A Yes.

Q Was that devised to you by will of Mr. Soper? A No. That was bought from the second eldest daughter.

Q Oh, you bought the sixth from the second eldest daughter? A Yes.

30 HERBERT W. WEST, sworn for the complainant.

Direct examination by Mr. Glassner.

Q Where do you live, Mr. West? A I live in Mr. Oeding's property, adjoining that lot.

Q How long have you lived there? A Since 1920, about this time of the year.

40 Q Since 1920. And do you know how that middle tract was used by Mr. Oeding during that period? A Why, it was used—the middle tract was used during that period to store

Herbert W. West, cross.

lumber on—particular years— Of course, he has some fruit trees he tried to keep alive and get some fruit off, and, if I may be permitted, I lived up there the year previous and I know that year he used to raise corn, potatoes and I don't remember whether he had much success with potatoes, but he used it as a garden. He farmed that center part. That was the year before I came to live in his house. 10

Q Is there lumber stored on that plot at the present time? A There is.

Cross examination by Mr. Grosso.

20 Q Mr. West, you say that you live on the Oeding property adjoining that lot. Where is that Oeding property? A My address is—you mean my post office address?

Q Your post office address? A About forty-three lots and beginning at number one.

Q Do you live on any street?

Mr. Glassner: I object to it. That has been answered.

30 A I live on a street—or, no, I don't live on a street. There is a lane, a driveway a passing from our house down to Benevue avenue, or I can go out the other way, I can use that driveway up to Northfield Road—Benevue avenue in the periods when trespassers broke down our bridge and I am compelled—that road Mr. Oeding built, then I go up the driveway apast Mr. Timm's and to Northfield.

40 Q What do you mean by "our bridge"? You don't own any land there? A Well, our bridge, when you pay rent for a place you kind of consider it in a measure your own. 40

Herbert W. West, cross.

Q What do they call this land, that you refer to? A Well—

Q Any name? A Well, some people call it St. Cloud Place.

10 Q What do you call it? A Gee, I don't know as I ever had occasion to call it.

Q Have you ever referred to that in any communication? Have you given that as your address? A I presume I have.

Q You say Mr. Oeding farmed this plot. Do you mean by that that he farmed the entire plot of one hundred feet? A Why, no; not according to my recollection.

20 Q What portion of it did he farm? A Well, as long as I can remember that it was not quite all space between the roads. I was not paying very much attention to that property because I didn't know Mr. Oeding at that time; I was not particularly interested, but I remember the things growing there.

Q He didn't farm the portions that are used as roads, did he? A Not as I remember.

30 Q And how much lumber has he stored there? A Oh, gee, I don't know. I am not a lumberman; I couldn't tell. In what way do you want, in feet or—?

Q Well, about the size of the pile of lumber. A Why, I should judge the pile of that lumber was about eighteen by eighteen and about eight—five or eight feet high, I should judge.

Q Is that lumber on any portions of the property which are being used as streets? A Why, no.

40 Q It is in the center piece? A It is on the plot, yes, because we wouldn't want to block off our driveway.

Herbert W. West, re-direct.

By the Court.

Q You couldn't get to your house if you blocked off your driveway? A I couldn't get access at the house.

Q And nobody else could get to their houses if it was blocked off, could they? A Why, not 10 over Mr. Oeding's property they couldn't.

Re-direct examination by Mr. Glassner.

Q One more question, Mr. West. From the extreme outside line of these so-called passageways how many feet is it to the front line of the houses on the northern side of this tract? May I refer to that search, please? I call your attention to this little sketch. What I want to know is this: How many feet—this is the 20 middle tract; there are two passageways on both sides of it—from the outside line of the passageway how many feet is it to the front line of the houses—of the houses along side of this road? A How many feet is the extreme edge toward the center?

Q From the extreme outside line of the houses along here (indicating)? A Oh. On—I should judge on the side in which Mr. Oeding's house is that it was about eighteen feet, the extreme outer edge of it, because I presume the reason is because since he, when he was running a truck down he had to have room to turn but on the opposite side, on the side on which Mr. Schweinler's lot is— 30

Q You mean on this side? A I mean on the west side of the lot.

Q Yes; Mr. Schweinler's lot. A I believe this is the property which Mr. Schweinler owns. 40

Herbert W. West, re-direct.

Q This. A That would be on the west side of that plot. It is very much narrower. I should say twelve feet, I should imagine.

Q In other words, if this whole thing were blocked up, there would be ample room for people to come and go on both sides? A I don't quite understand.

The Court: I don't, either.

Q If this entire tract enclosed here in red—
A Yes.

Q —were fenced in entirely, could these adjoining owners get to their homes from either road, from either Northfield avenue or Benevue avenue? A If that whole tract was closed up they couldn't get to their own homes over Mr. Oeding's property.

Q Well, could they through their own property? A I should judge those on the corner would.

The Court: It is a self evident fact, if that whole thing was closed up, those middle lots would have no access to Northfield Road or Benevue.

Q Could they get out—could the middle owners get to either Northfield avenue or Benevue without going over Mr. Oeding's property? A Oh, yes; they could go out over Mr. Schweinler's property or they could go out over Mr. White's property.

The Court: That is, assuming they could get—(interrupted).

The Witness: He means—I have been answering the question wrong. I get the idea

Alice M. West, direct.

of it. They have on their own property between their house and the limits of their house lot, between their stoop line and the limits of the house lot there is about twenty or twenty-two feet, I should judge. I am pretty good at measuring from my eyes; I am dealing with implements all the time in my work. I should judge twenty or twenty-two feet from the stoop line and the limits of their own house lot.

The Court: I am not interested in that because that is a perfectly ridiculous contention, if A were confined, to get out to Northfield avenue, we will say, over the lands of B, in the first place, B could say, "No; you can't come over my property at all."

Mr. Glassner: At that point, if we may digress, your Honor please—

The Court: And, in the second place, B might hold him up for \$5,000. The point of this case is whether these two roads were sufficiently dedicated and these people built these houses expecting ingress and egress through these roads. That is one point.

(Argument.)

ALICE M. WEST, sworn for the complainant.

Direct examination by Mr. Glassner.

Q Where do you live, Mrs. West? A I live in Mr. Oeding's house.

Q You are the wife of Mr. West, who just testified? A Yes.

Alice M. West, cross.

Q And how long have you lived there? A Four years the 20th of this month.

Q Will you tell the Court, please, what use was made of that middle tract in discussion in the four years that you have been living there?

A Well, the only thing it has been used for that I recollect that the lumber has been stored there, but I was away quite a bit so I don't know whether he put things there or used it much while I wasn't there.

Q Do you remember seeing lumber stored there? A Yes.

Q Is there lumber stored there at the present time? A Yes, sir.

Cross examination by Mr. Grosso.

Q Now, Mrs. West, it is also used for the purposes of two streets, isn't it, two streets, one on either side of this tract? A You mean the lanes going through there?

Q Well lanes or streets, whatever you want to call it. A Well, people use it.

Q Well, they are well-defined streets, aren't they; and aren't there ruts there? Doesn't the public use those streets, drive over them, automobiles, wagons, and so forth? A I presume they do.

Q Well, you have seen them do it, haven't you, Mrs. West? A Just in that property, you mean?

Q Yes, on that property, over these two lanes, as you call them? A Yes, sir.

Q And do you know what these lanes are called? Have they any name? A Well, I don't know what everybody calls them. I just simply call it—

Q What do you call it? A Well, the notice up says "St. Cloud Place."

Alice M. West, re-direct—re-cross.

Q And you call it St. Cloud Place, too, don't you? A When I call it anything.

Q Now, if you go to a department store to buy anything, you have to give your address, don't you? A Yes.

Q What address do you tell— A I say next door to Olstead's at Benevue.

Q Don't you say "St. Cloud's Place"? A Maybe I do.

Q Well, do you? A Some times.

Re-direct examination by Mr. Glassner.

Q What are the physical character of these lanes, as you call them? A Why, you mean the driveway?

Q Just tell us what they look like. A Well, since Mr. Oeding has improved them, why they look like—

Q No. What do they look like now? A They just look like a passageway.

Q Is there a curb over his part of it? A Oh, no.

Q Would you say there were just wagon ruts, or something like that? A Yes; I think they would be that.

Re-cross examination by Mr. Grosso.

Q There is no curb on Northfield avenue or Benevue, is there? A Curb?

Q Yes. There is no curb on either of those streets? A No.

Q They are just country roads? A Yes.

Further re-direct examination by Mr. Glassner.

Q What is the character of Benevue and Northfield avenue?

Alice M. West, further re-cross.

Mr. Grosso: I object.

Q Do you know the character of Northfield and Benevue avenue?

10 The Court: I will sustain the objection. I do not see that is of any importance. (To witness.) You say that Mr. Oeding, or whatever his name is, had improved the property, the streets or lanes, whatever they are?

The Witness: Yes; the lane on the side, because previous to the time we came there you couldn't get through. There is a deep gully there and you couldn't get through at all.

20 *Further re-cross examination by Mr. Grosso.*

Q On which side, do you say? A On both sides you couldn't get through.

Q Which side did Mr. Oeding improve? A Why, building the bridge?

Q You say he improved them. What did he do, improved what? A Just built the bridge so he could get out.

30 Q Where did he build the bridge? A Why, on Benevue avenue.

Q And is that all he did to improve them? A Yes, sir.

Mr. Glassner: We rest.

40 The Court: I do not think that you have established the jurisdictional fact necessary to quiet title. Your own evidence does not show that you have been in peaceable possession. It shows, on the other hand, that

Alice M. West, further re-cross.

there is a serious objection to your possession and an acquiescence in that objection, apparently. A fence was built and torn down, rebuilt and torn down and never reconstructed. A complaint was made that the United States mails were interfered with and the Recorder of West Orange instructed Mr. 10 what is his name—Oeding to take down the barricades and they were taken down. I will dismiss the bill.

Mr. Glassner: Your Honor please, will your Honor hear me on that?

The Court: Yes; of course.

Mr. Glassner: I think either Mr. Oeding has not made himself clear or I don't recall his testimony. Mr. Oeding's testimony in reference to the Recorder's dispute was this: 20 Not that he took them down at the Recorder's request or by the decree of any Court; he took them down by virtue of an agreement, and I have shown very clearly that these lanes which were used by the adjoining owners were used by the permission of the owners of the middle tract. The question involved is the ownership of the middle tract. They claim dedication in their answer and 30 they claim the property has been changed.

The Court: That may all be, but the jurisdictional fact for a bill to quiet title is peaceable possession, and there is no peaceable possession, in my opinion.

Mr. Glassner: Your Honor can say that the center part was subject to easement, if to all appearances it was in the peaceable possession of Mr. Oeding. 40

Discussion.

The Court: I am not stating anything. I am simply saying that you ask a bill to quiet title on this entire tract. At least some of it has been in dispute and therefore I do not think that this remedy will lie.

10 Mr. Glassner: Your Honor will allow me an exception?

The Court: You do not have to have an exception. You can take an appeal.

October 14, 1925.

20 Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Richard M. Glassner, Esq., (by Merritt Lane, Esq.) for complainant; Alfred J. Grosso, Esq. for defendant.

The Court: Well, now, what is this case?

30 Mr. Lane: It is a continuation of a hearing, if the Court please, which was heard before your Honor on the 3rd day of November, 1924, Oeding against Schweinler, and after taking the testimony of the complainant your Honor originally—

The Court: I remember the case.

40 Mr. Lane: —said your Honor would not dismiss the bill because there was not peaceable possession shown, and afterwards, at the request of counsel, the matter was reserved for briefs and after the briefs were submitted, your Honor then reopened the case and set it down for today for hearing. I think the complainant had concluded with the ex-

Discussion.

ception of offering the tax bills which had been paid on this plot of ground referred to and those bills I offer.

10 Mr. Grosso: If your Honor please, that is not my understanding of the matter. My understanding is the case was dismissed and this is a rehearing. I do not understand that this is a new case. It is a rehearing. It is not a continuation of the hearing—of the former hearing, that hearing having been dismissed.

Mr. Lane: It is a rehearing. I do not understand the word "rehearing" if counsel means we have to start anew, and I don't understand the case is dismissed until the decree is filed.

20 The Court: I do not think it is necessary to start in anew. We have the testimony heretofore taken and you were in court and cross examined.

Mr. Grosso: Yes, sir.

The Court: Well, I do not feel like going all over it again. There is no sense in that. Just add on to what we have got.

30 Mr. Lane: Do you want to look at these tax bills? Those are tax bills of the prior owners.

The Court: I must admit I am a little vague about this. Wasn't this a case of a strip of land with a street on each side of it or something?

40 Mr. Lane: This is a case where originally the land was in solid ownership, single ownership; subsequently various portions of it were sold off, leaving a strip between the portions sold off—all of the portions sold off,

Discussion.

allow me to state, fronting on a public street one hundred feet in width and also one strip on one side; that the entire strip was sold to our predecessors in title and came down to us and we have been, as we claim, in peaceable possession of that strip of land, and we ask that the title be cleared. We had nothing to do, as a matter of fact. Our case was sufficiently made out when we produced our deed and when we showed that we were in peaceable possession; the burden was then on the other side.

The Court: What cloud do you desire to have lifted from the title?

Mr. Lane: They claim, as set up in the bill and also set up in their answer, that the one hundred foot strip, in the first place, is a dedicated street and that they have the right, as members of the public, in that street; secondly, they claim a private right to easement over that one hundred feet.

The Court: All right. Now we will go on then. You rest, do you?

Mr. Lane: We rest with the production and offer of the tax bills.

Mr. Grosso: Your Honor please, I object to the tax bills being introduced in evidence, because there is no way of determining whether these tax bills are upon the premises in question. The complainant owns two parcels of land, one on which there are houses erected, title to which we do not dispute. We claim no right in that part on which his house is erected. The other is a strip of land one hundred feet wide, extending from Northfield Road to Benvenue avenue. In that we do dispute his title. We have no

Discussion.

block numbers or lots. I object to the introduction of the tax bills in evidence until it is shown that they affect the premises in dispute.

The Court: I think that is reasonable, of course.

Mr. Lane: I offer them subject to being connected up by producing the official tax map. If they do not affect this property in question, of course, they are immaterial, but I reserve the right to offer the tax map and show that they do affect this property on their face.

The Court: I will receive them with that understanding.

(Bundle of papers marked Exhibit C. 1.)

Mr. Grosso: May it please your Honor, I again move to dismiss the proceedings on the ground that there was not, as I recall—(interrupted).

Mr. Lane: Wait a minute. I do not like to listen to a motion to dismiss, if it is going to be a thorough waste of time. As I understand it, this Court will not dismiss on the complainant's case, unless the defendant rests. If the defendant rests, that is one thing. There is no non-suit in equity.

The Court: No. You can put in your evidence or you can—(interrupted).

Mr. Grosso: As I understand the procedure in a suit of this nature, the first question which is tried is the question of jurisdiction. Then, if the Court decided that the complainant has established the jurisdictional facts, then another date is set for the hearing of the rest of the case.

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Vice Chancellor Stevenson in the case of Fittichauer against the Metropolitan Fireproof Company outlined procedure in a suit of this nature, and he goes on to say: "If the complainant files his bill and then finds its allegations strictly to the statutory requirements, merely setting forth the names of the persons who deny or dispute his title, or claim to own the land or any interest therein, or hold any lien or encumbrance thereon, and calling upon the persons so named 'To set forth and specify' their titles or claims, all difficulty about the taxes, it seems to me, would be avoided, and several anomalous features of the practice which has so far prevailed would disappear. The defendant, if he desired to dispute the jurisdictional facts, could do so by an appropriate pleading. If the Court decided the issue so presented in favor of the defendant, that would be the end of the controversy. If the Court, however, found against the defendant at this issue, the order would be, as in the case of overruling a plea, that the defendant should answer over, and thereupon the defendant would file his affirmative pleading as prescribed by the statute, setting forth his title or claim, and thereafter the proceeding would follow as above indicated.

"Under the practice which seems to have become established and is sustained by the cases above cited, the defendant's answer is split in two. The Court first tries the jurisdictional question which the answer raises, and if the result is not averse to the complainant, the Court holds a further final hearing, in which that part of the answer

40

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which sets out the claim or title of the defendant is for the first time noticed and disposed of."

Then, if that is the practice, I will put my witnesses on the stand to furnish the control of the jurisdictional facts, and then after that has been disposed of, as I understand it, the Court will fix another date for hearing of our title.

The Court: I thought I was going to hear the whole thing now.

Mr. Lane: I do not understand—are you through?

Mr. Grosso: Yes.

Mr. Lane: I do not understand, if the Court please— (To Mr. Grosso:) Let me see that case for a moment. This is the first intimation that we had of any such practices in cases of this kind, and I do not know that there is anything in any of the books, except this opinion of Vice Chancellor Stevenson's which has just been read.

The difficulty with it is that the Vice Chancellor is thinking, apparently, of two things. Under the practice which was then in vogue in 1905, if the defendant in any suit in equity desires to raise a single question which will oust the jurisdiction of the Court he might, in 1905, do it by way of a plea. If he did it by way of a plea, the Court would then hear his plea and, if the pleas were overruled, judgment went for the complainant, unless the Court in its discretion should permit the defendant to answer over. When the defendant filed a plea, he took a chance. Now, when the new practice was adopted—the provision is in the new

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10 practice that advantage can be taken of the same facts and might be taken by a plea in an answer, but under the decisions, under the practice it is specifically stated that if you desire to take advantage of those matters either by way of demurrer, which ordinarily would be taken by way of demurrer, or by way of plea, you must so specify in your answer.

20 The answer in this case fails to assert this alleged lack of jurisdiction, as if a plea had been filed and they have joined issue upon the merits. The result of that is that we are here at this time upon a trial of the entire issue and not in piece-meal hearings. Moreover, this case, before Vice Chancellor Stevenson, arose upon a demurrer to the bill.

30 The Court: It seems to me that, without going into the technicalities of this matter, it would save the time of Court and counsel and witnesses, if we heard the whole shoot-in-match today. As far as the jurisdictional question is concerned, of course, I should have to read that testimony over again. I think counsel have submitted briefs as to the jurisdiction and I must have decided that there was jurisdiction, or else this hearing would not have come up.

40 Mr. Grosso: There was no brief submitted by me, your Honor. We had an informal discussion with your Honor after the hearing, and your Honor requested the complainant to file a memorandum, if he felt that you were in error in dismissing the bill. That memorandum was filed and no brief was filed by me, and I came here this morning prepared to try the question of jur-

Edward E. Williams, direct.

isdiction. I have not all the witnesses that I would have with regard to the proving of our title.

The Court: Well, have you got any witnesses?

10 Mr. Grosso: Yes. I have witnesses here to testify as to the jurisdiction, that is, as to the peaceable possession of the premises in question, which complainant alleges he has had, and I have a witness to—(interrupted).

The Court: Well, let us have them then, let us have what witnesses we can have.

20 EDWARD E. WILLIAMS, sworn for the defendants.

Direct examination by Mr. Grosso.

Mr. Grosso: Your Honor please, I would like to, for the sake of expediting the hearing, use an atlas so that I can refer to the atlas in questioning the witness.

Have you any objection, Mr. Lane?

30 Mr. Lane: I have no objection to the use of the atlas, but I have objection to the atlas being offered in evidence as illustrative of the witness' testimony. I have no objection to its use.

Mr. Grosso: Later on, I intend to offer the atlas in evidence.

Mr. Lane: That may be.

The Court: Why don't you offer it now?

40 Mr. Lane: I shall object then, unless it

Edward E. Williams, direct.

can be proven. We are not bound by any atlas.

The Court: Of course, you cannot just prove it by offering the atlas. You have got to bring the man who made the atlas, if Mr. Lane is going to be so technical.

10

Mr. Lane: I wouldn't go as far as that. I do not care who made the atlas. I want it shown it was prepared by somebody that had—that binds us. There are a great many maps made of the city.

Mr. Grosso: Well, I have three of them here, all made at different times, and I think they have more or less official recognition among real estate men and attorneys as showing the existence of streets and property lines, and so forth. I think everything—(interrupted).

20

Mr. Lane: I shall object to the atlas as to showing any streets.

The Court: Very well. I shall have to sustain the objection, because that is not the way to prove an atlas.

Mr. Grosso: Well, I will just use it as illustrative.

30

Mr. Lane: Yes.

Q Now, Mr. Williams, where do you live? A St. Cloud Place, West Orange.

Q Will you indicate to the Court with reference to that atlas where on St. Cloud Place you live? Now, where is St. Cloud Place? Will you show the Court?

Mr. Lane: You know where it is. Point it out.

40

Edward E. Williams, direct.

The Witness: I am not familiar with the atlas.

Q Here is Benvenue avenue, here is Northfield Road. A This is the plot, right in there (indicating).

Q This plot here (indicating) this shows two streets? A Two streets. 10

Q Now, where is your house? A My house is on the west side, the second and third house.

Q This would be the west side (indicating). The second and third house? A Yes.

The Court: Yes. Next to the Van Kuyl's.

Q Second and third house? A Yes. 20

Mr. Lane: Well, now, although it is not important, I do not want the record to indicate that this shows two streets. It does not. It shows a "park." That is what it shows.

The Witness: All right.

Mr. Grosso: Well, then, we will put in the record it shows a park with what appears to be two unimproved streets. 30

Mr. Lane: I do not concede that.

The Court: This atlas is not in evidence, you know.

Mr. Lane: No. What I am saying is not important, but I do not want the record to show, by any means, that this does show something which in fact it does not show, even if it is not in evidence.

40

Edward E. Williams, direct.

Q How long have you lived there, Mr. Williams? A Well, I have lived there permanently since 1908, March 1908.

Q And how long have you owned the property in which you now reside? A My mother—how long have I owned it?

10 Q How long have you owned it? A I have owned it since my mother died; she willed it to me.

Q How long ago did your mother die? A A little over two years ago.

Q And your mother owned it prior to that time? A She bought it in 1884.

Q And do you know when the houses were erected on the property? A Well, from what I was told by the—(interrupted).

20 The Court: No.

Q Never mind that. A Pardon me.

Q Do you know whether the houses were erected on the property at the time your mother purchased the same?

Mr. Lane: How could he know that? That was in 1884.

30 A There were eight cottages there.

Mr. Grosso: I withdraw the question.

Q How many houses are there on St. Cloud Place? A There are seven now. There was—(interrupted).

Q Were there always seven? A No, there was eight; there was one torn down on the corner of Benvenue avenue.

40 Q And do you know the owners of the seven cottages now on St. Cloud Place? A Yes, sir.

Edward E. Williams, direct.

Q Who are they? A Mr. Stephen B. Riddle owns one; Mr. Joseph Tyms, Mr. Oeding, John Olstead, Mr. White and myself.

Q And do all the owners of the cottages—how do the owners of the cottages get back and forth from Northfield Road to Benvenue avenue? How do they get in and out? A From the street. 10

Q Through what street? A Through the street on St. Cloud Place.

Q Through St. Cloud Place? A St. Cloud Place.

Mr. Lane: He didn't say that. He said, "Through the street on St. Cloud Place."

Q Will you repeat your answer, please? A Get through the street on St. Cloud Place. 20

Q What do you mean "get through the street on St. Cloud Place"? A Well, that opening there is called St. Cloud Place.

Q And have they always gone in and out over St. Cloud Place to get to and from their property? A Always.

Q And how do you get—do you have delivery wagons call at your place? A Yes, most every day.

Q And how do they get in? A Some come in through Benvenue avenue and some through Northfield Road. 30

Q How do they get to your house? Your house is in the middle of the block. A They come through the road on our side, either Northfield Road or Benvenue avenue.

Q Through St. Cloud Place? A Through St. Cloud Place.

Q Do you know whether either one of the streets have ever been improved? A Yes; the 40

Edward E. Williams, direct.

former engineer had to improve them, gentleman by the name of Winston.

Q In what way were they improved? A Well, he put in forty odd loads of ashes, boiler cinders.

10 Q And have any other improvements ever been made in the street called St. Cloud Place? A Yes; there has been water and electricity put in there.

Q Who was the water put in by? A The town—the Commonwealth Water Company, they call it.

Q And has there ever been any objection on the part of Albert Oeding to your going in and out, across and over these streets? Has he ever objected to your going in and out? A The only 20 objection he ever made was the crossing of the center lot.

Q Crossing the center lot? What do you mean by the center lot? A Well, the lot between the roads, about fifty-five feet, about that.

Q What was the nature of his objection? A Well, he said it was private property and he objected to people crossing there, although everybody else crossed it, but he objected to—against me.

30 Q Oh, he objected against you? A Yes, sir.

Q He did not object against anybody else? A Not that I ever heard.

Mr. Lane: I object to that. How can he tell?

Q How was the center portion of the property used, that is, within your knowledge? A I had a garden, half of that plot from about the entrance to Mr. Tyms' driveway up to Northfield 40

Edward E. Williams, direct.

Road. I had a garden there about five or six years onto it.

Q And did anybody else ever use it for gardening? A Yes, I believe Oeding had a garden at the lower end of it once.

Q And you heard Mr. Wensley testify about that fence that had been erected at one end of the property at one time, didn't you? A Yes. 10

Q When you were here before? A Yes, sir.

Q Do you know anything about that fence? A Yes; my mother's brother-in-law, Charles A. Soper, my mother sold that piece of property to him, the house and lot, and he erected a fence at both ends on Benvenue avenue and Northfield Road.

Q And when did he erect it? A Well, I couldn't tell you the year it was, might have been 1886 or 1887, along like that. 20

Q And how long did the fence remain there? A Well, it didn't remain there very long, because my mother tore it down.

Q And was it ever erected again after that? A No. He would lock the gates at certain times during the day and night and stop grocery wagons and like that, and vehicles, and the mail coming through there.

Q That was only during the short interval that the fence remained there? A Yes. 30

The Court: Well, how long did it remain there?

The Witness: Well, a portion of the park, at each end remained, but the gates to the street, entrance to both ends of the street was torn down.

Q When were they torn down? How long did the gates to the entrance of the street remain? A Oh, they didn't remain very long. 40

Edward E. Williams, direct.

Q (By the Court.) Well, what do you mean "not very long"? A Well, probably a week or so.

The Court: Oh, a week.

10 Q And that was in 1888? A Along—before 1888.

Q Before 1888? A Yes.

Q And how long has it been since there have been any fences on any portion of the property? A Well, I don't think there has been any fences since then, since my mother tore them down.

Examined by the Court.

20 Q Well, you said there was a fence that crossed what is known as the park. How long did that stay up? A Well, I don't know. I can't say exactly how long it stayed up.

Q Well, a year? A It might have been a year.

Q Well, was it two years? A It might have been a year. I don't think it was longer than that.

30 Q About a year, you say? A About a year.

The Court: All right.

Examined by Mr. Grosso.

Q Do you know why your mother tore the fences down? A Well, she said—(interrupted).

Mr. Lane: I object to what she said.

The Court: No; not what she said. I don't exactly see how he can testify as to why

40

Edward E. Williams, cross.

his mother tore it down. That calls for a conclusion on his part, I think.

Q Do you know whether there has been any litigation between your mother and—was it your Uncle Soper— A My mother's sister's husband, Charles A. Soper. 10

Q Your mother's— A Brother-in-law.

Q Your uncle? A Well, he was.

Q He was your uncle? A Yes; not a blood relation. He was an uncle.

Q Was there any litigation between your uncle and your mother with regard to the fence—(interrupted). A Nothing but bickering between the two of them, that was about all. He would come over and threaten to do so and so and she said, "Well, if you put them up again I will tear it down again." 20

Cross examination by Mr. Lane.

Q When were you born? A Fifth of May, 1862.

Q And when was it that you first went to live in this property? A March, 1908.

Q Did your mother occupy the house before that? A Yes, sir. 30

Q For how long a period? A She occupied it every summer from April to October, the latter part of October or into November, from the day that she purchased it, when the houses were fixed up to be tenantable.

Q Did you go on the property with your mother? A What was that?

Q Did you go on the property with your mother? A What do you mean did I go on the property with her? 40

Edward E. Williams, cross.

Q Well, were you there prior to 1908? A Yes; I was there when she purchased the property.

Q Well, were you there after she purchased the property? A Yes, sir, at times. I was there almost every summer. I would go up and stay
10 a week at a time.

Q Did you see this fence? A Yes; I saw portions of it.

Q Well, what were the portions of it that you saw? A Well, I have already stated that.

The Court: State it again.

The Witness: Part of the fence was on the park away from the driveways on each side of the road.

20 Q And that is all you saw? A That is all I saw; yes.

Q You don't know who erected it, except from what somebody told you? A Well, I know that Mr. Soper erected it, because I heard him say so.

Q Well, all right. That is what I say. You didn't know a thing about who erected it, except from what somebody told you, did you? A Well, Mr. Soper was the owner and he said so.

30 The Court: Well, that is enough.

Q You didn't know who tore it down except from what somebody told you? A No; I do not—yes; I do; my mother tore it down.

Q Did you see her tear it down? A Yes; I saw her tear it down that night.

Q You saw her? A Yes, some portions of it, yes.

40 Q What portions did you see her tear down?
A The gateways, the gates that he put up.

Edward E. Williams, cross.

Q Then at the time you saw it, you saw more than the portion right up by the park; you saw also the fence along what is called the road; is that right? A I saw after the gates were torn down there were portions of it remaining at both ends of the park.

Q But you have told us now that you saw the gates torn down? A Yes, sir; and I say that, certainly. 10

Q You saw your mother actually tear the gates down; is that right? A Yes.

Q Is that right? A Yes, sir.

Q Then why did you tell me a few moments ago that, when you first saw that fence, all that there was there was the portion around the park-way? A Well, you probably misunderstood me. 20

Q So I was mistaken with respect to that. So I understand now you were there one night and saw your mother tear down the fence? A I said I was there every week end, weeks at a time, most every year.

Q All right. You was there on a night when your mother tore the fence down and you saw her do it; is that right? A Yes; yes, sir.

Q And you helped her, I suppose? A Well, I can't say that I did. 30

Q You stood by and saw your mother tear this fence down; is that right? A Yes.

Q Eh? A Yes, sir.

Q And did your mother ask you to help her? A No; she had a—(interrupted).

Q Did your mother ask you to assist in the labor? A She had a helper sent, who was helping her.

Q I see. What was his name? A Harry E. Williams. He is dead. 40

Edward E. Williams, cross.

Q And she left the fence that was along the park, did she? A I believe so.

Q Now, these roads that you talk about are about eight feet in width, aren't they? A They are about fourteen feet wide, at present. The one on the opposite side of ours is probably
10 twenty-five feet wide.

Q How long since the one along your house has been fourteen feet wide? A Always, to my recollection.

Q Is there more than one wagon rut through that road? A Yes, sir; there is dozens; everybody goes through.

Q I didn't ask you who went through. I asked you if there is more than one wagon rut through there? A Oh, wagon ruts?

20 Q Yes. A Yes, sir.

Q How many? A Quite deep.

Q I know. One wagon rut running through that road; isn't that a fact? A Yes; one wagon road.

Q Well, one wagon rut is not fourteen feet wide, is it? A No; I can't say that it is.

Q It is about four and a half feet to six feet between wheels? A Well, I don't know.

Q You wouldn't say fourteen feet? A Well,
30 I wouldn't say that.

Q And the road on the other side is exactly the same? A No; the other one is more than twice as wide as the one on our side, because it has been improved more on that side.

Q And in the space between there are no wagon ruts of any kind? A Not to my recollection.

Q And that land in between there has been farmed or gardened at different times, has it? A
40 Yes, sir.

Edward E. Williams, cross.

Q Do you know how it was that your mother—Withdraw that. Did you see this portion that you say was used by your mother for a garden, or did you use it for a garden? A I used it for a garden.

Q And you say that was about five or six
10 years ago? A I said I had used it for six years.

Q You used it each summer? A Every summer.

Q Up till what time? A Up till about six years ago.

Q And then what happened? A Well, I stopped using it. That was all.

Q How much of it did you use for a garden? A About one hundred and fifty feet; one hundred and seventy-five feet.
20

Q One hundred and seventy-five feet in length? A Length.

Q And how wide? A And fifty-five feet wide, about fifty-five feet wide.

Q Along the whole width of that strip? A Yes.

Q Past other persons' houses? A Yes, sir.

Q As well as your own? A In front of their houses.

Q In front of other persons' houses? A
30 Yes, sir.

Q Did you have any permission from anybody to use that as a garden spot? A Yes; I had it from the executrix of Charles A. Soper's estate, Mrs. Julia Lenke.

Q And did she—what property did they own there at that time? A They owned the property of the estate left by her father, Charles A. Soper, the house that Mr. Oeding occupies or owns now.
40

Edward E. Williams, cross.

Q Yes, the house that Mr. Oeding owns. And how did you come to go to Mr. Lenke, or whatever his name is, to get permission to use that plot? A Mrs. Lenke used to visit our house every week.

Q Yes. A Come up Saturdays and stay over
10 Sunday.

Q Yes. A And she said, "Eddy, why don't you have a garden out in front? There is plenty of room for you."

Q And thereupon you did? A I did it, at my leisure.

Q And nobody objected to it? A They didn't object to it for five or six years.

Q Then you gave it up? A Yes, sir.

Q And you gave it up of your own volition or
20 without any suggestion from anybody? A Yes.

Q Do you know whether anybody else used that garden space with the consent of Mrs. Lenke, is it? A Lenke is the lady's name. She is dead.

Q I say, was there anybody else that used that garden space, that you know of? A Not at that time.

Q You understood, of course, when you got the consent of Mrs. Lenke, that she was the
30 owner of that property, didn't you? A Well, I always understood that that property was public property.

Q Well, then, why, did you get the consent of Mrs. Lenke for the use of public property? A Well, as the ground was not used for anything else, I thought I would take advantage and have a garden there. She said, "You might as well use it for a garden."

Q Well, what had she to do with it? It was
40 public property, according to your view now?
A Well, I suppose she—

Peter H. Glannan, direct.

Q Claimed ownership to it, didn't she? A She claimed ownership to it.

Mr. Lane: Yes, that is all.

Re-direct examination by Mr. Grosso.

Q When you used this garden property did
10 you deem it necessary to obtain Mrs. Lenke's consent, or was it just at her suggestion? A Only at her suggestion.

Q That you used it? A Yes, sir.

Q Not because you thought she owned it? A
No.

Q But you thought it was public property
and she suggested it to you it was public property
and you could use it; was that the idea? A That
20 was all.

PETER H. GLANNAN, sworn for the defendants.

Direct examination by Mr. Grosso.

Q Mr. Glannan, where do you live? A West
Orange. 30

Q What is your occupation? A Superintendent of the Commonwealth Water Company.

Q And do you know where St. Cloud Place is in West Orange? A I do.

Q Do you know whether the Commonwealth Water Company has water mains in St. Cloud Place? A It has.

Q When were they installed in St. Cloud Place? A Well, may I look at records in order to get the date properly? 40

Peter H. Glannan, direct.

Q Have you records with you? A I have, sir.

Q You may look at them. A Construction record shows that 464 feet of 2-inch main was laid on St. Cloud Place between Benvenue avenue and end of street, finished in June, 1905.

10 Q Do you know at whose order or request the water mains were laid in St. Cloud Place? A The owners of the property on the street petitioned to have water installed.

Q In the street? A In the street.

Q And do you know who the owners were at that time? A Again may I refer to records.

Q Yes. A Mr. Stephen B. Riddle applied for water on May 22, 1905; Mrs. Elizabeth Vantine applied for water on St. Cloud Place between Northfield Road and Benvenue avenue on the west side of the street on June 10, 1905; Mr. Joseph Tyms, St. Cloud Place, between Benvenue avenue and Northfield Road, on the east side of the street, applied for water December 9, 1905; Mr. John O. Olstead applied for water on St. Cloud Place, northeast corner of Benvenue avenue, in St. Cloud Place on October 7, 1914; Albert Oeding applied for water on St. Cloud Place between Northfield Road and Benvenue avenue on the east side of the street on April 2, 1921.

30 Q Are those the original applications? A They are the original applications signed by the owners.

Q And this application is signed by Albert Oeding (indicating). A Yes, sir; that is, he gives the owner's signature, that is all I can safely say.

40 Mr. Grosso: I offer these applications in evidence, these applications for water.

Peter H. Glannan, cross.

The Court: No objection; they will be admitted.

(Bundle of applications for water marked Exhibit D. 1.)

Q Do you know who paid for the installation of the water main? A Well, the early settlers, the first three applicants wrote on their application and petition there to the company they agreed to pay a certain proportion of that share. 10

Q Who were the first three? A Mrs. Vantine, Mr. Tyms and Mr. Riddle.

Q Did you have permission from the Town of West Orange to install the water main on that street? A We did.

Q And when was that given? A Prior to the installation which would be, apparently, in May, because the work had started in May, 1905. 20

Mr. Grosso: That is all.

Cross examination by Mr. Lane.

Q How long have you been with the water company? A I have been there thirteen years, sir. 30

Q And then what you are testifying to back of thirteen years ago you are testifying purely from records? A These are the records I am offering, sir.

Q You know nothing about this except from records? A I do know about that last application, if you work it that way.

Q I confined my question to what you testified of having happened more than thirteen years 40

Peter H. Glannan, cross.

ago; you are testifying purely from records; that is right, isn't it? A Yes, sir.

Q You know nothing about it from your own knowledge? A No, sir.

Q Where is the consent of the Town of West Orange, that you referred to, to have the water mains, where is that? A I haven't got it.

Q Have you seen it? A Have I seen it?

Q Yes. A Yes; I have seen it.

Q Where? A I had it here one day, sir.

Q Why isn't it here today? A Because I had no notice of this hearing until late last night, sir.

Q It is a written document? A It is, sir.

Q In 1905? A I wouldn't say the date, but I am pretty sure it must be to February, 1916.

Q You know nothing about it, except what you got from that written document? A That is all, sir.

Q And that you haven't here? A No, sir.

Q Are there any other papers in connection with those applications that you have not produced? A No, sir.

Q (By the Court.) Well, you know about that last application in 1921? A Yes; I was witness to that one.

Q (By the Court.) Did he pay any money for that? A Yes; it is written on there what it was paid for.

Q Was there a consent of the Town of West Orange to the last application? A No, sir; the consent of the Town is on this one only, the construction cost of the main going through the street, that is all the Town of West Orange has anything to do with. These applicants are individuals and applying for water from that main to their homes. Service connections the Town has nothing to do with it.

Peter H. Glannan, cross.

Q Are there any other documents of any other kind on the files of the water company with respect to these applications made back in 1905? A No, sir.

Q Except those that you produced? A No, sir. There might possibly be a letter that somebody had written in prior to that. I wouldn't say that.

Q Do you know whether or not there is a letter from, or communication from the Soper estate? A I don't know, sir.

Q Consenting to this? Oh, you don't know? A No, sir.

Q Have you looked? A No, sir.

Q You haven't looked for such a letter? A No, sir.

Q There may be one in your files; is that right? A What estate is that, please?

Q The Soper estate, the owners of the—the people who claim to be the owners of the park, so-called. A No, sir; we have never had a petition from them, that is, not that I know of.

Q I didn't ask you if you had a petition. Well, will you make a search and find out if there are any other papers of any kind, nature or description, bearing on these applications made back in 1905, and produce them, and also produce the consent of the Town of West Orange to which you have referred? A Well, now, let me get what you wish, sir. You wish the authorization of the Town of West Orange for the construction of the main in that street?

Q Yes. A That is the first thing. Now, then, I will have to get the name of the party you asked. I never heard it in West Orange.

Q Charles A. Soper.

Charles A. Winston, direct.

The Court: What Mr. Lane wants is all the papers of every kind.

Mr. Lane: Everything.

10 A You see. These applications, these are individuals only, that is complete in itself.

By the Court.

Q Yes, there maybe some letters from those people, you say? A Yes; there may be. I never had occasion to look it up.

Mr. Lane: The Soper Estate may be from Mrs. Lenke.

20 Q Now, do you know where this water main is laid? A Yes, sir.

Q Where? A On the east side of St. Cloud Place.

Q How close to the property line? A I would judge, six feet of the property line.

Q About six feet of the property line on the east side? A Yes, sir.

30 CHARLES A. WINSTON, sworn for the defendants.

Direct examination by Mr. Grosso.

Q Mr. Winston, where do you reside? A West Orange.

Q What is your occupation? A Civil engineer.

40 Q Were you formerly engineer for the town of West Orange? A I was.

Charles A. Winston, direct.

Q When? A From August 1, 1916, till August 1, 1921.

Q Do you know where St. Cloud Place is? A I do.

Q What is the nature of St. Cloud Place as to its improvements? A St. Cloud Place is a strip of land 100 feet wide, with a driveway along each side of it, something like twelve or fourteen feet wide, twelve feet wide, I think. 10

Q And extending from where? A From Northfield Road to Benvenue avenue.

Q Do you know whether any portion of St. Cloud Place was ever improved while you were engineer of the town of West Orange, by the town of West Orange? A It was.

Q What portion of it? A Each of the driveways on each side were taken care of in the regular course of procedure of keeping the streets in repair. 20

Q And what was the nature of the repair that was made to these streets? A Cinders were placed on them in order to make them passable, as I recall—

Q Was that at the general expenses of the town? A Yes, sir.

Q Do you know whether the street has been considered as a public street by the town of West Orange? 30

Mr. Lane: I object to what it has been considered.

The Court: Yes. I will sustain the objection. If it were dedicated as a public street, that is one thing.

Q And how long have you lived in West Orange, Mr. Winston? A Since 1916. 40

Charles A. Winston, direct.

Q And has the street been closed at any time since you have been living in West Orange? A Not to my knowledge.

Q You are also a surveyor, aren't you, in addition to being an engineer? A I am.

10 Q Have you ever made surveys along that street? A Yes.

Q And are the property lines of the properties along that street distinctly marked out? A Yes, sir.

Q Are any fences along the property lines? A Yes.

Q Did you ever make a survey for Albert Oeding? A I did.

Q Does that survey show the streets? A Yes, sir.

20 Q Have you the survey with you? A I have.

Q Where is it? A (Witness produces survey.)

Mr. Grosso: I offer this survey in evidence

Mr. Lane: When was this survey made?

Mr. Grosso: June 29, 1922.

(Survey marked Exhibit D. 2.)

30 Q Mr. Winston, I notice that on this survey you have the center portion of this tract marked "Property of Albert Oeding, West Orange, New Jersey." Why is that marked, "Property of Albert Oeding"? A This survey was made at the request of Mr. Oeding and by requisition from the Fidelity.

Q And the survey shows the certain premises that were—(interrupted).

40 Mr. Lane: I object to that as leading.

Charles A. Winston, direct.

Q What does the survey show?

The Court: The survey speaks for itself.

Q Where did you get the description that you used in the making of this survey? A I don't know that I can tell you where I got the description. Possibly I have—the Fidelity furnished me with certain descriptions covering certain of those properties. I can't tell you just exactly which ones they are, without going into it. 10

Q Well, you obtained the description from the Fidelity Trust Company? A Yes, sir.

Q What is the dotted line? A The dotted—

Q Dotted lines on the survey, what do they indicate? A Shows the present driveway.

Q It shows the present driveway? A (Witness nods yes.) 20

Q Do you know whether the town of West Orange uses what is known as official tax maps, Mr. Winston? A Yes, sir.

Q I show you book entitled, "Map of taxable real estate in the township of West Orange" and ask you what that is? A That is a map—that is a tax map formerly used prior to two more recent ones compiled, using this as a basis.

Q And it is the official tax map of the town of West Orange? A Yes, sir. 30

Mr. Grosso: I offer the official tax map of the town of West Orange in evidence.

The Court: How does this witness get the official tax map of the town of West Orange?

Q Where did you get this tax map? A I borrowed that from the town. 40

Charles A. Winston, direct.

Mr. Lane: I do not suppose the town engineer is the proper person to prove a tax map, but maybe I won't object to it.

By the Court.

10 Q You helped to make it? A I made the present tax map for West Orange.

By Mr. Lane.

Q This is not the present tax map? A No, sir; it was for a great many years prior to—Plate T you will find that.

Mr. Grosso: Here you are.

Mr. Lane: As near as I can see, there is a billiard room in the middle of the street.

20 The Court: "Billiard room," what does that mean?

Mr. Grosso: I will put in some other testimony later to explain that.

The Court: Well, do you object to this, Mr. Lane? This is evidently the *locus in quo* right here (indicating).

Mr. Grosso: This is the entire Fuller property along here (indicating). Here are the eight cottages that have been testified to and here are the two streets showing the park in the center with the billiard room in the center.

30 Mr. Lane: I will ask you one question. Let me ask him one question.

The Court: Yes.

By Mr. Lane.

40 Q What number has this, for taxing purposes, where does it appear on the tax records?

Charles A. Winston, direct.

Mr. Grosso: You mean for the tax bill?

Mr. Lane: Yes.

Mr. Grosso: It wouldn't show on there because the numbers have been shifted; we have a later tax map which is not here today, but which I will produce. There are the numbers that were used at that time. 10

Mr. Lane: No. These have been put in recently.

The Witness: This map is very old.

Mr. Grosso: This is 1874.

The Witness: Here—this has always been considered official and was used extensively in making the present ones.

The Court: What I want to know: Is there any objection to its being introduced? If there is, I will have to pass on that, I suppose. 20

Mr. Lane: I object to this map being used at this time, without the production of the accompanying data which would show what property was taxed at that time and under what denomination the property was taxed, which appears to be within the limits of this so-called park. 30

Mr. Grosso: Well, your Honor please, the tax maps do not show the property which is taxed, the tax duplicates, for various years except for the properties which are taxed in this county.

The Court: Mr. Lane objects to the introduction of this atlas and I cannot introduce it unless you produce the proper custodian of the West Orange records. This gentleman is—(interrupted). 40

Charles A. Winston, direct.

Mr. Lane: I will concede, if the Court please, that if the proper custodian of the West Orange records were produced, he would testify this is the official tax map and I still object as not binding upon us.

10 Mr. Grosso: You admit it?

Mr. Lane: I admit, if the proper custodian is called, that he would testify this is the official tax map.

The Court: And thereupon I will admit it.

Mr. Lane: And my objection now is confined to the fact that it is not binding on us.

Q Do you know when that map was made, Mr. Winston? A This atlas, you mean?

20 Q This atlas, yes. A No; not unless I looked at the date of it. That is all I ever know about.

Mr. Lane: It speaks for itself.

The Court: Yes.

Q Did you subsequently make a new tax map? A I did.

Q As town engineer? A Yes.

30 Q When was that? A Well, I started it in 1916 and finished it about 1919, I think.

Q And that map shows all public streets? A Yes, sir.

Q And all property lines? A Yes, sir.

Q And does it show—(interrupted).

Mr. Lane: I object to what it shows.

The Court: Wait a minute. You have got to produce the thing itself. You cannot tell us what it shows by this witness. You must have the map itself.

40

Charles A. Winston, direct.

Mr. Grosso: As I said before, your Honor, I did not know we were going to be called upon to prove our—to try anything except the jurisdictional facts, and for that reason I have not produced the official tax map, the more recent tax map, and I have not produced the tax records of the town of West Orange. 10

The Court: Well, you can get those?

Mr. Grosso: I can get them.

The Court: Yes.

Mr. Grosso: I would like to, in some way, tie in the tax map so I won't have to produce Mr. Winston as a witness.

Mr. Lane: I will make the same stipulation, if Mr. Winston was called he would testify that— Well, I don't know about that. I won't be able to make that stipulation. 20

The Court: No. You cannot prove an atlas or a tax map without producing the tax map. Now, this witness might very sincerely say that on Plate No. 8 there is such and such a thing, and it might not be there at all. Of course, I do not believe any such thing. I am just speaking technically now.

Mr. Lane: The whole difficulty is that the witness, in describing what appears on that map, may think himself as actually accurately describing it, whereas in the inspection of the map there may be some difference of opinion as to what the map shows. 30

Mr. Grosso: I don't want to show—I want to prove by this witness who made the tax map.

The Court: He has already said who did it; from 1916 to 1919 he worked on it. That is all in the record. 40

Charles A. Winston, direct.

Mr. Grosso: So I can later produce the map and use it in evidence.

10 Mr. Lane: I was about to consent to that, but I will not be able to, because there may be something on this map, after it is produced, that I shall desire to cross examine the man who made it, as to where he got his authority to put certain things on, if they are there.

Q Mr. Winston, has St. Cloud Place—before you answer this question, wait and see if there is any objection to it—has St. Cloud Place been treated by the town of West Orange as a public street?

20 Mr. Lane: I object to that.

The Court: Well, I will sustain the objection. That is not the proper way to prove a public street. If the thing is a public street, it must be dedicated according to the act relating to towns or boroughs, whatever this place is.

30 Mr. Grosso: Dedication can be in a number of ways, by user or selling lots fronting on the street and by the township—by the town making some improvement in the street, such as would indicate an acceptance of a dedication.

Mr. Lane: I had not—(interrupted).

The Court: The fronting lots on a public street, on a so-called public street, only bind the man who makes the map, it does not bind the public at all. I never heard of the dedication of a public street by user.

40 Mr. Grosso: No; it is not a dedication; it is an acceptance of that dedication. The

Charles A. Winston, direct.

dedication is an offer to the public by the owner of a piece of property. It is an offer and—

The Court: And it is accepted by the public?

10 Mr. Grosso: And it is accepted by the public, when there has some official act taken place, such as the improvement of that street, the policing of it, or any official act would constitute an acceptance of that offer or that dedication.

The Court: Well, I shall sustain the objection because I cannot agree with you.

Cross examination by Mr. Lane.

Q Mr. Winston, you told me that certain 20 things—told us that certain things had been done upon the street. Can you tell me when they were done? A During the time of my office. I cannot tell you the exact year without looking up my records.

Q Were there any bills rendered to the town for what was done? A No, sir. This was done under the general street improvement plan, for which appropriations were annually made for the maintenance of streets. 30

Q There is a record in the town, isn't there, of the different places the men worked on from time to time? A Yes, sir.

Q Is that record still in existence in the Town Hall? A Well, it is in existence in my files. Those records were not made public records in the nature of just exactly what street each man put down.

Q But they are there? A They are not in the Town Hall. They are in my journal. 40

Charles A. Winston, cross.

Q They are in existence somewhere? A Yes.

Q So you can accurately determine from an inspection of these records, just where the so-called improvements were made, and when they were made? A Yes, sir.

10 Q You are now calling upon your recollection, and you cannot tell me now exactly where they were made, or when they were made? A I can tell you where they were made, yes, sir, but I cannot tell you the year or date.

Q Where were they made? A They were made on St. Cloud Place.

Q What part of the place? A On both sides of the street, extending from Northfield avenue to Benvenue avenue.

20 Q There appears to be on this survey marked "Exhibit— A They were made.

Q Wait a minute—Exhibit D. 2" within the dotted lines on either side of this street? A Yes.

Q This was made from actual survey upon the ground, that is, Exhibit D. 2? A Yes, sir; that had nothing whatever to do with the town. That was in the nature—(interrupted).

30 Q I didn't ask you that. It was made from an actual survey upon the ground? A Absolutely.

Q Then how did you get your distance of twelve foot, which you have used as the width of these so-called driveways? A The used roadway.

Q That was the limit of the used roadway, was it? A Yes, sir.

The Court: How much is it, twelve foot?

Mr. Lane: Twelve foot.

40 The Court: On both sides?

Charles A. Winston, cross.

The Witness: Yes, sir.

Mr. Lane: On each side.

Q Now, this so-called street or these so-called driveways are in the state that nature left them, with the exception of what packing down there has been by wagons passing over them and what 10 cinders the Town of West Orange has put in? A I wouldn't say that.

The Court: In other words, in *ferae naturae*.

The Witness: It might be all that, but I don't know what it means. There have been roadways through there, ever since I knew anything about that property, that were 20 passable.

Q Yes. A And the way in which this matter was done: At the beginning of each year the engineer made a recommendation to the chairman of the street committee as to what roads should be taken care of and what the road needed. This happened to be one of those roads that year. And about that time we received a complaint from the Post Office Department that those roads were impassable and if they were not 30 made passable, they would deliver no further mail in there.

Q When was that? A Well, that was the time it was done.

Q 1921, wasn't it? A No, no.

Q Now, when the Post Office Department—(interrupted).

(Q (By the Court.) Well, was it before 1921?

A Yes, sir; because I left there in 1921. 40

Joseph Tyms, direct.

Q (By the Court.) Well, about 1920? A I can't tell you. It was some time between 1916 and 1921. I have records which I will be very glad to produce.

Q They are all on the records? A They are on my private daily blotter.

10 Q Now, one of the things, you remember the Post Office Department protesting and the town doing nothing and Oeding being obliged to put in bridges in that street? A That I don't know anything about. That is after my time.

Q You don't know anything about that. Don't you know from your knowledge of what occurred in that street, even if it were after your time in office, what was done? A I do not.

20 Mr. Lane: Well, subject to the production of these records, to which the witness has referred, upon which his testimony seems to be based, I have no further questions to ask him.

JOSEPH TYMS, sworn for the defendants.

30 *Direct examination by Mr. Grosso.*

Q Where do you live, Mr. Tyms? A St. Cloud Place.

Q And do you own property on St. Cloud Place? A I do.

Q How long have you owned that property? A Seventeen years.

Q And do you live there at the property? A What is that?

40 Q Do you live at the property? A I do at the present time, yes.

Joseph Tyms, direct.

Q How long have you lived there? A Eleven years.

Q And who lived in your property prior to your occupying it? A Why, a man named Otts and another man named McCarthy.

Q Tenants of yours? A Yes, sir. 10

Q And just where is your house on St. Cloud Place with relation to Benvenue avenue and Northfield Road? A Why, it is the third house in from Benvenue and it is the second house in from Northfield avenue.

Q And how do you get in and out from Northfield Road or Benvenue to your house? A Why, there is a street runs through there, known as St. Cloud Place.

Q And you go in and out over St. Cloud Place? A Yes, sir. 20

Q And you have been doing that for how long? A Ever since I had the property there. I patrolled that street over thirty-three years ago as a police officer.

Q You did? A Yes, sir.

Q How long have those streets been in existence to your knowledge? A Oh, over forty-five years, to my knowledge.

Q You say you patrolled them for thirty-three years? A Yes, sir. 30

Q Were they in existence then? A Oh, yes.

Q There were streets there then at that time? A Yes, sir.

Q And do you recall a fence ever having been erected on part of St. Cloud Place? A There was during that time when I was a chance-man. I was doing work there on Sundays, but I have heard people talking about a fence being there. 40

Joseph Tymes, cross.

Q You never saw the fence yourself? A I never seen it there.

Q (By the Court.) Still up on Northfield Road? A Yes, sir; your Honor.

Q Have you any other means of getting in and out from your property, other than St. Cloud Place? A No, sir.

Q Do you recall a building which used to—do you recall whether a building ever stood on this strip of land which is bounded on either side by St. Cloud Place? A I do.

Q What kind of a building was it? A It was a one-story building used as a club house, used as a club house.

Q Who was it used by? A By the neighbors in that plot, in that park, and by the people in St. Cloud's; it was a public park.

Q And was the club house a public club house? A Yes, sir.

Q Do you know, is the building still in existence? A Yes; it is over at Eagle Rock at the present time.

Q Well, how did it get there? A Why, they moved it over to Mr. Schweinler's, where Mr. Schweinler's is now, and then it was moved over to Crystal Lake and Eagle Rock.

Q Well, who moved it over there? A I couldn't say.

Q That club house was used as a public club house and it stood in the center of this— A On the northern end.

Q On the northern end of the property? A Yes.

Cross examination by Mr. Lane.

Q When did you first become a chanceman? A 1891.

Joseph Tymes, cross.

Q And it was while you were a chanceman that you heard about this fence? A Oh, it was before that.

Q Well, how long before that? A Oh, years ago. I couldn't just—five or six years.

Q How old are you? A Fifty-nine.

Q You didn't see the fence yourself? A I did see one part of the fence there that was in front of the park. It was torn down.

Q The part in front of the park was torn down? A Yes, sir.

Q When? A Oh, that was some years ago.

Q How many years ago? A Well, I should judge over twenty years ago.

Q Well, can you tell me more definitely, more than that "over twenty years ago"? A Well, between twenty and twenty-one years probably.

Q What? A Between twenty and twenty-one.

Q How do you figure just between twenty and twenty-one? What significance has the twenty in your mind? A Well, about that time when Mr. Soper was alive.

Q Then you think that fence remained up there from the time it was originally built, which, as I understand, was some time in 1886 until 1905, about? A About that.

Q Is that your recollection? A That is my recollection.

Q Eh? A Yes.

Q Did you see it torn down? A No, I did not.

Q So you don't know who tore it down? A No. It went away in piece-meals.

Q Somebody needed wood, I suppose, and took some of the fence? A I suppose so.

Joseph Tyms, cross.

Q This house that you have referred to as a public club house, were you ever in it? A Yes, sir.

Q How did you come to be there? A Well, it was just passing through; the door was open and I went in there.

10 Q Anybody there when you were there? A No.

Q You never were there when anybody else was there? A No.

Q So the house was deserted whenever you were there? A The books and billiard table and everything, library was there. It was just prior to them moving it.

Q Oh, you say you saw it just prior to their moving it? A Yes; long before that.

20 Q And there was a pool table in there? A A billiard table.

Q A billiard table? A Yes, sir.

Q Billiard balls? A Yes, sir.

Q And books? A Books.

Q Library? A Yes.

Q You don't mean to say that was open to anybody in the public in the Town of West Orange to go in there and use? A It was private property.

30 Q It was private property? A Yes.

Q And it appeared to be private property in the way in which it was furnished didn't it? A Yes.

Q You wouldn't expect the public promiscuously to go in there and use the place, would you? A No.

40 Q So you don't quite mean what you said a few moments ago when you said it was a public club house, do you? A Well, the people there in St. Cloud used it as a public place.

Joseph Tyms, cross.

Q Used it as a public place? A Yes.

Q Everybody went in there to that billiard room? A It was open to the neighborhood.

Q And the library? A Oh, in the neighborhood, yes.

Q Do you know—when was it that you first saw that house there? A Oh, it must have been all of thirty, forty years ago. 10

Q Yes. Do you know when it was removed? A No; I had not—I was out of town after it was moved; it was over forty years ago when I— (interrupted).

Q You say you saw it just before it was removed? A Yes, sir. That was over forty years ago.

Q Yes. Well, it was removed about forty years ago, wasn't it? A Yes, sir. 20

Q What? A About that, I should judge.

Q Moved in 1888, wasn't it? A Somewhere around there.

Q Somewhere around there and then it was taken where? A Over on—I think Mr. Fuller owned the property, I am not sure, and then it was moved from there over to Crystal Lake.

Q And put on private property on Crystal Lake, wasn't it? A Yes.

Q Yes. Where it is now? A Yes. 30

Q Now, when you speak of the street that you pass over to get in and out Northfield avenue and Benvenue avenue, you mean this driveway on each side of this tract of land, don't you? A Yes, sir.

Q And when was it that you had a patrol which took you in that neighborhood? A It was on my post.

Q When? A Along about 1893, which I first went up there as a chanceman. 40

Joseph Tyms, cross.

Q 1893? A Yes, sir.

Q And you walked along these driveways? A I patrolled them driveways, yes.

Q And at that time you were living where? A I was living down in West Orange.

10 Q Were you paid by the private owners at that time for patrolling? A Paid by the town.

Q Were you ever paid by the private owners up around there for patrolling? A No, sir.

Mr. Lane: I think that is all.

Mr. Grosso: That is all.

Your Honor please, I subpoenaed another witness to be here this morning, the surveyor who made the survey of the property, but he has not come in and there are several other witnesses that I have not produced here for the reason that I did not expect to go into the proof of our title to the property, except I thought we were just going to try to the jurisdictional fact, but I have a certified copy of a deed here, which I would like to offer in evidence, a deed from William J. A. Miller to Charles A. Soper. There is only one deed offered in evidence, deed from the estate of Charles A. Soper to the complainant. I would like to offer this in evidence.

30 The Court: Any objection to it?

Mr. Lane: No; I cannot very well. Soper is our predecessor in title. Is that right?

Mr. Grosso: Your predecessor in title, yes.

Mr. Lane: That is all.

40 The Court: Now, do you want the privilege of calling other witnesses?

Discussion.

Mr. Grosso: I would like to have the privilege of calling two other witnesses, the main witness is Mr.—(interrupted).

The Court: Could you get him this afternoon?

Mr. Grosso: —Mr. Edward A. Pierson. 10 He is an old gentleman who must be in his eighties, and suffering from some sort of disorder that he cannot be out of his house for more than an hour at a time. I have to notify him a little bit in advance because it takes him about an hour to get dressed.

The Court: Why can't you take the testimony at his house?

Mr. Grosso: Well, I would like to have the privilege of taking the testimony at his house. He is a man who owns property in that neighborhood and he knows all about the conditions up there. And the other witness is a Mrs. Bunn, who conducted a school in this billiard room. 20

Mr. Lane: Where?

Mr. Grosso: In this billiard room, so-called billiard room.

The Court: Well, we cannot—can you get her down here this afternoon, do you think? 30

Mr. Grosso: I don't believe I can get her here this afternoon.

The Court: Well, we will have to set another day and, if this old gentleman is too feeble to go out, counsel can go up there, take Mr. Salmon up there.

Mr. Lane: I would like to understand just where we are at. Do you rest so far as the issue of jurisdiction is concerned? 40

Discussion.

Mr. Grosso: Yes.

Mr. Lane: Well, what was the testimony?

Mr. Grosso: These two witnesses I have are with relation to the issue of jurisdiction.

The Court: They are?

10 Mr. Lane: Then I really cannot see what the object is in—I do not know what excuse there is for not producing them now. Counsel said that he was here prepared to try the issue of jurisdiction.

20 The Court: That is true. However, I am not going to take any advantage of Mr. Grosso. If he wants to produce these witnesses, I am willing to give him a chance to do it, and if this old gentleman cannot get down here, why, you will have to go up to him, that is all, if you think it is important that he should testify. I suppose the testimony will be similar to—(interrupted).

30 Mr. Grosso: It will be similar testimony. I won't hesitate to state what I intend to prove by these two witnesses: That Edward A. Pierson owned a large tract of land in the vicinity and at one time he was considering purchasing this property. He knows of the existence of these streets and he knows of the scheme under which the property was laid out and that was one of his reasons for buying it, and the other witness, Mrs. Bunn, taught school in this club house. She had a little French school there for people in the neighborhood.

40 The Court: I think, perhaps Mr. Pierson's testimony might be important, but I don't know that it makes much difference whether this lady taught school in this shanty or not.

Discussion.

Well, now, when do you think you can go and get this man's testimony?

Mr. Grosso: We might be able to get—your Honor please, he is a man—I saw him personally and he is suffering with an internal disorder and it would probably take him an hour or more to get dressed. It may be just possible we can get him for this afternoon and then again we may not be able to get him here. 10

The Court: I think you ought to fix a certain date, because we are all of us busy and we cannot—I have got two cases more after this one and I suppose Mr. Salmon could go up there after 4 o'clock, couldn't you?

Mr. Salmon: If it doesn't take too long. 20

The Court: Have you got any conveyance?

Mr. Lane: I won't go up, unless it is on my way home.

The Court: If you have an automobile here you can go up to his house, start from here quarter after four, or 4 o'clock.

Mr. Glassner: It will be inconvenient to me to go after four because I have to get a brief in that I am working on now. I would rather put the witnesses on for a single date at which time we can question them, if it is agreeable to your Honor and to Mr. Grosso. 30

The Court: Well, you can work on your brief from now until 4 o'clock. I think we better take the man's testimony.

Mr. Glassner: I have got another case before your Honor this afternoon, Odenwalder v. Odenwalder, a divorce suit with a 40

Discussion.

cross petition and the case is going to take until 4 o'clock, if not afterwards.

The Court: Well, I don't know what we can do. I have tried to accommodate counsel.

10 Mr. Glassner: I appreciate it, your Honor, but there are only two more days until the ten days after the opening term and all briefs must be in.

Mr. Grosso: I will be willing to go there now, if it is agreeable to counsel and the stenographer.

Mr. Glassner: That will be agreeable.

Mr. Grosso: Then we can argue this right after the noon recess.

20 Mr. Lane: Counsel is resting on the whole case with these two witnesses?

Mr. Grosso: On jurisdictional facts.

The Court: Then have we got more witnesses besides these two?

Mr. Grosso: Yes, sir.

The Court: Well, then, I think we had better put this off until another day.

30 Mr. Lane: I thought your Honor had determined that the case was to be heard upon the whole subject.

The Court: Well, that is what I thought I had determined. I want to make myself clear in that matter. In the first place, when this case was tried I said that I didn't think there was such peaceable possession as would enable a bill to quiet title to lie, and then you and Mr. Glassner talked to me and I said I would think it over and he would present me a memorandum of the law, and I

40

Discussion.

concluded that I had jurisdiction and therefore I said the case would go on. That is what I meant to say. Now, if you still have witnesses, this matter will have to go over and be set down at a definite day, with an understanding it must be settled. It cannot go on this way indefinitely. There is no use of going to take Mr. Pierson's testimony now, if you still have some more after that. Mr. Salmon, you will set it down for another day. 10

Mr. Grosso: There are three tax bills which were omitted from those I handed the stenographer. I now hand them to the stenographer as part of the exhibit already admitted. 20

20

30

40

EXHIBIT C. 1.

Exhibit C. 1 on the re-hearing consists of a number of tax bills, all from the Town of West Orange, summarized as follows:

10 (a) Oct. 7, 1918, addressed to Wm. Wensley, Year 1914, Block 158, Lot 76, Tax \$18.40; Lot 79, Tax \$37.95. Marked "Paid Oct. 18, 1916, Collector."

(b) Addressed to Albert Oeding, Block 158-B, Lot 76 Ft. Front 100, Tax \$30.64. Marked "Paid June 5, 1925, Collector."

(c) Addressed to Albert Oeding, 1925, Lot 158-D, Lot 79 Ft. Front 80, Tax \$84.26. Marked "Paid June 5, 1925, Collector."

20 (d) Dated June 23, 1919, addressed to Wm. Wensley, Year 1917, Block 158, Lot 76, Tax \$17.76. Marked "Paid June 23, 1919, Collector."

(e) Dated Jan. 13, 1916, addressed to Wm. S. Wensley, Year 1913, Block 158, Lot 76, Tax \$18.08; Lot 79, Tax \$37.29. Marked "Paid, Collector."

30 (f) Addressed to Albert Oeding, Year 1922, Block 158-B, Lot 76, Ft. Front 100, Value of Land, \$800.00, Tax \$35.92. Marked "Paid first half May 11, 1922; second half Dec. 4, 1922, Collector."

(g) Dated Dec. 3, 1919, Year 1919, Block 158, Lot 76, Second half \$12.56; Block 158, Lot 79, Second half tax \$26.69. Marked "Paid Dec. 5, 1919, Collector."

40 (h) Year 1923, Block 158-B, Lot 76, addressed to Albert Oeding, Land \$800.00, 100 Feet Front,

Exhibit C. 1.

Tax \$32.24. Marked "Paid May 29, 1923, Collector."

(i) Tax 1921, addressed to Albert Oeding, Block 158-D, Lot 79, Feet Front 80, Value of Land \$450.00, Value of Building \$1350.00, Tax \$75.70. Marked "Paid Dec. 1, 1921, Collector." 10

(j) Tax 1922, addressed to Albert Oeding, Block 158-D, Lot 79, Feet Front 80, Tax \$95.29. Marked "1st half paid May 11, 1922; second half paid Dec. 4, 1922, Collector."

(k) Tax 1923, addressed to Albert Oeding, Block 158-D, lot 79, Feet Front 80, Tax \$85.63. Marked "Paid May 29, 1923, Collector."

(l) Tax 1901, addressed to Chas. Soper, Block 158, Lot 79, Tax \$26.80. Marked "Paid Aug. 5, 1903, Collector." 20

(m) Tax 1920, addressed to Albert Oeding, Block 158-D, Lot 79, Feet Front 80, Tax \$62.54. Marked "First half paid June 8, 1920; second half paid Feb. 21, 1921, Collector."

(n) Taxes 1921, addressed to Albert Oeding, Block 158-B, Lot 76, Tax \$33.20. Marked "First half paid June 6, 1921; second half paid Dec. 1, 1921, Collector." 30

(o) Taxes 1920, addressed to Albert Oeding, Block 158-B, Lot 76, Feet Front 100, Tax \$28.96. Marked "First half paid June 8, 1920; second half paid Feb. 14, 1921, Collector." 40

W. BRADFORD SMITH
 COUNSELLOR AT LAW
 UNION BUILDING
 9-18 CLINTON ST.

NEWARK, N. J.

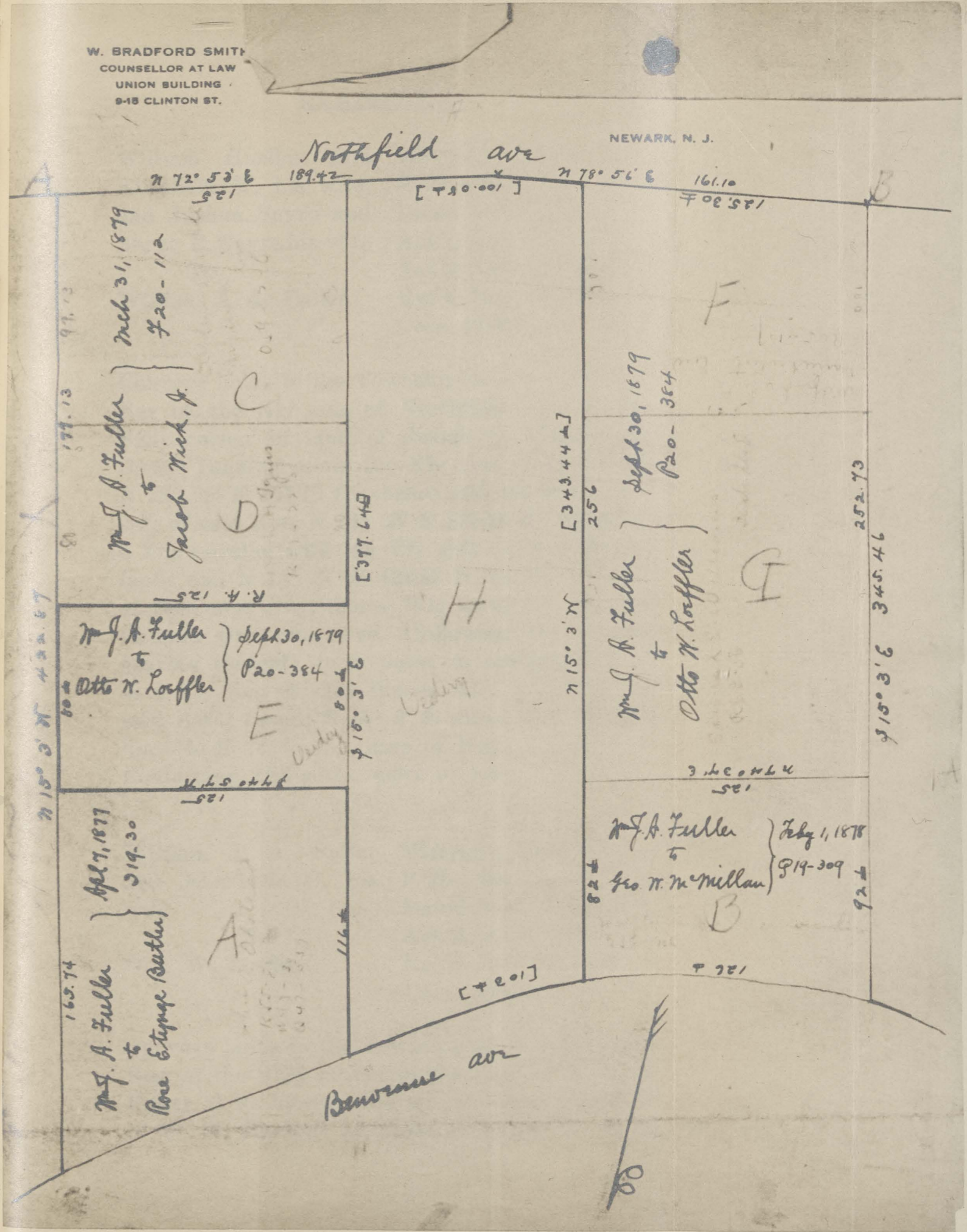


EXHIBIT C. 2.

| | | |
|-------------------------|---------------------|----|
| William Hurlbut and | Warranty Deed | |
| Elizabeth W. his wife, | W 17—575 | |
| and Joshua Sayre and | Dated Nov. 20, 1874 | |
| Sarah E. Sayre his wife | Ack'd Nov. 23, 1874 | |
| To | Ack'd Nov. 24, 1874 | 10 |
| William J. A. Fuller | Rec'd Dec. 10, 1874 | |
| | Cons. \$2962 | |

Conveys lands in the Township of West Orange:
 Beg on the Nly side of Northfield Ave. at the
 SEly corner of land of Josiah O. Ward; and
 thence running along the Nly side of said Ave.
 N 78° 56' E 161.10 ft; thence still along the Nly
 side of said Ave. N 72° 53' E 189.42 ft; thence in
 a line parallel with the Ely side of said Wards
 lands and N 15° 3' W 422.87 ft. to the Sly line
 of Benvenue Ave; thence Wly along the Sly line
 of said Benvenue Ave. (following the several
 courses thereof) to a point in continuation of
 said Ely line of said Wards land protracted to
 said Ave.; thence S 15° 3' E along said Ward's
 line 345.46 ft. to the place of Beg.
 Containing 2.96 acres, more or less.

| | | |
|----------------------|----------------------|----|
| William J. A. Fuller | Warranty Deed | 30 |
| and Elizabeth C. his | P 20—384 | |
| wife | Dated Sept. 30, 1879 | |
| To | Ack'd Oct. 6, 1879 | |
| Otto W. Loeffler | Rec'd Jan. 24, 1880 | |
| | Cons. \$6000 | |

Conveys lands in the Township of West Orange:
 Beg. at the SEly corner of the land of W. J. A.
 Fuller at its intersection with the land formerly
 of W. W. Hurlbut (deceased); thence Sly along

Exhibit C. 2.

the Wly line of said Hurlbut's land S 15° 3' E 80 ft, more or less, to the Nly line of land (formerly) of Jacob Wicke, Jr.; thence Wly along the said Nly line of said Wicke's land S 74° 57' W 125 ft; thence parallel with the first mentioned line N 15° 3' W 80 ft, more or less, to the Sly line of said Fullers land; thence Ely along said Sly line of said Fullers land N 74° 57' E 125 ft. to the place of Beg.

10
 Otto W. Loeffler and Rose his wife
 To Alexander T. Compton
 Warranty Deed
 Y 20—162
 Dated Dec. 3, 1880
 Ack'd Dec. 7, 1880
 Rec'd Dec. 13, 1880
 Cons. \$5000 &c.

Conveys lands in the Township of West Orange, same as described in P 20—384 and another tract.

Subject to four mortgages in R 7—255 to 264 (all discharged)

30
 Alexander T. Compton and Mary E. his wife
 To Stafford P. Cruikshank
 Bargain and Sale Deed
 S 21—460
 Dated Dec. 20, 1882
 Ack'd Dec. 23, 1882
 Rec'd Dec. 27, 1882
 Cons. \$1.

Conveys lands in the Township of West Orange. First Tract same as in P 20—384.

Exhibit C. 2.

Stafford P. Cruikshank
 To Justus C. Hall
 Warranty Deed
 Y 21—330
 Dated July 7, 1883
 Ack'd July 7, 1883
 Rec'd July 19, 1883
 Cons. \$6125. 10

Conveys lands in the Township of West Orange. First Tract same as in P 20—384.

Justus C. Hall and Mary Catherine his wife
 To Charles A. Egbers
 Warranty Deed
 C 22—186
 Dated Dec. 21, 1883
 Ack'd Dec. 29, 1883
 Rec'd Jan. 7, 1884
 Cons. \$4500 20

Conveys lands in the Township of West Orange. First Tract same as in P 20—384.

Charles A. Egbers
 To Pierce J. Murphy
 Quit Claim Deed
 D 22—310
 Dated Feb. 25, 1884
 Ack'd Feb. 25, 1884
 Rec'd Mch. 4, 1884
 Cons. \$1. 30

Quit claims lands in the Township of West Orange. First Tract same as in P 20—384.

Exhibit C. 2.

Leon Abbett, Daniel F. Bargain and Sale Deed
 Appleton and Freder- G 27—314
 ick H. Man, as execu- Dated Dec. 12, 1892
 tors and trustees under Ack'd Dec. 14, 1892
 the will of Wm. J. A. Rec'd Dec. 17, 1892
 Fuller, dec'd. Cons. \$350.

10 To
 Charles A. Soper

Deed for all the right and interest of the said
 William J. A. Fuller at the time of his death to
 lands in West Orange:
 Beg. in the Nly line of Northfield Ave. at its
 intersection by the Wly line of the premises con-
 veyed by William J. A. Fuller and wife to Jacob
 Wick, Jr. by deed dated Mch. 31, 1879 and re-
 20 corded in the office of the Register of said County
 in Book F 20 of deeds at page 112; running
 thence N 15° 3' W along said Wly line of said
 premises and the Wly lines of premises conveyed
 by said William J. A. Fuller and wife to Otto
 W. Loeffler and to Rose Eytinge Butler respec-
 tively by two deeds dated respectively Sept. 30,
 1879 and April 7, 1877, and respectively recorded
 in said Registers office in Book P 20 of deeds at
 page 384 and Book I 19 of deeds at page 30, to
 30 the Sly line of Benvenue Ave; thence running
 Wly along said Sly line of Benvenue Ave. fol-
 lowing the several courses thereof to the inter-
 section of said Sly line of Benvenue Ave. by the
 Ely line of the premises conveyed by said Wil-
 liam J. A. Fuller and wife to George W. Mac-
 Millan by deed dated Feb. 1, 1878 and recorded
 in said Registers office in Book Q 19 of deeds at
 page 309; thence S 15° 3' E along said Ely line
 and the Ely line of premises also conveyed by
 said William J. A. Fuller and wife to said Otto

40

Exhibit C. 2.

W. Loeffler by said deed dated Sept. 30, 1879 and
 recorded in the said Registers office in Book P 20
 of deeds at page 384 as aforesaid to the Nly line
 of Northfield Ave; and thence Ely along said
 Nly line of Northfield Ave., following the several
 courses thereof to the place of Beg. Being part
 of the premises conveyed to the said William J. 10
 A. Fuller by deed in W 17—575, and the inten-
 tion of this deed being to convey to the said
 party of the second part all the remaining right,
 title and interest of the said William J. A. Fuller
 to and in said last-mentioned premises that he
 had at the time of his death.

Estate of Charles A. Docket 695 F 20
 Soper, deceased, who Wm. S. Wensley
 died Sept. 18, 1895. appointed
 administrator;
 Letters
 Dated Jan. 18, 1897

Sworn application for probate, Book 7—598, show
 the next of kin and heirs at law to be:
 Hannah T. Soper widow
 Julia F. Lemke daughter 30
 Alfaretta M. Soper “
 Charles A. Soper son
 Isabelle Wensley daughter
 Wm. G. Soper son
 Adele Hartmann granddaughter
 Helen Hartmann “

Exhibit C. 2.

10 Julia F. Lemke, widow, Bargain and Sale Deed
 Alfaretta M. Soper, sin- F 34—534
 gle, Isabel Wensley and Dated Apl. 13, 1901
 Wm. S. Wensley her Ack'd Apl. 13, 1901
 husband, Charles A. Ack'd May 10, 1901
 Soper and Mattie F. his Ack'd May 13, 1901
 wife, Wm. G. Soper and Rec'd May 18, 1901
 Agnes M. his wife, heirs Cons. \$1, &c
 of Charles A. Soper,
 deceased,

To
 Hannah T. Soper,
 widow of Charles A.
 Soper, deceased

20 Deed for all the right, title and interest of the
 party of the first part in and to lands in the
 Town of West Orange.

The First Tract, same as in P 20—384.

30 The Second Tract: Beg. in the Nly line of North-
 field Ave. at its intersection with the Wly line of
 premises conveyed by William J. A. Fuller and
 wife by deed in F 20 page 112 to Jacob Wick,
 Jr; thence N 15° 3' W 377.64 ft., more or less, to
 the Sly line of Benvenue Ave; thence Wly along
 said Sly line of Benvenue Ave. following the
 several courses thereof 103 ft, more or less, to
 the Ely line of premises conveyed by William J.
 A. Fuller and wife to George W. MacMillan by
 deed in Q 19—309, recorded in said Registers
 office; thence S 15° 3' E. 343.44 ft., more or less,
 to said Nly line of Northfield Ave; thence Ely
 along same following the several courses thereof
 100.08/100 ft, more or less, to the place of Beg.
 Being the same premises described in G 27—314.

Exhibit C. 2.

Will of Hannah T. Docket 612 T U 3—481
 Soper, who died Oct. Dated Mch. 15, 1898
 31, 1905 Probated Apl. 17, 1898

1. Orders debts and funeral expenses paid.
2. Orders that headstone and marker be erected
 at grave. 10
3. Orders that family monument costing not
 less than \$200 be erected on the family burial
 plot.
4. Gives wardrobe to daughters Julia Soper
 Lemke, Belle Soper Wensley and Alfaretta Soper.
5. Directs that household furniture, bric-a-brac,
 dishes &c be kept together as long as children
 retain the home, &c
6. Gives certain specific articles of furniture to
 daughter Julia Soper Lemke 20

Gives other specific articles to daughter Belle
 Soper Wensley.

Gives other specific articles to daughter Alfar-
 etta Soper.

Gives other specific articles to son Charles A.
 Soper.

Gives other specific articles to son Wm. G.
 Soper.

30 Gives \$25 each to granddaughters Adele Hart-
 mann and Helen Hartmann, children of her de-
 ceased daughter Aimee Soper Hartmann, to be
 deposited by executor in a savings bank and paid
 at marriage or when 18 years of age.

Gives residue of furniture to daughter Alfar-
 etta and son William.

Gives an old tea set to son William and daugh-
 ters Julia, Belle and Alfaretta.

Exhibit C. 2.

7. Gives executors notes and accounts against son Charles A. Soper or any other person, to be collected and turned into residuary fund.

10 Gives and devises to executors all her lands, lots and buildings, all at St. Cloud, West Orange, N. J., to be held, leased, improved, or sold, as they may think best for the interest of the residuary fund, and authorizes them to make any contracts, lease or deed, &c.

Gives and devises to executors claim against sister for equity in home and lot in St. Cloud, West Orange, N. J., legal title to which is in her name, but purchased with a fund to which testatrix and her husband contributed, &c.

20 8. "I order and direct that after my debts and funeral expenses have been paid, my headstone and family monument erected and paid for, that any sum arising from the collection, improvement, sale, or settlement of the above-mentioned assets, be equally divided between my children Charles, William, Alfaretta, Belle and Julia."

9. The share of any deceased child to go to survivors and not to heirs.

30 10. If all her children be deceased, all the property to be collected into a trust fund for the benefit of the children of her sons and daughters, Charles, Williams, Alfaretta, Julia and Belle, and paid to them, males at 21 years and females at 18 years, &c.

11. Appoints son William and daughter Julia executors. Julia F. Lemke only qualified as executor Apl. 17, 1906

Exhibit C. 2.

The sworn application for probate, Book 19—325, shows the next of kin and heirs at law to be:

Charles A. Soper son.
 Alfaretta Soper daughter
 Belle Wensley "
 William G. Soper son 10
 Julia F. Lemke daughter
 Helen Hartmann } grandchildren
 Adele Hartmann }

Charles A. Soper and Warrantly Deed
 Martha F. his wife and A 42—510
 William G. Soper and Dated Mch. 14, 1907
 Agnes M. his wife Ack'd Mch. 22, 1907
 To Ack'd Mch. 26, 1907 20
 Alfaretta M. Soper Ack'd Mch. 30, 1907
 Rec'd June 18, 1907
 Cons. \$1, &c

Deed for all the right, title and interest of the party of the first part in lands in the Township of West Orange, same as described in G 27—314 and X 22—584.

Alfaretta M. Soper, un- Warrantly Deed
 married, E 41—493
 To Dated June 18, 1907
 William S. Wensley Ack'd June 18, 1907
 Rec'd June 20, 1907
 Cons. \$1, &c

Deed for one undivided sixth part, share or interest in premises in the Township of West Orange, same as in G 27—314 and X22—584. 40

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Simeon H. Rollinson, direct.

IN CHANCERY OF NEW JERSEY.

February 15, 1926.

Between

ALBERT OEDING,

Complainant,

and

JOSEPHINE N. SCHWEINLER,

Defendant.

10

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Richard M. Glassner (by Merritt Lane), for complainant; Alfred J. Grosso, Esq., for defendant.

20

SIMEON H. ROLLINSON, sworn for the defendant.

Direct examination by Mr. Grosso.

Q Mr. Rollinson, where do you live? A West Orange, New Jersey. 30

Q How long have you lived there? A Fifty-five years.

Q Are you Mayor of West Orange at the present time? A I am.

Q How long have you been Mayor? A Why, under the present form of government, nearly four years. Previous to that I was chairman of the Township Committee and councilman at large for several years. 40

Simeon H. Rollinson, direct.

Q When were you chairman of the Township Committee? A In—I was elected to the Township Committee in 1893, as I recollect it, and was chairman in 1894.

Q Do you know where St. Cloud place is in West Orange? A I do.

10 Q Are you familiar with that property? A Reasonably so.

Q Did you know Benjamin F. Small? A Married his daughter; he is dead now.

Q What do you know of the property up at St. Cloud Place, if anything? A Why, in a general sort of way, I know that years ago, when I was a small boy, that these two streets were cut through there, leaving a space in between on which there was a building. I have never been inside of the building, but it was a clubhouse, or intended for music or billiards, or something of the sort. As I say, I have never been inside of it. I don't know what was in there. I know the space between those two roads.

20 Q Did Benjamin F. Small have anything to do with that development? A That I personally know nothing about. I know that in my wife's family that he was supposed to have a financial interest. The title, I believe, stood in the name of Fuller, but he was financially interested in that development.

30 Q Do you know anything of the nature of the development? A The building of the houses on either side of these two streets, the houses are built on one side of one street, and then all open on the other, and a space in the middle was left open and was supposed to be a park.

40 Q During your time as chairman of the Township Committee, do you know whether the streets were considered to be public streets?

Frederick M. Hoffman, direct.

Mr. Lane: I object to that.

The Court: Yes; I think that is a matter of proof by the record of the town.

Q Were the streets ever improved, to your knowledge, by the Township Committee? A Not that I can remember. I had nothing to do with the work on streets; it did not fall within my department; I don't know. 10

Q Have you ever used the streets yourself? A Been through them?

Q Yes. A Oh, I presume so, yes, time and again.

(Cross examination waived.)

20

FREDERICK M. HOFFMAN, sworn for the defendant.

Direct examination by Mr. Grosso.

Q Mr. Hoffman, where do you reside? A In Livingston, now.

Q Did you ever live in West Orange? A Yes.

Q For how long? A Oh, five or six years. 30

Q When did you live in West Orange? A Well, I lived there previous to the spring of 1874.

Q What section of West Orange did you live in? A Well, it is on the Northfield Road near the Rock Spring.

Q Do you know where St. Cloud Place is in West Orange? A Yes, sir.

Q What is your business, Mr. Hoffman? A Builder. 40

Frederick M. Hoffman, direct.

Q Did you ever conduct any building operations in St. Cloud? A I did.

Q On St. Cloud Place? A Yes.

Q What were the nature of those building operations? A I had a contract of enclosing eight buildings on St. Cloud Place.

10 Q For whom? A Well, it was—at the time it was represented as Judge Fuller's, but B. F. Hall acting as agent. My contract and everything, and my pay, was all received through Mr. Small.

Q Your contracts were with Mr. Small? A Yes.

Q Did you know the property before the houses were built? A Yes, sir.

20 Q What was the character of the property at that time? A Well, it was—previous to that it was woods, it was rough ground.

Q Well, just tell the Court what was the nature of the development which took place there, to your knowledge? A Well, Mr. Small had a strip cleaned off there, and had two roads built with a piece of ground in between the two roads, and erected those two rows of houses.

30 Q Did you ever talk with him about the development? A Anything further, in talking about it, he said it was intended—(interrupted).

Mr. Lane: I object, your Honor, to conversation between this witness and Small.

The Court: Why?

Mr. Lane: Because Small is not a party to this record at all, he is not a predecessor in our title in any manner, shape or form.

Mr. Grosso: The testimony is, he was acting as agent and he supervised this development.

40

Frederick M. Hoffman, direct.

Mr. Lane: That is based on Small's own statements, proving agency by the—(interrupted).

The Court: That is true. I do not think I can receive that.

10 Q Well, just what work was done there, and what you saw. A Well, there was two roads built, each side of this piece of green strip of ground, and the two rows of houses built, and on the center between half way there was a—I put up a building, which Mr. Small said was to be a clubhouse or a community house for the use of all eight buildings—eight families.

Mr. Lane: I move to strike out what Mr. Small said.

20 The Court: Yes; strike out what Mr. Small said.

Q Do you know whether there were any signs erected on the premises? A Yes, sir.

Q Where and what were the nature of the signs? A On the west end there was a sign up, fastened on a permanent post and called Benvenue Park.

Q It said "Benvenue Park" on it? A Yes. 30

Q Have you ever used the streets in question? A Well, only while I was doing that building work there; we used both streets.

Q Have you had occasion to go back and forth since then by the property? A Only once, to my recollection.

Q Well, do you ever go through Northfield Road or Benvenue avenue? A Yes, sir; quite often.

Q Have you ever known of the streets to be closed? A No, sir. 40

Frederick M. Hoffman, cross.

Q The streets that were opened then are the same streets that are there now? A Yes, sir.

Q And that was in 1874, you say? A 1874, in the winter of 1874 and 1875.

10 Q Do you remember how wide the streets were? A Well, not—I never measured them. I should judge, from twelve to fourteen feet wide, the roadway. I am not certain about that because I never measured them.

Cross examination by Mr. Lane.

Q When you say the streets were opened, what do you mean? What was done? A Well, the streets were graded, they were worked up; they were a dirt road, but they were graded up.

20 Q What grading was done? A What is that?

Q What grading was done? A Well, the roads was graded up and formed up, rounded up, and smooth.

Q Well, have you been there recently? A Not through it, no, sir.

30 Q How long ago has it been since you have seen it? A Well, that is something that I couldn't tell exactly how long ago it was since I have been through there. It has been some time.

Q Well, about how long ago was it that you were through there? A Well, I couldn't say. I went through there once to go up to Mr. Riddel's house, and I went up the street on the north side, but that must be—oh, I couldn't say—fifteen or twenty years ago.

40 Q How can you say that the streets that are there now are the same streets that were there then? A Well, because I see them every time I go by.

Guy Barker, direct.

Q Do you see them? A Yes, sir.

Q Do you see the grading there now, do you see the streets graded? A Well, that I have never taken any particular notice.

Q Don't you know there is nothing there except wagon tracks? A What is that?

10 Q Don't you know there is nothing there except wagon tracks? A I do not, because I have not taken notice enough of it to say; only I know the streets are passable, because I have seen wagons and cars going over them.

Q Yes. When you were there, right at the junction of the street with this main thoroughfare, whatever name it is, didn't you see that there was nothing but a wagon track leading off of the main road? A I didn't take any particular notice of it, no, sir; I couldn't say that I did. 20

GUY BARKER, sworn for the defendant.

Direct examination by Mr. Grosso.

Q Mr. Barker, where do you live? A In Walker Road.

Q West Orange? A Yes.

30 Q And did you ever live on St. Cloud Place? A Yes, sir.

Q How long ago? A I lived there from 1901 to 1919, nineteen years, or—1920, I meant to say.

Q And did you live in that vicinity prior to that? A Yes, I lived over in Ridgeway avenue.

Q Ridgeway avenue, how long did you live on Ridgeway avenue? A Sixteen years.

40 Q Sixteen years, and you are familiar with that property, are you? A Yes, sir.

Guy Barker, direct.

Q Have you ever used the roads? A Used them for a good many years, yes.

Q What are the nature of the roads? A The road on each side of the houses, the road on this side for four houses, and road on the other side for four houses.

10 Q Are you familiar with the center portion?

A Yes, sir.

Q Did you ever use it? A Yes.

Q What did you use it for? A We had a garden there one year, we had a garden on it, and played ball on it, and things like that, and pastured a cow on it.

Q Have you ever seen the roads closed off? A Once.

20 Q When was that? A It must be—I couldn't tell just when, about thirty or thirty-one years ago.

Q How were they closed off? A Down on Benvenue avenue they had a picket fence, you know, in between, that is, on the green, and up this way they had one up there and the other was closed with ribbon wire.

Q Who erected the fence? A Soper.

30 Q Mr. Soper? How long did the fence remain there? A It remained there only a little while. Mrs. Williams—Harry took it down.

Q Harry who? A Harry Williams just cut the wire so you could get through.

Q Were the streets ever closed off again, to your knowledge? A No, sir.

Q Did you ever have a mail box in front of your house? A Yes, sir.

Q Standing outside of your fence line? A Yes, sir.

40 Q Did anyone ever object to your having a mail box there? A No, sir.

Guy Barker, direct.

Q Did other property owners along the street have mail boxes, to your knowledge? A Yes, sir.

Q And did you ever see people use the streets? A Yes, sir.

Q Often? A Every day. I used to use it myself, and everybody else who had to go through there.

10 Q Have you ever seen delivery wagons go through? A Sure, butchers and bakers and everybody else go through.

Q Is there any other way of getting to the main highway from the inside houses except through the use of these streets? A No, sir.

Q Do people walk over the street or is there a sidewalk there? A No; no sidewalk.

20 Q Well, is there any sort of pathway or anything? A It is a regular roadway, it is passable; the town fixed it twice while we were there, put cinders on it.

Q And when did they do that, if you know? A No; I couldn't tell you just about when. It was about—I should think it was about—the first time, I think, was about seventeen or eighteen years ago. Then, when Winston and Freeman was there, they put it on the other side.

30 Q Did you ever see any water pipe laid there? A Yes; over on the right side, over on Riddel's side, because we had water over across the way from it.

Q How long ago were the pipes laid there? A I should judge—I don't know just when—about seventeen years ago.

Q And where were the pipes laid with respect to the road? A They just laid up on the side, right close to the sidewalk line, they laid about eight feet of the sidewalk line.

40 Q In the road itself? A Yes, in the road itself.

Guy Barker, cross.

Cross examination by Mr. Lane.

Q Mr. Barker, when was it that you had a garden on this center piece? A It was the second year we went over there. It was about 1903.

10 Q Did you see anybody before you put your garden there? A No; there was an agreement when we went to the place—Mrs. Van Tyle, we rented the place.

Q Who from? A Mrs. Van Tyle, and there was the agreement, she said.

Q Never mind that. Did you see anybody before you—(interrupted). A No; we did not; there was the agreement when we hired the house.

20 Q Will you answer my question a little more directly? You did not see anybody? A No.

Q Who was the owner of your house? A Mrs. Van Tyle.

Q And you were the lessee, you leased it? A My mother did. I did not.

Q And for a period of twenty years? A Yes.

Q How many houses were there on the left side of the street? A There were four.

Q Northfield avenue? A Four.

Q How many on the right side? A Four.

30 Q Did anybody else have a garden there at the same time, do you recollect? A Yes.

Q Who? A Bohsen, on the other side.

Q What was his name? A Bohsen.

Q B-o— A B-o-h-s-e-n, he had half on his side and we had half on our side.

Q I didn't hear—you testified something about the town putting cinders on the road. A Yes.

40 Q Do you know it was the town that did it? A Yes.

George Hubert, direct.

Q How do you know? A Because I knew some of the men that worked there and I knew the foreman that worked there.

Q Is that the only way you knew it was the town who did it? A They got ashes over at Brown's.

10 Q Is that the only way you knew the town was the individual that put the ashes on the road? A Sure; the road foreman was there and I knew it was the town doing it.

Mr. Lane: That is all.

GEORGE HUBERT, sworn for the defendant.

Direct examination by Mr. Grosso. 20

Q Mr. Hubert, where do you live? A Northfield Road.

Q West Orange? A West Orange.

Q How long have you lived there? A Forty-two years.

Q And where is your house; is your house near St. Cloud Place? A Yes, sir.

Q You know St. Cloud Place? A Yes.

Q Have you ever used it? A Yes, sir. 30

Q Do you remember when it was opened or was that before your time? A It was before my time it was opened.

Q And what was the nature of the property there at St. Cloud Place? A Well, there is a road on each side of a big piece of land, about one hundred feet wide, I should judge, something like that; it was green when I was a boy, and a road on each side in front of the houses, there was a regular park in front of the houses. 40

George Hubert, direct.

Q And have you ever used the road? A Yes, sir; used the center, playing ball on it.

Q Did anybody ever stop you? A No, sir.

Q Do you remember whether the streets were ever closed off? A Once.

10 Q Now, when was that? A Well, it was sometime, Mr. Soper lived there—it was just before Mr. Soper died that he took the picket fence from the front of his house and put it down at Benvenue avenue and he closed the upper end in with a wire fence.

Q What became of the wire fence? A Well, it was up one night, I think, and it was open the next morning. All I remember it up was one night.

20 Q Do you know who took it down? A No, sir.

Q But it was taken down? A Yes, sir.

Q Was any attempt ever made after that to put a fence up? A Not to my knowledge. I never saw one up.

Q Have you ever seen delivery wagons go through these streets? A Yes; been on them.

Q Been on delivery wagons? A Twenty-five years ago.

30 Q Often? A Yes; once a week pretty near. Mr. Ziegler delivered groceries on that street, I guess, thirty years ago, an uncle of mine.

Q And have you ever known of these streets being improved by anyone? A Yes.

Q By whom were they improved? A I think the town carted ashes on them several times.

Q What were the nature of the improvements? A Well, they put stones and ashes in it.

40 Q Did they do anything else with them, lay any sidewalks? A No sidewalks.

George Hubert, cross.

Q Did you ever know of water mains being laid in the property? A Yes, sir.

Q Did you see them laid? A I didn't see them laid, no; but I seen them when the pipes were there and the men working there. I never was there when they were working there at it.

10 Q What about the center tract between the roads, have you ever seen that used by anyone? A Yes, sir.

Q By whom and for what purpose? A Well, every one had gardens in it, Mr. Bohsen had a garden in it for a long while. He lived where Mr. Riddel owns that property now, on the other side.

20 Q Did you ever see anyone else use the center portion of the garden? A Yes; I seen the Williams use it.

Q And did you ever see it used for pasturing? A Yes; Bohsen and Barker had cows out there, staked out on it.

Q How frequently were cows left pasturing out on that center portion? A Well, I don't know about that. They put them out lots of times. They put them out and leave them out there all day.

30 Q Was that just during one year or over a period of years? A Oh, I guess Bohsen done it for five or six years, when he lived there on the corner.

Cross examination by Mr. Lane.

Q Now, how many years did you see Barker have a garden there? A Two or three years, to my knowledge.

40 Q You are sure you saw him have one there for more than a year? A Yes, sir.

Joseph Sulpy, direct.

Q You did not have a garden there yourself, did you? A No, sir; I lived down the street from it.

Q The part of the fence that was taken down was part of the fence which closed up the roadways, wasn't it? A Yes, sir.

10 Q On the Northfield Road side.

Mr. Lane: That is all.

Re-direct examination by Mr. Grosso.

Q Is there any fence of any kind there now? A No, sir.

20 JOSEPH SULPY, sworn for the defendant.

Direct examination by Mr. Grosso.

Q Where do you live, Mr. Sulpy? A I live in Roseland just now.

Q Did you ever live in West Orange? A I did.

Q And when and for how long? A I lived in West Orange from 1909 to 1921.

30 Q Whereabouts in West Orange? A St. Cloud Place.

Q With whom did you reside? A Mr. Riddel.

Q And you are familiar with the character of the roads known as St. Cloud Place? A I am.

Q What do they consist of? A Well, there is a stretch of flat land about one hundred feet wide, I should judge, about two hundred foot, two or three hundred foot deep and there is a road

40

Joseph Sulpy, direct.

on each side of it and there is a cinder path out in front of each house.

Q In addition to the road there is a cinder path? A In addition to the road.

Q And what is that cinder path used for? A For sidewalks.

Q And are there any fences along on the side lines? A There is on the building property.

Q On the building line? A There is.

Q There is fences? A There is fences there.

Q And did you ever use the roads while you were there? A I did. I used to drive a bus for the Town of West Orange quite often, every day I used to come through those roads with the bus.

Q And have you ever heard of anyone being stopped in using these roads? A Never.

Q Were you ever stopped by anyone? A Never.

Q Have you ever seen fences there? A Never did.

Q To close off the roads? A Never did.

Q Or to close off the center portion? A Well, I did on the center portion but never on the roads.

Q Did Mr. Riddel ever have a garden in the center portion, do you know? A No; he did not.

Q Did you ever see any garden? A I did.

Q Whose gardens were they? A Mr. Barker's.

Q And did you ever see anybody pasture any cows there? A I did.

Q Who? A Mrs. Barker's.

Q Anyone else? A That was all that I know of.

10

20

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Joseph Sulpy, cross.

Q How many houses are there on the property? A There is four on the right side and four on the left.

Q And have the owners of the respective houses mail boxes? A They have mail boxes; yes, sir.

10 Q And where are they with relation to the property line? A They are opposite the road, right in front of the houses, opposite the sidewalk line.

Cross examination by Mr. Lane.

Q I understand that you drove your bus over this land? A I did.

20 Q To get to where? A To get to my place from the new Northfield Road.

Q To get to your house? A To get to my house.

Q Well, how far from Northfield Road was your house? A About three hundred feet.

30 Q Well, isn't the Riddel property on the corner? A The Riddel property is on the corner, but my run was on the opposite corner and I used to go through there so I didn't have to go all the way around the block, about a quarter of a mile around, to get to Riddel's house from that road which was only three hundred feet from new Northfield Road.

Q Is the new Northfield Road the road you call Benvenue avenue? A I guess it is Benvenue avenue.

Q Now, I don't just understand that. Does not Benvenue avenue run into Northfield avenue? A It does down at the corner.

40 Q Yes. A (Continuing.) Of Bevenue avenue and Northfield Road, but that is quite a distance away.

Charles A. Winston, direct.

Q Yes. (A (Continuing.) My route was on Benvenue avenue and when I used to run from my route and I had some passengers on, I would stop right at the corner of St. Cloud Place and pull right up to the driveway, which was about three hundred feet. If I wasn't allowed to go through there, I would have to go a quarter of a mile all around St. Cloud to get to my place. 10

Q And the time that you went there, the time that you went over this driveway, was when you went home to lunch, wasn't it? A Home to lunch and had a school trip, two school trips, in the morning and the afternoon.

Q When was it that you stopped driving? A I stopped driving in 1919—1920.

Q And how old are you? A I am twenty-seven—twenty-eight years old. 20

Mr. Lane: That is all.

CHARLES A. WINSTON, sworn for the defendant.

Direct examination by Mr. Grosso.

Q When you testified before, you were asked to produce, if possible, your records to substantiate the fact that the town performed work on St. Cloud Place. Have you those records with you? A I have. 30

Q Will you produce them? A (Witness does as requested.)

Q Now, will you turn to the record before you? Whose record is that, Mr. Winston? A That is my personal record of work performed as engineer of the town. 40

Charles A. Winston, cross.

Q And will you turn to your record and tell us what work was performed there by you as engineer for the Town of West Orange? A On June 9th—

The Court: What year?

10

The Witness: 1917.

The Court: Yes, June 9th, 1917.

The Witness: June 9th, 11th and 12th, I had some work on those streets, grading them up with ashes.

Q June 9th, 11th and 12th? A Yes.

Q You graded them up, you say? A Yes, sir.

Q With ashes. Did you do any other work? Do your records show that any other work was done? A No; I do not find any record of having done anything else at any other time there.

20

Q Do you know whether, in addition to the roads, there are also cinder paths? A I think, I wouldn't be absolutely positive of that, but I think so. I think there is a cinder path on either side, that is my recollection.

Mr. Grosso: That is all.

30

Cross examination by Mr. Lane.

Q Will you let me see your record? A (Witness does as requested.)

Q This is "three men and one team, ashes, St. Cloud Place, thirteen dollars and a half." What is the significance of the thirteen dollars and a half? A That is the cost.

Q Was that paid for by the town? A Absolutely.

40

Charles A. Winston, cross.

Q June 12th? A The same thing.

Q "Three men and one team, ashes, St. Cloud Place, fourteen dollars and a half." Where is the next? That is the 12th and the other is the 9th. "Three men, one team, ashes, St. Cloud Place, fourteen dollars." A (No answer.)

10

The Court: That is thirty-one dollars.

Q What is the significance of the number that appears here before the three men? A "4th Ward."

The Court: Do you want to offer those records?

Q You say, that is a town record? A That is the record that was kept by me as engineer to enable myself at the end of the year to make my report to show what work had been done on the streets.

20

Q Where does the money that was expended by the town for this work show up on any town record? A It shows up on the payroll of the men.

Q That is taken from your memorandum here? A Yes; I keep the payroll and I take and turn it in weekly.

30

Mr. Grosso: I offer that record at this time.

(Record marked Exhibit D. 1, February 15th, 1926.)

40

Peter H. Glannan, direct.

PETER H. GLANNAN, sworn for the defendant.

Direct examination by Mr. Grosso.

10 Q Mr. Glannan, when you testified before in this matter, you were asked to produce records in addition to the applications for water which were produced to substantiate the date on which the mains were laid. Have you those records with you? A I looked for the records. As I understood it, the record I was to get was the order from the Town Council at that time authorizing the water company to lay the mains. That record I have been unable to find.

20 Q Do you find any other records? A In looking for the records pertaining to the case, what would lead to it, I found the old field book which covered that particular period.

Q Have you that field book with you? A I have, sir.

Q Will you produce it? A (Witness does as requested.)

Q Is the field book in your handwriting, in your own handwriting? A No, sir.

30 Q In whose handwriting is it? Who makes the field book? A The engineer in charge or the superintendent of the company. I was not there at that time, sir.

Q Oh, you were not there at that time? A No.

Q Have you made any of the entries in the field book? A In this particular field book?

Q Yes. A No, sir.

Q This is one of the records of your company? A Yes.

40 Q What does that field book show as to work on St. Cloud Place? A It gives the designation

Peter H. Glannan, direct.

of main on Benvenue avenue from Prospect avenue to St. Cloud avenue, and St. Cloud avenue from—I will use the word “Benvenue avenue” because it was that; now it is Northfield Road—from Benvenue avenue in a southerly direction through St. Cloud Place to Northfield Road. 10

Q Did you personally superintend the laying of any water mains on St. Cloud Place? A Not mains, no, sir.

Q Did you lay any water connections? A Yes.

Q Do you know that mains are in St. Cloud Place? A They are in, yes, sir.

Q How many? A One, sir.

Q One main? A One main.

Q On which side is it? A The east side 20 of the street.

Q And all connections run from that one main? A Yes, sir.

Q What connections run across the center tract to get to the houses on the southerly side? A There is only one house on the southerly side with connections, that does go through the center.

Q Which house is that? A That is the present White house, owned by White, and 30 formerly owned by Van Tyle.

Q And the connection runs across the center portion? A The center portion.

Q To get to that house? A At the present time.

Mr. Grosso: That is all.

Peter H. Glanman, cross.

Cross examination by Mr. Lane.

Q When was that main laid, that connection laid? A Which connection, sir?

Q The one to the White house? A It was originally laid in 1905, from the records; it was
10 relaid for Mr. White, oh, I would say, three or four years ago.

Q Do you remember when it was relaid there was produced to your water company a consent from Mr. Oeding that they should be laid there? A Yes.

Q And Mr. White produced that consent, didn't he? A Yes.

Q Thereupon you laid the main? A Well, service. I wouldn't call that main, sir; that is
20 service from the main to the house, is a service line.

Q (By the Court.) House connection? A House connection.

Q And that house connection was paid for by White or by the water company? A By Mr. White.

Q And how many connections are there on this main altogether, on this so-called street? A One, two, three, four, five.

Q And does the main serve any other purpose
30 except to supply the houses on that street? A No, sir.

Mr. Lane: That is all.

Joseph Tyms, direct—cross.

JOSEPH TYMS, recalled.

Direct examination by Mr. Grosso.

Q Mr. Tyms, in addition to the roadway, do you know whether there are any pathways?
A Why, yes; on the southerly side of it a side-
10 walk runs from the old Northfield Road to Benvenue avenue.

Q What kind of sidewalk is it? A Cinders; and Mr. Oeding, in front of his place he tore up the sidewalk, tried to make it impassable.

Q Prior to that time there was a sidewalk there? A Yes, sir.

Q For how long—how long has that sidewalk been there, to your knowledge? A It has
20 been there over twenty years. I got property there twenty years.

Q Have you had occasion to use the pathway since Mr. Oeding ripped up his part of it? A I have to use the road.

Q I mean, the pathway? A When it is dry weather we can use it; otherwise, in a storm, we cannot use it.

Cross examination by Mr. Lane.

80

Q How long do you say that cinder path has been there? A It has been there over twenty years. I have got property there twenty years.

Q And was there a cinder path all along that road at the time you first got your property there? A Yes.

Q And it is the same cinder path today that it was then? A All but in front of Mr. Oeding's
40 property.

17 MAY.T.1928

Joseph Tymes, cross.

Q Have you put cinders on your side? A Yes; we keep it up in repair, Mr. Roy, myself and Mr. Allstead.

Q How wide is this cinder path? A Oh, I should judge, about three feet, three to four foot.

10 Q Do you know where that cinder path is with respect to your line? A Why, it runs alongside of the driveway, it goes in there.

Q Yes. Do you know if it is on your property? A That I couldn't tell you. I don't know that.

Q You don't know if it is on your property or where it is? You don't know whether it is on your property line or where it is? A My property line joins it.

20 Q I know. Do you know whether your property line includes it or not? A I think it does.

Mr. Lane: That is all.

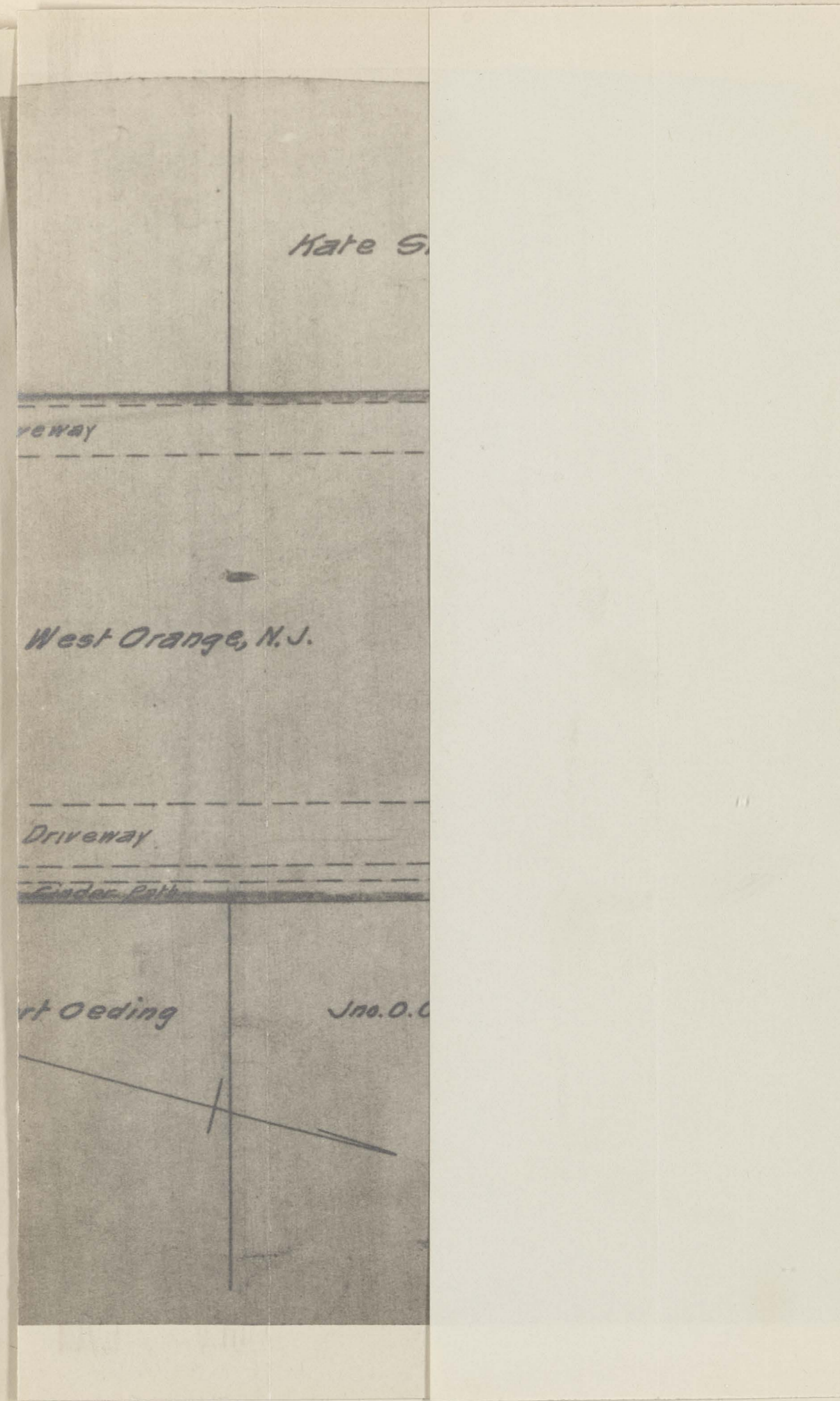
Mr. Grosso: That is our case.

Mr. Lane: We have nothing further.

The Court: Has the testimony hitherto been written out?

Mr. Lane: Yes.

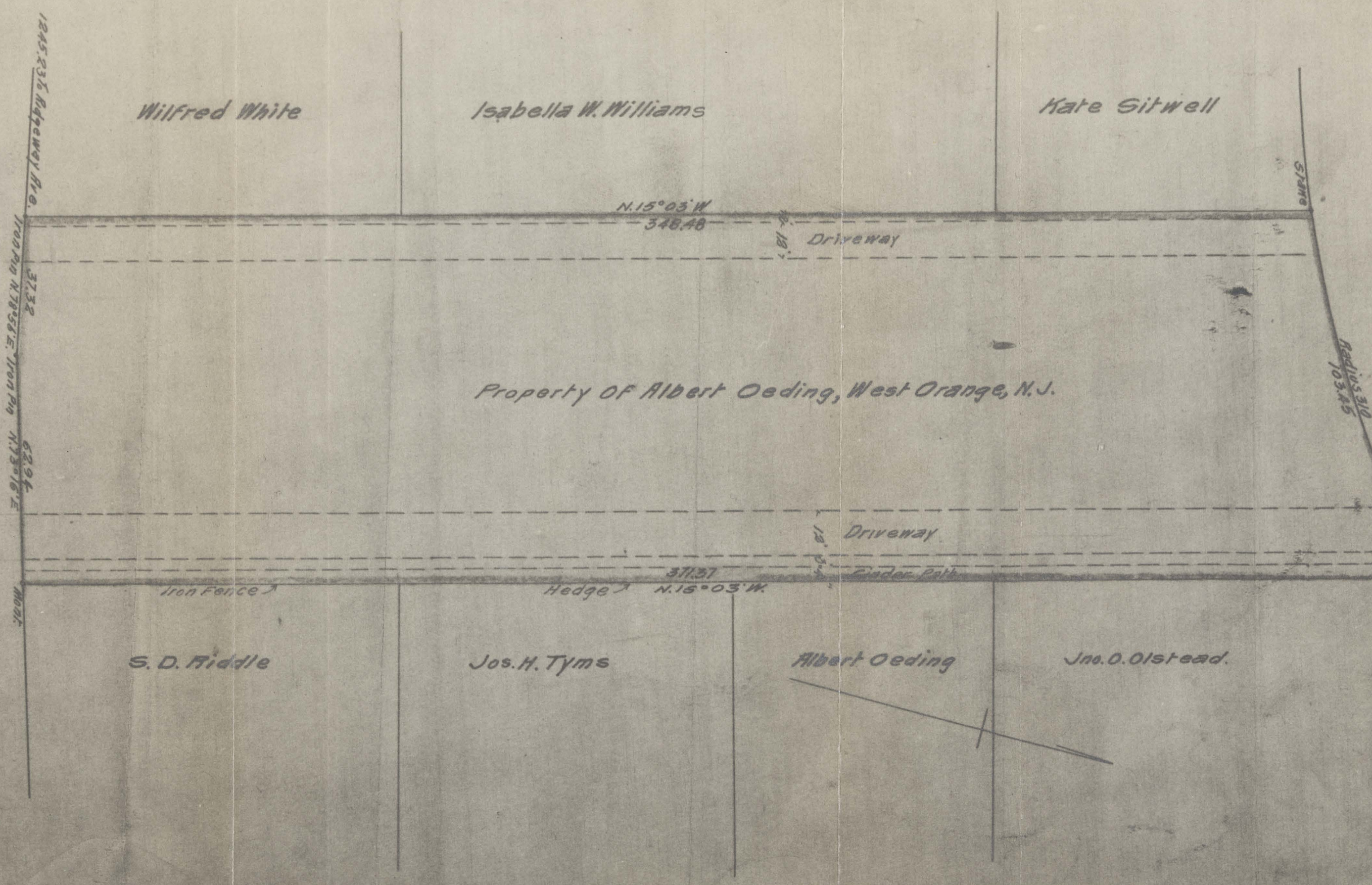
30 The Court: Then you better write this out, and if you will furnish me with memorandums, I will try to solve the mystery.



This Survey is Made Upon A Requisition of Fidelity Union Trust Company No. 49739 and Follows the Instructions Therein Contained
 Freeman & Winston Civil Engineers
 Mark Orange, N.J.
 June 29, 1922

Return to
 Freeman & Winston

BENVENUE AVE.



NORTHFIELD 60 AVE.

Freeman & Winston, Civil Engineers
 West Orange, N.J.
 May 31, 1922.

663-19-71.

17 MAY.T.1928

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

New Jersey Court of Errors and Appeals

Between

ALBERT OEDING,
Complainant-Appellant,

and

JOSEPHINE N. SCHWEINLER,
et als.,
Defendants-Respondents.

On Bill, &c.

*On Appeal
from
Chancery.*

*Church,
V.-C.
Decree for
Defendants.*

*Complain-
ant's Appeal.*

BRIEF FOR APPELLANT.

(Italics ours, except where otherwise noted. There is a supplemental state of case and the initials "S. S. C." refer to it.)

Statement of the Case.

The Bill.

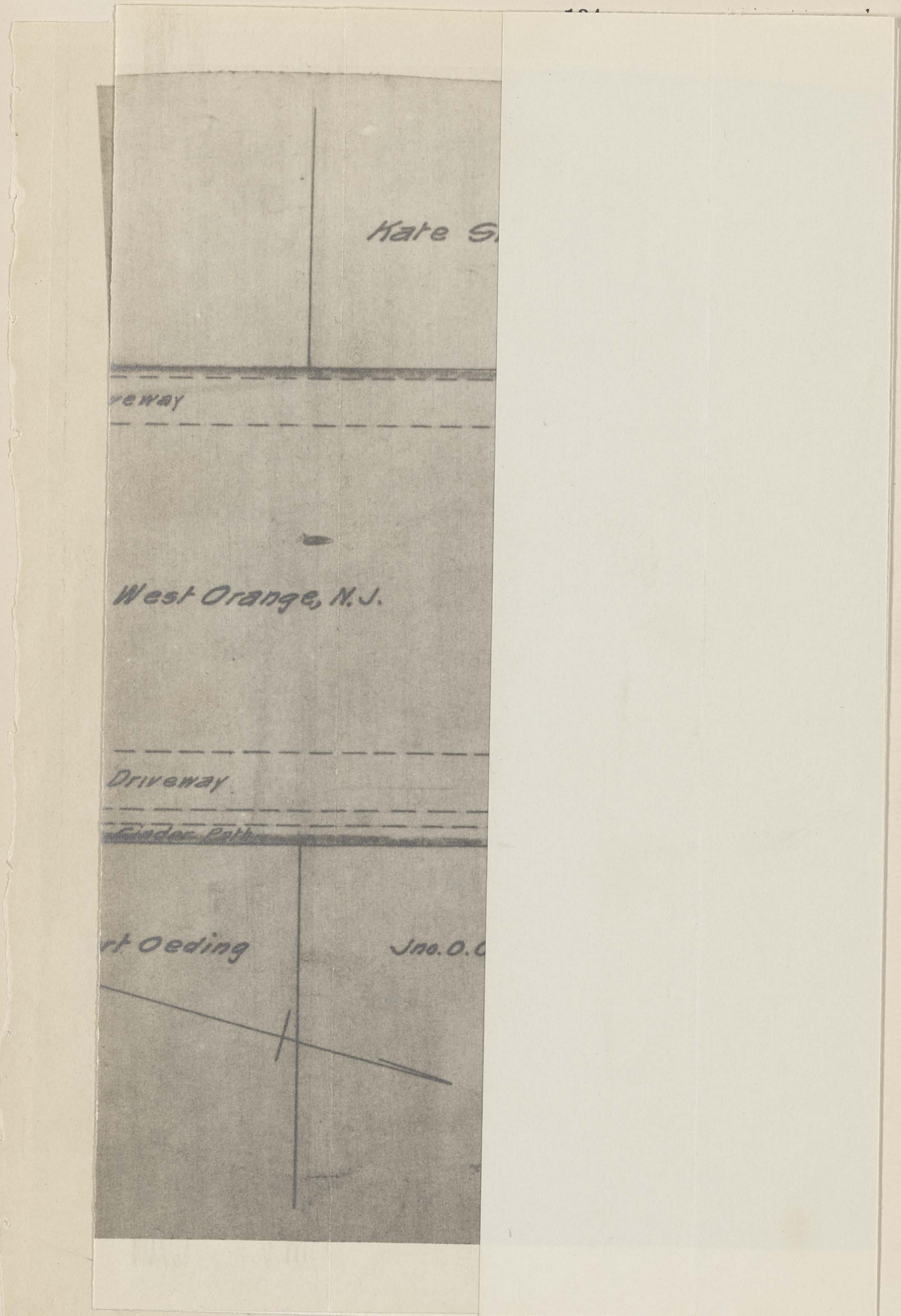
The bill was filed to quiet title under the provisions of an act entitled:

"An Act to Compel the Determination of Claims to Real Estate in Certain Cases, and to Quiet the Title to the Same" (P. L. 1870, p. 20, Revision of 1877, p. 1189, as amended P. L. 1901, p. 57, 4 C. S. 5399).

(Bill, p. 1.)

The property involved, the physical situation of the record title and the relative location of the respective properties, all conceded.

To understand the issues it is necessary to refer to the plotting (Exhibit C. 2, p. 96 of the



State of Case). The property involved is the central piece on the plotting, marked "H," a plot of land approximately 100 feet in width and 350 feet in depth, running from Benvenue avenue on the north to Northfield avenue on the south. Complainant is the owner of the plot of land marked on the plotting "E" and has clear record title to both "E" and "H."

Defendant, Schweinler is the owner of the plot marked "B" fronting on Benvenue avenue.

Defendant Williams is the owner of the plot marked "G."

Defendant Riddle is the owner of the plot marked "C."

Defendant Tyms is the owner of the plot marked "D."

Defendant White is the owner of the plot marked "F."

Defendant Olstead is the owner of the plot marked "A."

One Fuller became the owner of the entire plot shown on Exhibit C. 2 (p. 96) in 1874.

On April 7, 1879, Fuller conveyed "A" to Butler, and by mesne conveyances the property is now vested in defendant Olstead. At the time of the conveyance the property had, and still has, a frontage on a public street, Benvenue avenue.

On March 31, 1879, Fuller conveyed as one plot the present plots "C" and "D" to Jacob Wick, Jr., which plot, when conveyed by Fuller, had a frontage on Northfield avenue, a public street. After Wick became vested with the title to "C" and "D" as one plot, the plot was

split up and "C" became owned by defendant Riddle and "D" by defendant Tyms.

On February 1, 1878, Fuller conveyed "B" to McWilliam. It had a frontage upon Benvenue avenue, a public street, and by mesne conveyances it is now vested in defendant Schweinler.

On September 30, 1879, Fuller conveyed "E," "F" and "G" as one plot to Loeffler. "F" and "G," conveyed as one plot, had a frontage upon a public street, Northfield avenue. "E" did not. Subsequent to the conveyance to Loeffler, the plots were split up and "F," by mesne conveyances, became vested in defendant White, "G" in defendant William and "E" in complainant Oeding.

By 1880 Fuller had parted with the ownership of all of the property shown on the plotting (Exhibit C. 2), with the exception of the central plot "H." All of the property conveyed by him, with the exception of complainant's plot "E," had frontage on the public streets, Northfield or Benvenue avenue.

None of the conveyances out of Fuller granted any rights in "H."

Fuller died in 1888, leaving a will (p. 101). By deed in 1892 his executors, under power granted by the will, conveyed "H" to Soper (p. 102). He died in 1901 and his heirs conveyed "H" to his widow, Hannah T. Soper (p. 104). Hannah T. Soper died in 1898 (p. 105). By deed, dated March 14, 1907, her heirs conveyed "H" to Alfaretta M. Soper (p. 107). By deed, dated June 18, 1907, Alfaretta M. Soper conveyed a one-sixth interest in the property to the witness Wensley (pp. 29 and 107). By deed in 1913, Alfaretta M. Soper conveyed

her remaining rights to Parsons. February 11, 1918, Wensley quitclaimed his one-sixth interest to Parsons, and by deed, April 21, 1919, Parsons, and certain of the heirs of Hannah T. Soper, who had not conveyed their interest to Alfaretta M. Soper in 1907, conveyed "H" to complainant Oeding for a valuable consideration, as shown by the deed, and at that time Oeding became vested with full legal title to "H" (p. 108).

Complainant acquired title to both "E" and "H" by the same conveyance, "H" being the first tract described and "E" the second (p. 1).

The Answer of Defendants and the Issues.

Defendants admitted the right of complainant to a decree to quiet the title to plot "E." As to plot "H" they— (a) denied peaceable possession of complainant sufficient to support a decree, (b) alleged that, as a result of the conveyances out of Fuller, there was left the central plot "H," a tract approximately 100 feet in width and that Fuller "dedicated to the public and granted to the predecessors in title of the defendants, *rights of way over and through two streets, running from the said Benvenue avenue to the said Northfield Road and being on either side of the said strip of land described in the first tract ('H')*, which said streets have been continuously used by the public, by the defendants and their predecessors in title ever since the date of the laying out of the said tract, which was in the year 1874," and that, by reason of said dedication, they were "entitled to pass and repass at will over and through the lands described in the first tract," (c) alleged that the "streets" had been continuously used since the date of the laying out of the same "openly, noto-

riously and adversely and the right of the defendants and of the public to use the same has never been questioned or disputed by any one" (p. 6).

The Opinion and Decree.

The court below held that complainant did not have the necessary peaceable possession for a decree (p. 7) as to "H" and that, therefore, the court had no jurisdiction and dismissed the bill (p. 13).

Although the extreme claim, to which defendants adduced proofs, was to rights of way over the streets which they said had been opened on both sides of "H," and although the extreme substantial claim as to the widths of these supposed rights of way was 14 feet, the court refused to settle the title, to *any* part of "H."

Defendants made no claim of title or of right in the fee of "H." Their extreme claim was to an easement over those portions of "H" which were included within the lines of the supposed streets.

The decree dismissed the bill as to plot "H," with costs to defendants, including a counsel fee of \$500. From that portion of the decree this appeal is taken (Notice of Appeal, p. 15; Petition of Appeal, p. 16).

ARGUMENT.

The Possession of Complainant.

The Facts.

We have already shown that complainant has a perfect record title to the whole of plot "H" and has had such record title since 1919 and that

the property had been conveyed by mesne conveyances several times after the death of Fuller, the original owner, in 1888.

So far as dealing with the title is concerned, the plot has been considered as lands of which Fuller died seized and was so dealt with by those who took his estate, and was by them conveyed to Charles A. Soper in 1895 and was considered as lands of which Charles A. Soper died seized, and was so dealt with by those who took his estate, who conveyed to his widow, who died in 1898, and was dealt with by those who took her estate as property of which she died seized and has generally been dealt with as private property.

The situation with respect to the record title is not that the plot has been lying for years without being dealt with and then a sudden activity in dealing with the record title has developed. The title to this plot has been consistently dealt with for a period of upwards of thirty-four years. The property is designated upon the tax map of West Orange as lot 76, plot 158. It is vacant land. It is described as being a plot 100 feet front. Taxes were paid on it for the years 1914 and 1916, the property being assessed during those years to William S. Wensley, who had a one-sixth interest in it by grant (pp. 29, 30). In the year 1919, the property was conveyed to Oeding and he paid the taxes for that year, the property still being assessed to Wensley. Since 1919, the property has been assessed to Oeding, and taxes have been paid by him. Receipted bills were introduced in evidence for the years 1919, 1920, 1921, 1922, 1923 and 1925.

The bill was filed July 11, 1924, so that, for a period of more than five years preceding the filing of the bill, taxes had continuously been paid upon the property, and, after the filing of the bill, taxes for the year 1925 were paid, and during all of that period of time, the property had been assessed by the city to the owners of the record title (Exhibit C. 1, p. 94).

During the time that Soper was the owner the property was used for raising potatoes (pp. 30, 31). Wensley's wife was one of the heirs of Soper (pp. 23, 34, 104). Wensley acted as agent and leased the property to a man named Bowden, who raised potatoes on it (p. 31). After Oeding acquired title he used the property for the purpose of storing lumber, and he also planted fruit trees and used it for a general garden (pp. 34, 35). The property which was so used for garden purposes and for the storage of lumber was the central portion lying between the so-called roads (pp. 36, 40). At the time of the hearing in November, 1924, the property was being used by complainant for the storage of lumber (pp. 35, 40).

Defendants' witness Williams, who is the owner of Plot "G" (Exhibit 2, p. 96), says that his mother bought that plot in 1884 and that he has been familiar with the property since that time and has lived permanently on it since March, 1908 (p. 54). He says that he had a garden on a part of the central Plot "H" for five or six years (p. 63)—

"Q Did you have any permission from anybody to use that as a garden spot? A Yes; I had it from the executrix of Charles A. Soper's estate, Mrs. Julia Lenke.

Q And did she—what property did they own there at that time? A They owned the property of the estate left by her father,

Charles A. Soper, the house that Mr. Oeding occupies or owns now."

On pages 64 and 65 he says that she claimed ownership of this plot.

At the time this permission was obtained and he, Williams, used this plot as a garden, the record ownership was in the estate of Mrs. Hannah T. Soper, of whose will Mrs. Lenke was executrix (pp. 105, 106).

During the time that Fuller owned the property a one-story building was erected on it.

Defendant Tyms, the owner of Plot "D," testified that he had owned that plot for seventeen years and had resided thereon for eleven years (p. 82). He was a chanceman of the Police Department of West Orange and patrolled in the neighborhood for over thirty-three years (p. 83). The building was taken away and moved over to Crystal Lake and Eagle Rock (p. 84) about forty years ago (p. 87).

From the direct examination it would appear that the building the witness refers to was a public building (p. 87), but the testimony on cross examination (p. 83) indicates that it was private. The witness says:

"Q So the house was deserted whenever you were there? A The books and billiard table and everything, library was there. It was just prior to them moving it.

Q Oh, you say you saw it just prior to their moving it? A Yes; long before that.

Q And there was a pool table in there?

A A billiard table.

Q A billiard table? A Yes, sir.

Q Any books? A Books.

Q Library? A Yes.

Q You don't mean to say that was open to anybody in the public in the town of West

Orange to go in there and use? A *It was private property.*

Q *It was private property?* A Yes.

Q *And it appeared to be private property in the way in which it was furnished, didn't it?* A Yes.

Q You wouldn't expect the public promiscuously to go in there and use the place, would you? A No."

He then tries to reiterate that the building was used by the public in the neighborhood (p. 84), and it transpires that he knows nothing about it. It was removed, he says, about forty years ago and Fuller took it over on some other property he owned but from there it was moved to Crystal Lake.

"Q Moved in 1888, wasn't it? A Somewhere around there.

Q Somewhere around there, and then it was taken where? A Over on—I think Mr. Fuller owned the property. I am not sure, and then it was moved from there over to Crystal Lake.

Q And put on private property on Crystal Lake, wasn't it? A Yes.

Q Where it is now? A Yes."

It may be that this gentleman can remember this particular place as it was forty years ago and the removal of this building. He is only fifty-nine now (p. 87). By his testimony it appears, however, that the building was maintained by Fuller. When it was removed it was taken and put on other property of Fuller's and finally it was moved to private property on Crystal Lake. In no sense was it a public building.

This building is referred to by certain of the other witnesses.

Simeon H. Rollinson, Mayor of West Orange, who has lived in West Orange for fifty-five years (S. S. C., p. 172), remembers the passageways

on both sides of Plot "H" and the building erected on the central portion. He says he never was inside of the building. He thought it was intended for music or billiards or something of the sort.

Frederick M. Hoffman, a builder, in 1874 or thereabouts, had a contract for enclosing seven or eight buildings erected on the entire plot owned by Fuller. He received his contract from a Mr. Small, who had no connection with the title whatever. He says the two roads were cleared over Plot "H," leaving the central portion (S. S. C., p. 115), and that on that central portion he, Hoffman, erected a building, which is the building referred to by the witnesses.

There is considerable testimony in the case with respect to the erection of fences at one time closing off the property at Northfield avenue and Benvenue avenue. The witness Wensley says that the fences were erected about two years after Charles A. Soper obtained title, which was in 1892 (p. 31) and that a part was taken down during the night (p. 31). At the point where the driveways were, or where one of the driveways was, there were gates (p. 33). Wensley says that, after a portion of the fences had been taken down, it was rebuilt and then taken down again (p. 34).

Defendant Williams, the owner of Plot "G," says that, as he remembers, the fences were erected in 1886 or 1887 (p. 57) by Charles A. Soper. He is mistaken in this, for Charles A. Soper did not get title until 1892. He says there were gates in the fences and that Soper "would lock the gates at certain times during the day and night and stop grocery wagons and like that, and vehicles, and the mail coming through

there." A portion of the fence which cut off the pathways was torn down by Williams' mother (p. 61), who was a relative of Soper's, and such tearing down was due to bickering between the two relatives (p. 59). But it appears from this witness' testimony that no portion of the fences was disturbed except that which permitted Soper, by locking the gates, to close off the entrance to the two paths on either side of Plot "H." No attempt was made to disturb those portions of the fences closing off the central portion from the public streets (pp. 57, 60), and as the witness testified (p. 60)—

"Q What portions did you see her tear down? A The gateways, the gates that he put up."

Those portions of the fences which closed off the central part from the public road remained standing. The witness Williams does not know how long they stood. They were not torn down (pp. 57, 58, 59, 60, 61).

Defendant Tyms, testifying as to the fences, says that those portions which cut off that portion of Plot "H" lying between the two paths remained until 1905 (p. 85). The witness thinks the fences were erected in 1886 and remained until 1905 (p. 85). His recollection as to when the fences were erected accords with that of Williams but does *not* accord with the record which shows that Charles A. Soper, who is said to have built the fences, did not acquire title until 1892. However that may be, from this testimony it appears that, from the time of the original erection of the fences, those portions, except that which closed off the paths, remained standing until 1905, and then the fences were not torn down by any person asserting an adverse right,

but they went away piecemeal, as fences will (p. 85).

Defendants' witness Barker remembers the fences having been erected by Soper (S. S. C., p. 118), and he says, with respect to the taking down, that all that was done was to cut the wire of those portions of the fences which shut off the pathways "so you could get through."

Summarized, the testimony with respect to the fences is that, as early at least as 1894, Soper, who had the record title, claiming ownership over the whole of Plot "H," erected fences at both ends of Plot "H" so that ingress and egress to the pathways, which were on both sides of the plot, would be cut off, and that one of his relatives with whom he had a dispute, cut those portions of the fences which prevented ingress and egress to the pathways, and that the remainder of the fences continued standing, without opposition from anyone, until about 1905, when they disappeared in the natural course of events. They continued in existence for upwards of eleven years without opposition.

The erection and maintenance of these fences was an act of ownership by the owners of the record title and a physical possession of the land taken and maintained. In addition to this we have the fact that, during the ownership of Soper, it was used for the raising of potatoes by a man to whom it had been leased by authority of the record owner, and, after the death of Soper, it was used by defendant Williams for the purpose of maintaining a garden with the permission of the executrix of Hannah Soper, the estate of whom owned the land, and, after complainant acquired the property, he used it for the planting of fruit trees, raising of corn and potatoes

and latterly for the storage of lumber, and, at the time of the filing of the bill, he had lumber stored upon it as also at the time of the hearing.

So far as the central portion of Plot "H" is concerned, there is no evidence of the assertion of any right by defendants or their predecessors in the title or anyone under them, or any objection by them to the exercise of ownership by complainant and his predecessors in the title. So far as this central portion is concerned no act has been committed for which an action in trespass would lie, nor has any act been committed which would support any other action at law. Ejectment may not be maintained by complainant, for he is in possession. Notwithstanding the fact that no overt act has been committed by defendants for which an action at law would lie against them, they assert rights in this central portion and they object to complainant maintaining his lumber on the tract (p. 21). They commit no physical act for which they may be sued at law, but their claims destroy the marketability of complainant's title.

The Proof as to the Alleged Rights of Way.

There is no doubt but that these paths have been used by defendants and by tradespeople making deliveries at defendants' houses. The used paths are shown on a survey made by defendants' witness Winston and offered in evidence by defendants at pages 70 and 72. That survey shows the paths by dotted lines on Plot "H," which is marked "Property of Albert Oeding." The survey shows a used driveway on each side of Plot "H" 12 feet in width (pp. 80, 81).

Ashes were put upon these used pathways under the direction of Winston who was engineer

for the Town of West Orange between 1916 and 1921 (pp. 71, 79, 80, 81).

Water mains were laid from time to time along the entire line of the paths within six feet of the property line (Glannan, pp. 67, 70). The first main was laid in 1905 and the last in 1921. The town had nothing to do with the installation of the mains and the consent of the town was not required or obtained (p. 68).

There is very little question as to the width of the paths. The extreme claim made by any of the defendants is that they were about fourteen feet wide. (Williams, p. 62). It is true Williams says that, "The one on the opposite side of ours is probably twenty-five feet wide." But he says (p. 62):

"Q I know. One wagon rut running through that road; isn't that a fact? A Yes; one wagon road.

Q Well, one wagon rut is not fourteen feet wide, is it? A No; I can't say that it is.

Q It is about four and a half feet to six feet between wheels? A Well, I don't know.

Q You wouldn't say fourteen feet? A Well, I wouldn't say that."

No one else testifies to the paths being any such width. And an examination of Williams' testimony indicates that it is not to be relied upon. He testifies to a great many things which happened before he could possibly have known anything about them. He is the witness who maintained the garden in the center of Plot "H" *with the consent of complainant's predecessor in the title* (p. 63).

Winston, the surveyor, who made the survey, Exhibit D. 2, said (p. 80):

"Q There appears to be on this survey marked 'Exhibit—' A They were made.

Q Wait a minute '—Exhibit D. 2' within the dotted lines on either side of this street?

A Yes.

Q This was made from actual survey upon the ground, that is, Exhibit D. 2? A Yes, sir; that had nothing whatever to do with the town. That was in the nature— (interrupted).

Q I didn't ask you that. It was made from an actual survey upon the ground? A Absolutely.

Q Then how did you get your distance of twelve foot, which you have used as the width of these so-called driveways? A The used roadway.

Q *That was the limit of the used roadway, was it?* A Yes, sir.

The Court: How much is it, twelve foot?

Mr. Lane: Twelve foot.

The Court: On both sides?

The Witness: Yes, sir.

Mr. Lane: On each side."

Knowing, as we do, the width of a wagon, or of an automobile, and, taking the testimony with respect to the width of these driveways, which varies from seven or eight feet to fourteen feet, while the engineer fixes the limits of the used driveways at twelve feet, it is fair to assume that he has included certain unused space on each side and that the actual width of the used driveway is ten feet. This limit of ten feet would be sufficient as ways of necessity if the matter of necessity is involved in this case, which we insist it is not. From the standpoint of user, if that is to be considered, there is no testimony of probative force that pathways more than ten feet in width have, in fact, been used.

The contractor who leveled off the ground originally for the two roadways, testified (S. S. C., p. 116):

“Q Do you remember how wide the streets were? A Well, not—I never measured them. I should judge, from twelve to fourteen feet wide, the roadway. I am not certain about that because I never measured them.”

THE LAW.

The possession of complainant is sufficient to sustain jurisdiction of the court.

The Court of Chancery held that the possession of complainant of Plot “H” was not sufficient to sustain the jurisdiction relying upon *Barry v. Tunick*, 97 N. J. E. 281.

The case bears a close resemblance to that at bar. The complainant filed his bill to obtain a decree quieting the title to a certain tract of land. Respondents answered asserting an easement of way over the land. The Court of Chancery made a decree establishing the validity of the respective claims of the defendants and perpetually restrained the complainant from interfering with the defendants in the exercise thereof. From this decree the complainant appealed. This court reversed upon the ground that, it appearing that there had been a continued user of the alleged right-of-way by each of the defendants, if such user had been without legal justification an action in trespass would lie, and “the judgments in such actions would settle the question of the right of the complainant to hold his land free from the further user thereof by the respective defendants.”

It is apparent from a consideration of the opinion in *Barry v. Tunick* that the bill, while in

form one to quiet title, was, in effect, a bill to determine whether or not the easement of right-of-way over the land existed and this court held that the Court of Chancery had no jurisdiction to determine *that* legal question. In this case the bill is for the purpose of quieting title to *all* parts of Plot “H”—not only to those portions of Plot “H” over which the alleged rights-of-way run but likewise the central portion which is a tract at least 377 feet in depth by seventy feet in width, sufficient to construct at least three houses upon. Defendants set up in their answer not only that they have the rights-of-way as used but that because (par. 6 of the answer, p. 6) of a dedication to the public by complainant’s predecessor in the title they and the public have the right “to pass and repass at will over and through the lands described in the first tract.”

So far as this central portion of Plot “H” is concerned, no act has been committed by any one of the defendants which would permit complainant to bring an action of trespass or any other form of legal action. Notwithstanding this fact, defendants assert that, even with respect to this central portion, they have rights and that complainant has not, as against them, clear title.

With respect to this central portion complainant has shown peaceable possession. It was used by his predecessor in title for garden purposes and by him for the planting of trees, etc., and, at the commencement of, and during, the suit, was used by him for the storage of lumber. While his predecessor in title, Soper, was in possession a lease had been given by Wensley, by Soper’s authority, to another for use to raise potatoes (p. 31). The right of Soper and his predecessors in title to the undisturbed use of the central portion was admitted by the witness, Williams,

when he obtained permission from the executrix of Soper's estate to use a part of the central portion for garden purposes (pp. 63, 64).

There was no proof in the case of any use of the central portion by any of the defendants adverse to complainant or his predecessors in the title. This is but another way of saying that no act had been performed by any of the defendants for which an action at law would lie.

The record title of complainant to the whole of Plot "H" was strictly proven.

There was, therefore, proof of peaceable possession of the central portion of Plot "H," uninterrupted by any positive act of defendants.

Section 1, 4 Comp. Stat. of N. J., p. 5399, provides—

"and whenever any lands within this State, shall not, by reason of * * * being * * * or uninclosed or unimproved lands, be in the actual peaceable possession of the owner or person claiming to own the same in fee under a deed or other instrument, duly recorded with this State, *who shall have paid the taxes upon such lands and to whom or to whose grantors the taxes upon such lands shall have been assessed for five consecutive years immediately prior to the commencement of suit*, shall be presumed to be in peaceable possession of such lands within the meaning of this act; provided, no other person be in possession thereof."

And the statute proceeds to permit such a person, so presumed to be in possession, to bring a suit "to settle the title of said lands and to clear up all doubts and disputes concerning the same."

In the case at bar, complainant and his grantors had paid the taxes upon the lands for

five consecutive years immediately prior to the commencement of the suit and the taxes had been, during that period of time, assessed to complainant or his grantors.

It is immaterial if, from time to time, there had been trespasses upon this central portion. The peaceable possession is only required *as against the defendants named in the bill* and there is no proof whatever that *they* ever trespassed upon the central portion under such circumstances as either to amount to an assertion of right or under such circumstances as would give a right of action.

In *Allaire v. Ketcham*, 55 N. J. Eq. 168, the lands involved were unenclosed woodlands and actual possession was held to be proven by the fact that complainant's predecessor in title had cut hoop poles from the whole tract in 1856 and that in 1871 stakes had been placed on the line and trees marked and after that time complainant had stopped the trespassing of cutting wood on the lands by any person so far as such trespassing was brought to his knowledge. These acts, which fall far short of the acts of possession proven in the case at bar by complainant and his predecessors in title, were held sufficient evidence of actual possession. With respect to the peaceableness of the possession, Vice-Chancellor Emory said:

"Has the possession been 'peaceable' under the statute? If by peaceable is meant quiet and peaceable as to every trespasser, whether claiming title or not, then the possession cannot be said to have been altogether peaceable, for the trespassers whom complainant ordered off disturbed this peaceable possession. But I think the true construction of the statute is that the possession *must be peaceable as against the defendant*. And further, it seems to me that in de-

termining whether the possession as to the defendant is peaceable, the test must be whether the defendant setting up a claim of title has interfered with complainant's possession *by an act which is suable at law, and suit upon which will or may involve the title of the defendant.* This is the test applied by the courts to the term 'peaceable' as connected with the acquiring of easements by continued and peaceable possession for twenty years. *Lehigh Valley Railroad Co. v. McFarlan*, 14 Vr. 605 (Errors and Appeals, 1881), see opinion of Mr. Justice Depue (p. 631)."

In *Bradley v. McPherson*, 58 Atl. 105, not officially reported, Vice-Chancellor Reed said:

"The doctrine laid down in this court is that the peaceable possession required by the statute is not a possession which is peaceable as to third parties, *but only peaceable as to the defendant*; and, as to the defendant, that *it is a possession undisturbed by any act of the defendant in or upon the locus in quo, for which act the defendant would be suable in an action by which the title to the property could be determined. Mere words denying the right of the complainant to possession, which afford the complainant no right to test the substance of such claim by an action at law, do not destroy the peaceableness of complainant's possession.*"

In *Blakeman v. Bourgeois*, 59 N. J. Eq. 473, Vice-Chancellor Grey said, at page 476:

"What constitutes such a possession of lands must be indicated by the acts of the party claiming to own them. These acts will naturally adapt themselves to the nature of the land and the uses which may be made of them. In this case the property was incapable of being farmed. It was almost if not quite, an island, on which grew salt grass and sedge, valuable for hay or litter. Part of it was usable as oyster grounds, on

which oysters might be planted for future use. Ducks and other game made it attractive for gunning, and its nearness to the thoroughfare, for fishing, so that it was rentable to city people for a clubhouse, for those uses. There was no other purpose for which this property could be used. If a person went there to look at it, to see whether any one was claiming ownership in it, he would naturally examine it with relation to those incidents for which it might be used by the claimant. The law implies notice to parties interested in such cases in much the same way, the acts of possession varying according to the nature of the land."

And at page 479:

"The contention of the defendant that the hay cutting, as evidence of possession, must be limited to the extent of the stroke of the scythe, does not recognize the true criterion by which the statute tests the possession of the party claiming to be owner. *If the acts of possession are such as an owner would exercise on land of the character in question they are sufficient.* Cutting on the premises for hay, not in one place, as if the right were limited to that place, but wherever on the tract the grass happens to grow, is the manner in which one claiming to be owner of the whole tract might be expected to cut. The place of cutting may vary because the crop does. It is shown by the proofs that the cutting followed the crop wherever it was growing on the island. This was the situation of affairs at the time the complainant filed her bill of complaint in this cause."

Use by defendants of the paths or roadways does not destroy the peaceable possession of complainant either as to the central portion of Plot "H" or as to the whole plot.

The claim by defendants is to an easement of right-of-way. The claim of complainant is to the fee of the whole of Plot "H," free of any charge of the supposed easement.

So far as the central portion of Plot "H" is concerned, as we have shown, there is no proof of any right of defendants to any easement what ever, nor is there any proof of any acts performed by defendants disturbing the possession of complainant. So far as the used rights of way over Plot "H" are concerned, there is proof of the exercise by defendants of the right of passage. But the exercise of that right does not affect the legal title of complainant to the fee nor disturb his peaceable possession of the land as such. The right of complainant to the fee and the right of defendants to the easement, if such exists, are independent.

In *Perrine v. Berge*, 14 N. J. L. 355, Justice Ford said:

"If such a nuisance, whether by smelting house, hog sties or raising back water, has been continued in the same manner, peaceably and without interruption, twenty years, it thereby ripens into a rights, and then it takes, in law, the name of an easement, but even an easement works no dispossession of the owner; the possession still remains in him as much as if the easement did not exist. Thus, if the public have a highway over any man's land, or if an individual have a private way over it, such easements of their's impair not the owner's possession; he may maintain trespass for digging the soil of such highway or even private way, which shows the possession is his as much as if such easements were not in existence."

And in *Burnet v. Crane*, 56 N. J. L. 285, the Chancellor, speaking for this court, said:

"The existence of the easement claimed by the plaintiff-in-error will not justify the exclusive possession which she has taken of the land. Such possession is not necessary to or authorized by a mere right-of-way, and is inconsistent with the right of the defendant in error, which the present action is brought to vindicate."

And quoting from Mr. Justice Bigelow in *Morgan v. Moore*, 3 Gray 319, 322, (Mass.), the Chancellor further said:

"* * * The right to a fee and the right to an easement in the same estate are rights independent of each other, and may well subsist together when vested in different persons. Each can maintain an action to vindicate and establish his right; the former to protect and enforce his seizin of the fee the latter to prevent a disturbance of his easement."

And the rule was recognized by Vice-Chancellor Stevenson in *Country Homes Land Co. v. De Gray*, 71 N. J. Eq. 289, which was affirmed upon the Vice-Chancellor's opinion. See his opinion in 71 N. J. Eq. 289.

The proof is that the right of complainant in these roads has been recognized. When it became necessary to re-lay a water main for defendant White, who owns Plot "F," the consent of complainant Oeding was obtained by White (p. 117).

Some attempt was made to show that there was a cinder path along the roadways, but that path is on the property of the abutting owners (p. 120).

It follows that complainant is in peaceable possession of the whole plot notwithstanding the

use by defendants of the roadways on both sides of the plot, for nothing is proven indicating that defendants have any right in the fee of the land.

Complainant, in any event, was entitled to a decree settling the title as against defendants to all portions of Plot "H" not traversed by the roadways; and, further, to a decree settling his title to that portion of Plot "H" involved in the roadways, subject to such rights of passage over the roadways as defendants might, at law, be determined to have.

We have already argued to some extent his right to a decree settling his title to those portions of Plot "H" not involved in the roadways.

As to that portion of the land, this case is a typical one for quieting title under the cases. Chief Justice Beasley, for this court, in *Jersey City v. Lembeck*, 31 N. J. Eq. 254, at page 272, said:

"The inequity that was designed to be remedied grew out of the situation of a person in the possession of land as owner, in which land another person claimed an interest which he would not enforce; and the hardship was that the person so in possession could not force his adversary to sue, and thus put the claim to the test. The title of the act indicates that this is its purpose, for it is an act 'to compel the determination of claims to real estate.' In the present instance, the complainant had it in his power by one of the customary processes of the law, to bring to judgment the claim he wished to control, and it would, therefore, seem to be going out of the way to maintain that this statute is applicable in aid of his inaction. If a party in possession of land can throw the hostile claim into a course of law, and thus get rid of the cloud overhanging his estate, why should he not do it? And what

reason is there to say that this act was designed to help a party who was in no strait, but of his own choosing? On the other hand, there is a class of cases in its application to which the law under consideration would be highly reasonable and beneficial. I would instance, as a sample, the case of a doubtful claim upon land arising under a will, a person who asserts an absolute title being in possession. In this situation the existence of such a claim, *no matter how inauthentic or unsubstantial, would work, oftentimes, a serious injury to such real owner, and, without statutory help, the latter might not, in all cases, be able to clear his title.* In such a conjuncture the present act would operate favorably, and, in such connection would be in harmony with legal and constitutional principles. In my view, that law was intended for the relief of such cases of hardship as this and other cases of a similar nature; but it was not intended to aid those who have no need of aid, and to this latter class the complainant belongs."

And in *Sheppard v. Nixon*, 43 N. J. Eq. 627, cited by the court below, Mr. Justice Depue, speaking for this court, pointed out when it was that there could be relief under the act and when not. He said at page 633:

"The infirmity in this suit is fundamental. Both parties claim the legal title to the premises, and the legal remedy is adequate. The foundation of the jurisdiction of the equity court is the inability of the complainant to obtain relief by an action at law, or the inadequacy of the legal remedy. Hence it is the settled law that, where the estate is legal in its nature, and the remedy at law is adequate, and full and complete justice can be done thereby, the party will be left to his legal remedy. The exception to this rule is where the case presents some special ground for equitable interposition, such as fraud, accident or mistake, requiring the setting aside

or reformation of deeds or instruments of conveyance. If these elements be wanting, a bill to establish the complainant's title is an *ejectment bill put and simple*; and if the situation of the parties be such that the complainant may have an action at law to establish his title, his remedy is in a court of law. 3 Pom. Eq. Jur. Sec. 1399, and note; Sedg. & Waite on Trial of Titles, Secs. 163, 169, 170; Lord Tenham *v.* Herbert, 2 Atk. 483, 484; Bailey *v.* Briggs, 56 N. Y. 407-415; Hipp *v.* Babin, 19 How. 271; Lewis *v.* Cocks, 23 Wall. 466-470; Crane *v.* Conklin, Sax. 346-352; Haythorn *v.* Margerem, 3 Hal. Ch. 324-342; Camden and Amboy R. R. Co. *v.* Stewart, 3 C. E. Gr. 489; Pilhower *v.* Todd, 3 Stock. 54; Jersey City *v.* Lembeck, 4 Stew. Eq. 255-272; American Dock and Improvement Co. *v.* Trustees, 10 *Id.* 266; 1 Stew. Dig. 376, Sec. 56.

"The action of ejectment under the act of 1855 (Rev. p. 326) has greatly circumscribed the necessity of resort to equity to establish or quiet titles."

In the Lembeck case it was held that complainant had a remedy at law to review, by certiorari, an assessment claimed to be a lien; in the Nixon case that complainant had a complete remedy at law by ejectment.

Penrose v. Absecon Land Co., 94 N. J. Eq. 436, in this court was reversed upon the ground that, the peaceable possession of complainant having been questioned, the court took no proofs with respect to it. It will be observed that in both the Lembeck and the Nixon cases a judgment in the law court would give ultimate relief. If the certiorari was sustained the assessment would be set aside. If plaintiff recovered in ejectment he would be put in possession.

In *Barry v. Tunick*, 97 N. J. Eq. 281, this court held that, if an action in trespass could be

brought, there was no jurisdiction in equity to settle the title because the possession of complainant was not peaceable. This court said that the complainant had a complete remedy at law for the alleged illegal acts of the several defendants, but the action in trespass, while giving damages for past acts of trespass, would not prevent continuance of the trespasses and equity would have jurisdiction to enjoin these continuous trespasses. *But there is no remedy for complainant at law with respect to the central portion of the plot not involving the roadways.* He can maintain neither ejectment nor trespass, nor can he force defendants to any legal action.

Defendants, however, without performing any act which would give rise to a legal remedy, have made claims with respect to this central portion and do, in their answer, make claims with respect thereto. They claim the right to pass and re-pass at will over and through *all* portions of the plot (paragraph 7 of the answer, p. 6). But the proofs show that this is a mere claim without any substance so far as the central portion of the plot is concerned. It has substance so far as the used roadways are concerned. Defendants are confining themselves, as to their physical acts, to the used roadways. Suppose complainant brings a suit in trespass against defendants for trespass upon the used roadways. If the judgment be in complainant's favor, it may be that this would settle the question as to the whole tract because, certainly, if complainants were not legally justified in using the used roadways, they would not be legally justified in using the central portion of the plot, although this might not be so. But suppose the judgment was in favor of defendants. In such a case all that the judgment would establish would be that the defend-

ants were entitled to use the used roadways. It would *not* determine in anywise the right of defendants in the central portion of the plot and complainant would be remediless unless he could resort to a bill to quiet title.

The statute contemplates that title may be settled to *any* portion of the lands described in the bill. It provides, Sec. 4, 4 Comp. Statutes of N. J., page 5402, that:

"That if any defendant shall answer claiming any estate, or interest in, or encumbrance on said lands or any part thereof, he shall in such answer specify and set forth the estate, interest or incumbrance so claimed, *and if not claimed in or upon the whole of said land, he shall specify and describe the part in or upon which the same is claimed.* * * *"

And Section 5 provides that the Court of Chancery:

"shall proceed to inquire into and determine such claims, interest and estate, according to the course and practice of that court; and shall * * * settle and adjudge whether the defendant has any estate, interest or right in, or incumbrance upon said lands, *or any part thereof*, and what such interest, estate, right or encumbrance is, and *in or upon what part of said land the same exists.*"

Defendants, by their answer, claim rights in *the whole* and they deny the peaceable possession of complainant of the whole. But the proofs show that complainant unquestionably has had peaceable possession of the central portion and that any claim of defendants is confined to the roadways and that their asserted claim to any rights in the central portion are not capable of being adjudicated at law.

By the express terms of the statute, we submit, therefore, that it was the duty of the court below at least to enter a decree for complainant settling the title of complainant as against defendants to all that portion of Plot "H" as is not involved in the used roadways.

But we submit that complainant was also entitled to a decree settling his title to the whole of the plot, subject to such easement of passage as might be determined at law to belong to defendants over the used roadways. We submit that complainant is entitled to such a decree upon the authority of those cases which have been heretofore cited holding that the existence of an easement does not work a dispossession of the owner of the fee and that the rights are independent, the owner of the fee having peaceable possession as such owner, permitted to do that which he may with the land which will not interfere with the right of passage.

In other words, the claimed existence of an easement and its assertion does not in fact go to the peaceable possession, which is jurisdictional under the act to quiet title, but rather goes to the question as to whether a court of equity will determine, in the course of the proceedings, the legal existence of the easement or will send that issue to law to be decided. If this be the real objection, then the proper decree, we submit, would be one settling the title of complainant with respect to all of that portion of Plot "H" not involved in the roadways and, with respect to that issue, retaining the bill and sending the matter of the existence or non-existence of the easement to law to determine.

This course was suggested in *De Hanne v. Bryant*, 61 N. J. Eq. 141, at page 144.

In the face of the decisions of this court, illustrated by *Barry v. Tunick*, 97 N. J. Eq. 281; *The Borough of West Long Branch v. Hoch*, 99 N. J. Eq. 356, reversing 99 N. J. Eq. 103, we cannot contend that the law is not settled that the existence or non-existence of the easement claimed by defendants must be settled at law if there is a substantial legal dispute. The claim of defendants to the easement is based upon:

- (a) Dedication.
- (b) A way of necessity.
- (c) Adverse possession.

Their claim to dedication is not substantial. No proof was offered of dedication either express or implied. No proof was offered of a grant to the public or to any of defendants or their predecessors in title.

Their claim to a way of necessity seems to present a matter for equitable determination. *Feters v. Humphreys*, 18 N. J. Eq. 260 in the Court of Chancery, decree affirmed 19 N. J. Eq. 471, opinion of Mr. Justice Depue. The bill was to enjoin defendants from obstructing complainant and her tenants "from passing over and along said alley and passageway to and from said stable and the streets" claimed as a way of necessity or implication from a devise. And see *Brakely v. Sharp*, 10 N. J. Eq. 206, opinion of Chancellor Williamson; *Haskell v. Wright*, 23 N. J. Eq. 389; *Denton v. Leddell*, 23 N. J. Eq. 64; *Mann v. Vockroth*, 94 N. J. Eq. 511, in this court. A way of necessity must necessarily be of equitable cognizance because the extent of the use is governed by the necessity of the occasion and the right must be exercised with due regard to the rights of the owner of the dominant tenement and there is no process by which a court of law can reconcile the conflicting rights of the

parties and determine how the right of the owner of the easement is to be exercised. Upon the authority of the cases hereafter referred to, defendants have no way of necessity.

A way of necessity arises "where an owner of lands conveys to another an interior tract or those lands, abutting on no public way and having no appurtenant right of way or other means of access to such public way without trespass upon the lands of another, * * *." *Mann v. Vockroth*, Court of Errors and Appeals affirming upon the opinion of Vice-Chancellor Buchanan, 94 N. J. Eq. 511 at page 516.

It arises upon the severance of the tenements. *Brakely v. Sharp*, 10 N. J. Eq. 206.

In *Haskell v. Wright*, 23 N. J. Eq. 389, the court said:

"The claim of the defendant that he had a right of way for these purposes, by necessity or by dedication, cannot be sustained. By the provision of the trust deed, he had a right of way to use the avenue in front of his lot for purposes within its provisions. The deed for his lot refers to the trust deed, and he must be held to have accepted the right of way therein provided, as his way. And when a way is provided which gives access, for ordinary purposes, to the lot granted, no way, of necessity, will arise, although that way is not sufficient for all purposes.

"If a rear tenement is conveyed or leased, as is frequently the case, with a right of passage expressed in the deed through an alley-way of four feet wide, it does not give a right to have a way of necessity, cut through the house or garden on the front of the lot, although the four-foot alley is not sufficient to pass a car, or for many other purposes for which a way is usually needed. The defendant having accepted the conveyance of this lot, with a restrained right of

way, is barred from claiming a larger way as a necessity."

No right of way went to Plots "A," "B," "C," "D," "F" and "G" because, as we have already stated, at the time of the severance of the tenements by Fuller, Plots "C" and "D" were conveyed as one plot and fronted on Northfield avenue, Plots "F" and "G" were conveyed as one plot and fronted on Northfield avenue and Plots "A" and "B" fronted on Benvenue avenue.

When the grantees of Fuller conveyed they could create no right of way, either by implication or by necessity, over the land retained by Fuller, *i. e.*, Plot "H." Undoubtedly, when Plots "C" and "D" were split up into two plots, Plot "D" acquired a right of way by necessity, not over Plot "H" but over Plot "C," which was in the ownership of the person who had owned Plots "D" and "C" and cut Plot "D" from Plot "C." So with respect to Plots "F" and "G." When Plot "G" was conveyed apart from Plot "F," a way of necessity was created not over Plot "H," which was not at that time in the ownership of the person who owned Plot "C," but over Plot "F," which was at that time in the ownership of the same person who owned Plot "G."

Where a person conveys property in plots, which plots at the time of the conveyances have frontage on public streets, and the grantees of these plots then split the plots up in such a way that some of the plots are interior, *they cannot create a right of way of necessity over lands retained by the original grantor.* While Plot "E" undoubtedly had a right of way by necessity over Plot "H," that right of way has now been extinguished because Plot "E" and Plot

"H" are both in the same ownership, *i. e.*, the complainant.

In *Fetters v. Humphreys*, 19 N. J. Eq. 471, this court said:

"In legal acceptance, a right of way extinguished by unity of seisin, or which is not a legal right of way because of such unity of seisin, is as completely non-existent as if it was not in fact an existing way. That it was used as a way in connection with the premises devised, has only the effect that the testator by employing words of express reference to such user, may pass the way as a newly created easement. In *Grymes v. Peacock*, 1. Bulstrode 17, a right of common which was formerly used in the waste of the owner, and had become extinct by unity of seisin was held not to pass under a grant of the house and land, with all commons appurtenant to the said messuage and close; and *Fleming, C. J.*, said if it had been laid with all commons belonging to the house and usually occupied and enjoyed with the same, with an averment of such former user, this had been good. *Soundeys v. Cliff*, Moore 467; *Bradshaw v. Eyre*, Cro. Eliz. 570; *Worledg v. Kingswel*, Cro. Eliz. 794; and *Clements v. Lambert*, 1 Taunt. 205; are to the same effect. In *Whalley v. Tompson*, 1 Bos. & Pul. 371, a way which had become extinguished by unity of seisin, was held not to be revived or newly created by a devise of the dominant tenement with the appurtenances; and the court say, that if the devise had been 'with the ways now used,' it would have been a devise of the close with an easement newly created."

And the first headnote in *Denton and Wife v. Leddell*, in 23 N. J. Eq. 64, is:

"No one can have an easement in his own lands; and if an easement exists, if the owner of the dominant or servient tenement acquire the other, the easement is extinguished."

Whether defendants have a right of way by adverse possession is a legal question, if the claim is substantial. We submit that the testimony shows that the claim is not substantial. The proofs show that the passage of defendants has been by *permission* of the owners of Plot "H." Possession and use to be adverse must be continuous, notorious, to the full extent, and with a claim of right. *Colton v. Depew*, 60 N. J. Eq. 454; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Cornelius v. Gibbardson*, 25 N. J. L. 1; *Myers v. Folkman*, 89 N. J. L. 390. It must *not* be under permission. *La Porte v. Todd*, 32 N. J. L. 124.

If possession commences in permission, possession for twenty years does not ripen into a title. *Pennsylvania R. R. Co. v. Hulse*, 59 N. J. L. 54.

These principles all apply to a claim of adverse possession to the use of a way.

In *Pennsylvania Railroad Co. v. Hulse*, 59 N. J. L. 54, the Supreme Court said:

"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."

And the Supreme Court in *Holmes v. Murphy*, 1 N. J. Misc. 127, said:

"As to the alleged existence of a private easement in favor of the plaintiff and his predecessors in title, we think that question was properly resolved. Where a party crosses over the land of another with such frequency as to indicate that he has a way over it, the *presumption is that he is using the way with the permission of the owner and not adversely to him*, and, by force of this presumption, the owner of the land is entitled to withdraw the permission whenever he sees fit. To succeed in establishing a way against the owner, it must be proved that

the user was adverse, and there seems to have been no testimony of that kind in the case."

Pennsylvania Railroad Co. v. Hulse was relied upon by the Court of Chancery in *McCran v. Erie Railroad Company*, 93 N. J. Eq. 286 at p. 291, Vice-Chancellor Lewis there said:

"At most, the use of the footpath, primarily provided for the convenience of the railroad employees, was permissive only as to others. If originally permissive it could not ripen into a prescriptive right. *Pennsylvania Railroad Co. v. Hulse*, 59 N. J. L. 54."

This court said in *DeLuca v. Melin*, 4 N. J. Adv. Rep. 1649 at p. 1652:

"In the face of evidence supporting these findings we are unable, however, to find proofs supporting an easement in the lands in question acquired by respondent by adverse user.

"To sustain a title by adverse possession the party relying thereon must establish a continued, open, visible and exclusive possession and one that is hostile, that is, with the intention to claim title against the true owner, and, obviously, it must appear that the possession, or use, which is claimed to be adverse was such that the owner knew, or should have known, that the disseizor intended to make title under it. *Cornelius and Empson v. Giberson*, 25 N. J. L. 1 (at p. 31); *Cobb v. Davenport*, 32 *Id.* 369; *Meyers v. Folkman*, 89 *Id.* 390.

"And where the use of a way, at its inception, was permissive, the mere continuance of such use, for the statutory period, will not ripen into a hostile right. *Pennsylvania Railroad Co. v. Hulse*, 50 N. J. L. 54.

"It must likewise be apparent that one cannot successfully contend for title by adverse possession where that possession is as a member of the public, in common with all

others exercising and enjoying the privilege of use and occupancy, for the reason that such possession and use is lacking the necessary element of exclusiveness. *Cobb v. Davenport, supra*; 19 Corp. Jr. 898, Sec. 76d."

That case had originally been in the Court of Chancery on a bill to enjoin the defendants from interfering with the use of the right-of-way by the erection of a building thereon. The Court of Chancery dismissed the bill upon the merits. This court affirmed the decree upon the ground that there was a dispute as to the legal title which should not be adjudicated in equity (3 N. J. Adv. Rep. p. 940). An action was then brought in trespass. Plaintiff succeeded and damages were assessed at six cents. Had this court affirmed and had plaintiff's judgment been sustained, it is submitted that the extent of the right-of-way would *not* have been determined.

It is submitted that, so far as the legal right of defendants in this case is concerned to an easement by adverse possession, the law is settled by the decision of this court in *DeLuca v. Melin*, 4 N. J. Adv. Rep. 1648. The claims there made by those claiming the right of easement were, barring necessity, substantially the same as the claims made by the defendants in the case at bar. They claimed;

1. Dedication and donation to public use.
2. Right acquired by adverse possession.

This court held that, although the proof showed a clear intent to donate the land to public use, there was no proof which would support a judgment in favor of plaintiff for the violation of any legal right acquired by him by adverse possession.

The presumption is that the use was by permission. *Johanson v. Atlantic City Railroad Co.*, 72 Eq. 332; *Holmes v. Murphy*, 1 N. J. Misc. 127; *Lacari v. Carr*, 84 N. J. L. 345. There is no proof in this case that the use was otherwise than by permission. It is true that, at one time, because of bickering between members of the Soper family, gates or wire were put up which closed off the roadways, and that these gates were removed, or wire cut, within a week after they had been put up. But the proofs show that this removal, rather than being under any claim of right, was due to bickering between relatives (p. 59).

Within the past few years, complainant Oeding had signs put up stating that the roads were private roads (p. 22), but removed the signs after conference with the postmaster and recorder, not because of the assertion of adverse claim but so as not to interfere with the delivery of the mail (pp. 25, 26).

In other words, *complainant permitted the use* and Wensley, who had a one-sixth interest in the property from 1907 to 1918 and who represented the owners of the estate of Soper from the death of Charles A. Soper in 1895 to the date he acquired his one-sixth interest and thereafter the owners of the other five-sixths until he conveyed in 1918, testified that the adjoining owners were *permitted*, during all of that period of time, to use the roadways (p. 31).

It is quite true that, comparatively recently, the owners of these adjoining properties have asserted an adverse right and have, without consent of complainant, placed mail boxes in the roadways, but there is no proof whatever of any adverse use for a continuous period of anything like twenty years.

It is therefore, submitted that, the claim of dedication being unsupported by any proofs, and the proof with respect to the acquirement of any rights by adverse use being so slight in nature as to make the claim wholly without substance, and there being no dispute in the proofs with respect to a way of necessity, and the matter of a way of necessity being of equitable cognizance in any event, and the rule of law having been settled by this court in *DeLuca v. Melin*, 4 N. J. Adv. Rep. 1648, *there is no substantial question of legal right left for determination of a court of law.*

As Vice-Chancellor Buchanan said in *Mann v. Vockroth*, 94 N. J. Eq. 511, affirmed by this court on his opinion: "It is by no means true that in every case where there is a dispute as to a legal right, equity is without jurisdiction." The kind of evidence which was introduced in the case at bar is quite similar to that dealt with by the Court of Chancery and this court in *Mann v. Vockroth*, 94 N. J. Eq. 511.

Assuming that defendants have an easement of some nature, the regulation of the use of that easement is a proper matter to be determined in a court of equity. *Mann v. Vockroth*, 94 N. J. Eq. 511.

While the bare legal existence of *an easement* might be determined by an action in trespass, the *extent* of the easement cannot, we submit, be determined in an action at law.

We therefore, submit that complainant had sufficient peaceable possession of the property as a whole to permit the Court of Chancery to determine whether the easement existed, and if so, the permissible extent of its use.

CONCLUSION.

It is respectfully submitted that the decree should be reversed and the record remitted to the Court of Chancery with direction to enter a decree either:

(a) Settling the title of complainant as against the defendants to that portion of Plot "H" which is not involved in the used roads; or,

(b) Settling the title of complainant to the whole of Plot "H," subject to such easement in the used roads as may be determined in an action at law to exist in favor of defendants; or,

(c) Settling the title of complainant to the whole of Plot "H," excluding that portion involved in the used roads and retaining the bill as to those used roads until the existence or non-existence of the claimed easement be determined at law.

(d) Settling the respective rights of both complainant and defendants in every part of Plot "H."

Respectfully submitted,

RICHARD GLASSNER,
MERRITT LANE,
Of Counsel for Appellant.

17 MAY.T.1928

New Jersey Court of Errors and Appeals

Between:

ALBERT OEDING,
Complainant-Appellant,

v.

JOSEPHINE N. SCHWEINLER, *et als.*,
Defendants-Respondents.

On Bill, etc.
On Appeal from
Chancery.

BRIEF FOR RESPONDENTS.

The Facts.

Complainant's Possession.

The tract of land described in the bill of complaint was originally part of a large tract of land owned by Fuller. In 1874 Fuller erected eight houses, four on either side of the tract marked "H," in Exhibit C-2, and at the same time opened up two streets running from Northfield Road to Benvenue Avenue, one on either side of the tract marked "H" (S. S. C., p. 114, lines 10 to 28; S. S. C., p. 115, lines 10 to 18). The streets that were then opened are the same streets that are now there (S. S. C., p. 116, lines 1 to 3). Subsequently Fuller conveyed the several plots of land on which the houses stood to divers parties. Fuller died in 1888. On December 12th, 1892, his executors gave a deed covering the tract marked "H" to one Charles A. Soper, which deed recited: "And the intention of this deed being to convey to the said party of the second part, all the remaining right, title and in-

Italics ours, unless otherwise indicated.

terest of the said William J. A. Fuller, to and in said last mentioned premises, that he had at the time of his death." Soper died in 1895, and the tract marked "H" passed by mesne conveyances to the complainant, in 1919.

Defendants denied the complainant's peaceable possession to the tract marked "H." This denial was amply substantiated by the testimony of the complainant, as well as that of defendants.

It is apparent from complainant's testimony that he did not have peaceable possession of the tract marked "H" at the time of the filing of his bill. He stored some lumber on that tract, and the people living on either side thereof objected to his doing so (p. 21, lines 1 to 18). The lanes or streets on either side of tract "H" are used by people on both sides of the tract (p. 21, lines 30-35; p. 22, lines 1 to 8). He has objected to such use of the streets. He erected two signs, "that these were private roads, no thoroughfare." In spite of the signs the people living on either side of the tract continued to use the lanes or streets (p. 23, lines 10 to 20).

It appears that after the signs were erected, complainant was brought before the Recorder of the Town of West Orange, who directed that the signs be removed. Complainant, in testifying as to what transpired before the Recorder, said: "He says—and I said that Mr. Tyms and Mr. Riddle put the letter boxes in my ground, five feet or six feet away from the house line, and I says, 'Well, I object to those letter boxes being in there. They only were put in recently, for they claim an easement; they have no right whatsoever to put anything permanent in the road, or what they claim is their easement, to travel in and out their places'" (p. 24, lines 30 to 40). Mr. Tyms and Mr. Riddle, mentioned by complainant, are defendants in this suit.

Later, complainant testified: "The letter boxes are there today. They absolutely refused to take them out" (p. 25, lines 8 to 10).

Complainant asserted that the streets belong to him and that no one had a right to traverse them (p. 25, lines 17 to 20).

Mr. William S. Wensley was at one time the owner of an undivided one-sixth interest in the tract marked "H" (p. 29, lines 10 to 18). He acquired his interest in 1907, and disposed of it to complainant in 1918 (p. 29, line 40; p. 30, lines 1 to 3). Mr. Soper was the owner of the tract before this witness (p. 30, lines 36 to 38). During the time that the witness Wensley had an interest in the property, he permitted the adjoining owners to use the streets on the same, to pass and repass, going to and from their homes (p. 31, lines 13 to 21).

This witness testified as of his own knowledge that within a year or two after Soper received his deed to the tract marked "H," from the executors of Fuller, he undertook to prohibit the use of the streets or roads on the tract, by the erection of a fence. He testified as follows:

"Q. Do you know whether or not Mr. Soper permitted them to do that? A. He had a fence up there and it was taken down during the night, or partly taken down during the night, by someone.

"Q. When was that? A. I think I would have to state now from guess or recollection.

"Q. Give us your best recollection. A. About a year, or possibly two years after he bought the property.

"Q. That was in 1892, wasn't it? A. Yes, 1892" (p. 31, lines 21 to 31).

And again:

"Q. Where did he put the fence? A. He put the fence around the plot. He had it across—

as I recall it, he had it across all of the road except possibly over toward what we call the Macmillan side, that is, the Williams side. It ran from Benvenue Avenue to the old Northfield Road. It was taken practically most of the front" (p. 32, lines 26 to 34).

And later:

"The Court: What the witness means is that the fence included the grass plot, but they did not include the two roads, which were about eight feet wide. Is that right?

"The Witness: That is true, sir; except there was a gate here, as I recall it, shutting off the whole thing, except part of that—

"Q. That driveway was open? A. Well, so far as I know. I think it was open.

"Q. And you say those fences were taken down? A. In the night, by someone adverse to him, and he put it up the second time.

"Q. How long did the fence stay there? A. I don't know, but probably for some months."

"Q. (By the Court.) And both times the fence was taken down? A. Yes. He never took it down" (p. 33, lines 23 to 30).

According to Herbert W. West, the tract of land is known as "St. Cloud Place" (p. 36, lines 5 to 7). If the roadway were blocked, people living in the middle house would not have access to Benvenue Avenue, or Northfield Road (p. 37, lines 4 to 11).

Edward E. Williams, one of the defendants, residing at St. Cloud Place, West Orange, derives his title through his mother, who purchased in 1884 (p. 54, lines 7 to 17). There are now seven cottages on St. Cloud Place, owned by the defendants, Riddle, Tyms, Olstead, White and Williams (p. 54, lines 32 to 40; p. 55, lines 1 to 5). All of the owners of the cottages get to and from Northfield Road and Benvenue Avenue, through St. Cloud Place (p. 55, lines 10 to 15). They always come in and out of St. Cloud Place, to get to and from their

properties (p. 55, lines 25 to 27). The Commonwealth Water Company have laid a water main in the tract (p. 56, lines 13 to 16).

Complainant objected to this defendant crossing that portion of the tract, between the roadways. The witness testified with reference to this objection, as follows:

"Q. And has there ever been any objection on the part of Albert Oeding to your going in and out, across and over these streets? Has he ever objected to your going in and out? A. The only objection he ever made was the crossing of the center lot.

"Q. Crossing the center lot? What do you mean by the center lot? A. Well, the lot between the roads, about fifty-five feet, about that.

"Q. What was the nature of his objection? A. Well, he said it was private property and he objected to people crossing there, although everybody else crossed it, but he objected to—against me.

"Q. Oh, he objected against you? A. Yes, sir.

"Q. He did not object against anybody else? A. Not that I ever heard" (p. 56, lines 13 to 28).

This witness had a garden on about one-half of the tract between the roadways, every year, for about five or six years (p. 56, lines 35 to 40; p. 57, lines 1 to 2).

Charles A. Soper was a brother-in-law of the mother of this witness; she sold Soper a piece of property adjoining tract H. He erected a fence at both ends of the tract, at Benvenue Avenue and Northfield Road; the fence did not remain there long, because his mother tore it down (p. 57, lines 12 to 25). During the short interval that the fence remained there, Soper would lock the gates at certain times during the day and night and stop

grocery wagons and the like, and vehicles and mail, going through there (p. 57 and p. 58). The gates to the entrance of the streets remained possibly a week or so (p. 58, lines 1 to 7). There has been no fence erected on any portion of the property since his mother tore them down (p. 58, lines 10 to 18). That portion of the fence across the park remained in position about a year (p. 58, lines 20 to 30).

It is clear that the witness' mother disputed Soper's right to erect the fence. He testified as follows:

"Q. Was there any litigation between your uncle and your mother with regard to the fence— A. (Interrupted.) Nothing but bickering between the two of them, that was about all. He would come over and threaten to do so and so and she said: 'Well, if you put them up again I will tear it down again'" (p. 59, lines 15 to 21).

This witness heard Soper say that he erected the fence (p. 60, lines 27 to 30). He saw his mother tear it down at night. She tore down the gateways that Soper put up (p. 60, lines 30 to 40). Portions of the fence remained at both ends of the park (p. 61, lines 7 to 10). According to this witness the land between the roadways has been farmed or gardened at different times (p. 62, lines 38 to 40).

He himself had a garden there for several years. Complainant endeavored to show that this witness had his garden in the tract by permission of the executrix of the estate of Hannah Soper, but this is not so. The testimony shows he farmed a portion of the tract with the acquiescence of Mrs. Lenke, executrix of the Soper estate. The witness, on cross examination, testified:

"Q. You understood, of course, when you got the consent of Mrs. Lenke that she was the owner of the property, didn't you? A. Well, I

always understood that that property was public property.

"Q. Well, then, why did you get the consent of Mrs. Lenke for the use of public property?

A. Well, as the ground was not used for anything else, I thought I would take advantage and have a garden there. She said, 'You might as well use it for a garden'" (p. 64, lines 27 to 38).

And on redirect examination, the witness testified:

"Q. When you used this garden property did you deem it necessary to obtain Mrs. Lenke's consent, or was it just at her suggestion? A. Only at her suggestion.

"Q. That you used it? A. Yes, sir.

"Q. Not because she thought she owned it? A. No.

"Q. But you thought it was public property and she suggested it to you it was public property and you could use it; was that the idea? A. That was all" (p. 65, lines 10 to 20).

Peter H. Glannon, superintendent of the Commonwealth Water Company, testified that four hundred and sixty-four feet of two-inch main was laid on St. Cloud Place, between Benvenue Avenue and the end of the street, in June, 1905. The water mains were laid at the request of the owners of property on St. Cloud Place. They were laid in the streets. Among those who petitioned for the laying of the main were Stephen Riddle, Mrs. Van Tine, Joseph Tysms and John O. Olstead, all of whom are defendants, with the exception of Mrs. Van Tine. Complainant applied for water on St. Cloud Place between Northfield Road and Benvenue Avenue, on the east side of the street, on April 2nd, 1921 (p. 66, lines 18 to 30). The main is on the east side of St. Cloud Place, within six feet of the property line (p. 70, lines 22 to 28).

Defendant, Joseph Tyms, has owned his lot for seventeen years and has lived on St. Cloud Place eleven years (p. 82, lines 37 to 40; p. 83, lines 1 to 2). His house is the third house in from Benvenue Avenue, and the second house from Northfield Avenue (p. 83, lines 10 to 14). He gets to and from Northfield Road and Benvenue Avenue, through the street known as "St. Cloud Place." He goes in and out of the said St. Cloud Place, and has been doing so ever since he owned his property on that street (p. 83, lines 15 to 25). According to this witness, the streets have been in existence for over forty-five years, to his knowledge. He is a police officer of the Town of West Orange, and patrolled those streets for thirty-three years (p. 83, lines 28 to 30). He has no means of getting to and from his property, excepting by way of St. Cloud Place (p. 84, lines 8 to 10).

This witness remembers seeing a part of the fence that was in front of the park. The fence was torn down over twenty years ago—about the time that Mr. Soper was alive (p. 85, lines 10 to 25). It will be recalled that Soper died in 1895.

Simeon H. Rollinson, Mayor of the Town of West Orange, recalls that when he was a boy, two streets were cut through the tract of land in question, and that houses were built on either side of the tract. The space in between the streets was supposed to be a park (S. S. C., p. 112).

Frederick M. Hoffman, a builder by trade, had a contract for enclosing eight buildings on St. Cloud Place. Prior to the building of the houses, the property was covered with woods, it was rough ground (S. S. C., p. 114, lines 1 to 20). A strip was cleared off, two roads were built, with a piece of ground in between the roads, and a number of houses was erected on either side of the streets (S. S. C., lines 20 to 30). This witness erected a

building between the roadways. On the west end there was a sign up, fastened on a permanent post and called Benvenue Park (S. S. C., p. 115, lines 20 to 30). The streets that were opened at that time are now there—the streets were opened in 1874.

Guy Barker lived on St. Cloud Place from 1901 to 1920, and lived in the vicinity thereof for sixteen years before that (S. S. C., p. 117, lines 30 to 40). He used the roads for a good many years. When he lived on St. Cloud Place, he used the center portion between the roadways; he had a garden there one year, he played ball on it, and pastured a cow on it. He recalled that the roads were closed off once, about thirty or thirty-one years ago. Soper erected a picket fence on Benvenue Avenue, and a ribbon wire fence on the other end. The fence remained there only a little while. Mrs. Williams and Harry Williams took it down. The streets were never closed again, to the knowledge of this witness (S. S. C., p. 118, lines 10 to 35). This witness had a mail box in front of his house, standing outside of his fence line, and no one objected to it being there (S. S. C., p. 118, lines 35 to 40). The other property owners along the street had mail boxes (p. 119, lines 1 and 2). There is no other way of getting to the main highways, from the houses, excepting through the use of these streets (S. S. C., p. 119, lines 13 to 20). He recalls that a man by the name of Bohson had a garden on a portion of the tract, between the roadways (S. S. C., p. 120, lines 30 to 37).

George Hubert has lived on Northfield Road, in West Orange, forty-two years. His house is near St. Cloud Place, which was opened before his time (S. S. C., p. 121, lines 20 to 32). In describing the property he says: "There is a road on each side of a big piece of land, about one hundred feet wide, I should judge, something like that; it was

green when I was a boy, and a road on each side in front of the houses, there was a regular park in front of the houses" (S. S. C., p. 121, lines 34 to 40). He has used the roads. He recalls that the streets were once closed off when Mr. Soper lived, and just before his death. Soper took the picket fence from the front of his house and put it down at Benvenue Avenue and closed the upper end in with a wire fence. When asked what became of the wire fence, the witness said: "Well, it was up one night, I think, and it was open the next morning. All I remember it up was one night" (S. S. C., p. 122, lines 10 to 20). This witness does not know who took the fence down. No attempt was ever made to put the fence up again, to the knowledge of this witness. He recalls water mains being laid in the property (S. S. C., p. 122, lines 15 to 30). He recalls that Mr. Bohson, who lived in the property now owned by the defendant Riddle, had a garden in the tract, between the roads. He has seen Bohson and Barker pasture their cows in the center tract. Barker pastured his cow there for five or six years (S. S. C., p. 123, lines 10 to 30). There isn't any kind of a fence on the tract of land in question, at the present time (S. S. C., p. 124, lines 17 to 19).

Joseph Sulpy lived on St. Cloud Place, with Mr. Riddle, from 1909 to 1921. When asked to describe the street known as St. Cloud Place, he said:

"Well, there is a stretch of flat land about one hundred feet wide, I should judge, about two hundred foot, two or three hundred feet deep and there is a road on each side of it and there is a cinder path out in front of each house.

"Q. In addition to the road there is a cinder path? A. In addition to the road.

"Q. And what is that cinder path used for? A. For sidewalks.

"Q. And are there any fences along on the side lines? A. There is on the building property.

"Q. On the building line? A. There is.

"Q. There is fences? A. There is" (S. S. C., p. 124, lines 37 to 40; p. 125, lines 1 to 15).

This witness used the roads while he lived there. He never heard of anyone being stopped in the use of the roads. He recalls seeing Mr. Barker's garden in the central portion of the tract and that Barker's cow used to pasture there (S. S. C., p. 125, lines 30 to 40). The owners of several houses have mail boxes which are opposite the road, right in front of the houses, opposite the sidewalk line (S. S. C., p. 126, lines 1 to 14).

The defendant, Tyms, was recalled and testified that in addition to the roadways, there is a cinder pathway on the southerly side, from Old Northfield Road to Benvenue Avenue. Complainant tore up the sidewalk in front of his place and tried to make it impassable. The sidewalk had been there for over twenty years, to the knowledge of this witness. The pathway is about three or four feet in width. The pathway adjoins the property line (S. S. C., p. 134, lines 10 to 20).

Exhibit D-2 shows a cinder pathway on either side of the center portion, between the roadways, running from Northfield Avenue to Benvenue Avenue; the pathways are outside the property lines (S. S. C., p. 134).

THE LAW.

The possession of complainant is not sufficient to sustain the jurisdiction of the Court of Chancery.

The Act under which the bill was filed was designed for the relief of a class of persons who being in peaceable possession of lands have no means

of contesting the validity of adverse claims thereto by suits, in due course of law (4 C. S. 53, 99). In *Sheppard v. Nixon*, 43 N. J. Eq. 627, Justice DEPUE, speaking for the Court of Errors and Appeals, said: "Under this statute, possession in fact, as distinguished from that constructive possession which in ejectment suits arises in virtue of the legal title, is essential to the jurisdiction of the Court. The bill contains the necessary jurisdictional averment. But the defendant having in his answer made denial of the possession by the complainant, it was incumbent on the complainant to establish that fact by proof. There being no proof upon that subject, I agree with the Chancellor that the suit for that reason cannot be maintained under the statute. I also agree with the Chancellor that this Act was designed for the relief of a class of persons who, being in peaceable possession, had no means of contesting the adverse claim by a suit in due course of law."

"Peaceable possession," under the statute, is defined in *Allaire v. Ketcham*, 55 N. J. Eq. 168, as follows: "Has the possession been peaceable under the statute? If by peaceable is meant quiet and peaceable as to every trespasser, whether claiming title or not, then the possession cannot be said to have been altogether peaceable, for the trespassers whom complainant ordered off, disturbed this peaceable possession. But, I think the true construction of the statute is that the possession must be peaceable as against the defendant, and further it seems to me that in determining whether the possession as to the defendant is peaceable, the test must be whether the defendant setting up a claim of title, has interfered with the complainant's possession by an act which is suable at law, and suit upon which will or may involve title of the defendant. This is the test ap-

plied by the Courts to the term 'peaceable' as connected with the acquiring of easements by continued and peaceable possession for twenty years."

Complainant admits in his brief (p. 22), "So far as the use of the rights-of-way over plot H are concerned, there is proof of the exercise by defendants of the right of passage." Defendants claim the right of passage over the roadways by adverse user. The undisputed testimony is that the defendants and their predecessors in title have used the roadways as a means of getting to and from their homes, from Benvenue Avenue, or Northfield Avenue, since 1874. More than twenty year ago, Soper, complainant's predecessor in title attempted to interfere with the use of the streets or roads by erecting a fence across both ends of the tract. The fence remained intact but for a very short time. Defendant, Williams, says that the part of the fence enclosing the roadways, remained standing for about one week. The part of the fence blocking the use of the roadways, was torn down by Mrs. Williams, the mother of and predecessor in title to this defendant; and at the time she tore down the fence, she told Soper if he attempted to erect a fence again, she would tear it down again.

It also appears that for more than twenty years last past, there has been, at least on the easterly side of the tract, a cinder pathway of about three or four feet in width. Defendants and their predecessors in title have used this pathway as a means of ingress and egress. Complainant would like us to believe that these pathways are not on tract H. But the survey made by Winston (Exhibit D-2), upon which complainant relies to prove the width of the roadways, shows the pathways on either side to be on the tract and adjoining the property line. Moreover, the witness, Sulpy, says

that the pathways are outside the property line. Complainant has torn up that part of the roadway in front of his home so as to make it impassable to defendants, but defendants continue to use the pathway in good weather.

In addition, defendants have erected in tract "H" mail boxes in front of their respective property lines. It is not clear from the testimony whether the mail boxes are erected in that portion of the tract between the roadways. Sulpy says: "They are opposite the road, right in front of the houses, opposite the sidewalk line." In any event, they are standing in a part of tract H, for complainant has objected to them being in his ground (pp. 24 and 25). By complainant's admission, defendants have erected the mail boxes under a claim of right; they have refused to take them down, although he has requested them to do so (pp. 24 and 25).

At the time of the opening up of the property in question a building was placed on the tract between the roadways and signs bearing the inscription "Benvenue Park" were erected (S. S. C., p. 115). This building was used as a clubhouse by the people living on either side of the tract (S. S. C., p. 84). There were books and a billiard table and a library in the house. The people on St. Cloud Place used it as a public place (p. 86, S. S. C.). The tract between the roadways was a green—a regular park, when the witness George Hubert was a boy (S. S. C., p. 121, lines 30-40).

Thereafter Soper attempted to close the whole tract, to prevent passage over the tract by the erection of fences, but portions of the fences were taken down. According to complainant's witness West the fences remained in possession probably for some months, but were taken down by some one adverse to Soper (p. 33, lines 30 to 40).

Several witnesses testified that Mrs. Barker, a tenant of the defendant Riddle, used the center portion of the tract as a pasture for cows. The defendant Williams, and others, from time to time farmed a portion of the tract. Complainant contends that Williams farmed the tract with the consent of the owner, but the uncontradicted testimony demonstrates that he did so merely with the acquiescence of the party who claimed to own the tract.

The uncontradicted testimony shows, too, that complainant objected to the defendant Williams walking over that portion of the tract between the roadways. Williams says that everybody else (meaning, of course, other people living on either side of the tract) crossed over the center portion, but complainant objected only to him doing so. It is clear, too, that Williams' user of that portion of the tract between the roadways was under a claim of right.

It is respectfully submitted that complainant has failed to establish peaceable possession of tract "H," and hence the Court of Chancery did not have jurisdiction.

Acts of defendants under claim of right have destroyed complainant's peaceable possession of all of Tract "H."

Under claim of right, defendants have exercised, and still do exercise, rights of passage over the roadways, over the cinder paths and over the central portion of the tract, which has been used as a sort of commons by defendants and their predecessors in title. Defendants, moreover, have erected in Tract "H," letter boxes, which they have refused to remove under claim of right, *at complainant's request*.

It is not necessary that the proof *conclusively*

establish such rights in defendants. It is sufficient that defendants have made entries upon complainant's land, under claim of right, for which defendants are suable at law, and the acts have been such that in a suit thereon, the validity of defendants' claims would or could be put in issue.

Barry v. Tunick, 97 N. J. Equity 281;
DeHanne v. Bryant, 61 N. J. Equity 141;
Allaire v. Ketcham, 55 N. J. Equity 168.

Complainant admits there is proof of exercise of the right of passage over the roadways, but contends that as there is no right of defendants to that part of the tract between the roadways, and as there is no proof of any acts of defendants disturbing complainant's possession, complainant's possession as to the central portion of the tract is peaceable. Assuming, for the sake of argument, that there is no proof of any act of defendants disturbing complainant's possession of the tract, excepting the right of passage over the roadways, the exercise of that right is sufficient to destroy complainant's peaceable possession. Complainant, in his brief, alleges that he is in peaceable possession of the whole tract. He admits defendants' exercise of the right of passage over the roadways, under claim of right. Substantial proof of the existence of that right is found on the record.

The act on which the suit is based requires that complainant shall be in peaceable possession of the whole tract in order to maintain his bill. Section 1 of the Act, 4 C. S., 5399, provides in part: "That when any person is in *peaceable possession of lands* in this state, claiming to own the same and his title thereto or *to any part thereof is denied or disputed*, or any other person claims or is claimed to own the same *or any part thereof*, or any interest therein, or to hold any lien or en-

cumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle the title of said lands, and to clear up all doubts and disputes concerning the same."

It is clear that if *complainant's* possession is not peaceable as to the whole tract, he cannot maintain his bill.

The precise question was before the Court of Chancery in the case of *DeHanne v. Bryant, supra*. The complainant in that case was the owner of a tract of land of about *eight* acres. Defendant claimed an easement of a water course over complainant's lands. It appeared that defendant entered upon complainant's lands for the purpose of cleaning and repairing the water course, without complainant's consent and under claim of right. The Court said at page 144: "But without deciding this point, I conclude upon the whole evidence that entries have been made and acts have been committed upon complainant's premises by the defendant, or under his authority, under claim of right to the easement set up in his answer to his suit, for which the defendant is suable at law, and that these entries and acts have been such that in a suit thereon the validity of defendant's claim would be involved, or could be put in issue. Complainant's possession, therefore, is not a peaceable possession, as against the defendant, and this Court has in the present case no jurisdiction to try and determine the legal title to the easement in dispute. I will hear counsel as to whether the bill should be dismissed or the hearing be directed to stand over until after the settlement of the title at law."

In *Barry v. Tunick, supra*, complainant filed a

bill to quiet title to a tract of land over which defendants claimed an easement of way. The evidence submitted by the defendants very clearly proved the existence of a right-of-way vested in each of them. Chief Justice GUMMERE, speaking for this court said at page 283: "In the present case the continued user of the alleged way by each of the defendants, if without legal justification, constituted a series of trespasses, for which actions at law would lie in favor of the complainant, and the judgments in such actions would settle the question of the right of the complainant to hold his land free from the further user thereof by the respective defendants. The complainant's possession, therefore, not being a peaceable possession, within the meaning of the statute, and he having a complete remedy at law for the alleged illegal acts of the several defendants, the Court of Chancery was without jurisdiction to try and determine the legal title to the easements in dispute, and the bill of complaint should have been dismissed for this reason. *Penrose v. Absecon Land Co.*, 94 N. J. Equity 436."

In view of these authorities, it is apparent, therefore, that the exercise of the right of an easement over a portion of a complainant's land is sufficient to destroy complainant's peaceable possession. Even though defendants did nothing more than pass over the roadways, under claim of right, the exercise of that right would destroy complainant's peaceable possession to the whole tract and the bill of complaint should therefore be dismissed. But as we have seen, complainant's peaceable possession is destroyed not only by defendants' passing over the roadways, but also by their exercise of the right which they claim to pass over the pathways, to maintain the mail boxes in Tract "H" and to pass over the central portion of the tract.

Complainant contends that the exercise by defendants of a right of passage over the roadways does not disturb complainant's peaceable possession of the land. It is said: "The right of complainant to the fee and the right of defendants to the easement, if such exists, are independent" (p. 22). The contention is, in other words, that defendants' easements of way over the tract do not disturb complainant's possession.

Several cases are cited in complainant's brief in support of this proposition, only one of which, however, *Country Homes Land Co. v. DeGray*, 71 N. J. Eq. 289, was on a bill to quiet title. We shall make observation concerning this case hereafter. This contention, it would seem, begs the question, for complainant claims to own the entire tract of land, free and clear of all liens and encumbrances on the part of the defendants. It is obvious, therefore, that if complainant claims to own the entire tract, free and clear of encumbrances, any acts of the defendants done pursuant to their claim of easements of way over the tract would disturb the peaceable possession of the complainant as the owner or holder of the unencumbered title to the premises. An easement is certainly an encumbrance. Moreover, the authorities do not sustain complainant's contention.

In *Barry v. Tunick*, *supra*, the question involved was whether defendants had an easement of way by adverse possession over complainant's premises. This Court held that the continued user of the alleged way by the defendants constituted a series of trespasses for which an action at law would lie in favor of complainant and that the claimant therefore did not have peaceable possession.

In *DeHanne v. Bryant*, *supra*, defendant claimed an easement in a water course. The Court held

that defendant's acts under his claim of a right to an easement in the water course were sufficient to destroy complainant's peaceable possession.

In *Country Homes Land Co. v. DeGray*, cited in complainant's brief, the bill was not only a partition bill, but one to quiet title. Without going into the facts of the case, it is sufficient to remark that the Court adhered to the rule requiring a legal question to be solved by a court of law.

It is apparent that complainant's contention that an easement does not disturb complainant's possession, is not sound in logic, nor is it supported by the authorities.

Complainant was not entitled to a decree settling the title as against defendants, to all portions of Tract H, not traversed by the roadways; nor was complainant entitled to a decree settling his title to that portion of Tract H, involved in the roadways, subject to such rights of passage over the roadways as defendants might at law be determined to have.

Complainant's contention that he was entitled to a decree settling the title as against the defendants, to all portions of plot H, not traversed by the roadways, overlooks the undisputed testimony that defendants, under claim of right, have destroyed his peaceable possession, by use of the cinder pathways which run along the extreme edge of the tract, on either side; by the erection and maintenance of mail boxes, in front of their respective property lines; and by crossing that portion of the tract between the two roadways.

It is, moreover, difficult to conceive how any decree could be made, settling complainant's rights in the tract, until the question of the existence and extent of defendants' rights was deter-

mined in a court of law. For it is well settled in this state, that a court of law is the proper forum for the determination of the existence of easement, as well as the extent thereof. *Barry v. Tunick, supra*; *Borough of South Amboy v. Penn. R. R. Co.*, 77 Eq. 242; *Imperial Realty Co. v. West Jersey and R. R. Co.*, 79 N. J. Eq. 168, and *The Borough of West Long Branch v. Hoch*, 99 N. J. Eq. 356. The case of *Man v. Bockroth*, 94 N. J. Eq. 511, cited by complainant, is not applicable, for it appeared in that case that defendants admittedly had a legal easement upon the roadway in question, and the whole question involved was the extent of the legal rights of the respective parties, according to the construction of certain deeds; the Court there was not concerned with the physical location of the boundaries or rights.

Manifestly, then, no decree could be made settling complainant's rights to that portion of the tract, until the question of the existence of the defendants' rights and the extent thereof was determined in an action at law.

Complainant now suggests that the record be remitted to the Court of Chancery, with directions to settle complainant's title to the whole of tract H, subject to such easements in the roadways as may be determined in an action at law, to exist in favor of the defendants. The record should not be remitted with such directions at this step in the cause. Complainant has an adequate and full remedy at law. He has failed to avail himself of that remedy. Defendants daily use the roadways, the cinder paths and the mail boxes, and frequently pass over the center portion of the tract. These acts are committed under a claim of right. An action at law would determine the respective rights of the parties, not only as to the center tract, but also as to the roadways, cinder path and the mail boxes. The case is similar to that

of *Steelman v. Blackman*, 72 N. J. Eq. 330, where Vice-Chancellor LEAMING, advising a decree dismissing the bill for want of jurisdiction, said (at p. 331): "The proofs disclose that about a week before this bill was filed, defendant entered upon the land in question and for one-half day plowed the land for the purpose of cultivation. After the bill was filed defendant finished the plowing and cultivated the land. The proofs also disclose that, at the time the bill was filed, complainant knew that the plowing had been done, and that he was informed by his neighbors that it had been done by defendant. I am entirely clear that under these conditions it was incumbent upon complainant to exercise at least a reasonable effort to procure the necessary evidence upon which to base an action at law before he could properly apply to this court for the statutory remedy under the claim of a peaceable possession. The trespass upon the land in question was of no ordinary character, and the certain ascertainment of who did the plowing was necessarily easy of accomplishment, and my judgment is that that duty rested upon complainant before he became entitled to avail himself of this statutory action. Had complainant made a reasonable effort to ascertain who did the plowing and failed to procure the necessary evidence to enable him to maintain an action at law, a different condition would not be presented; but in view of the well-recognized purpose of the statute to afford a remedy only where no remedy at law exists, I am of the opinion that complainant is not entitled to invoke the aid of the act."

There is another reason why the record should not be remitted to the Court of Chancery, with instructions to direct an issue at law. The first suggestion that an issue at law be directed by the Court of Chancery, is made upon this appeal.

Complainant was entitled, under Section 5 of the Act, 4 C. S., page 5402, to apply for the direction of an issue at law. He did not do so. He chose, rather, to let the whole matter go to a decree; and now that the decision of the Court of Chancery is unfavorable to him, he now for the first time, suggests that an issue at law be directed out of the Court of Chancery. Complainant has waived his right for the direction of an issue at law out of the Court of Chancery.

It would be unfair to defendants to permit complainant to gamble with obtaining a favorable decree in the Court of Chancery, without making application for the direction of an issue at law. At the trial of this cause in the Court of Chancery, counsel for defendants insisted that the question of complainant's peaceable possession, that is, the jurisdictional requisite, be first tried in accordance with established practice. On page 47, Mr. Grosso said: "May it please your Honor, as I recall it—(interrupted) * * * (Mr. Grosso). As I understand the procedure in a suit of this nature, the first question which is tried is the question of jurisdiction, then, if the Court decided that the complainant has established the jurisdictional facts, then another date is set for the hearing of the rest of the case" (p. 47, lines 32 to 40). Mr. Grosso cited the case of *Fittichauer v. Metropolitan Fireproof Co.*, 70 N. J. Eq. 429. Counsel for complainant took the view that the parties should try the entire issue (p. 50, lines 13 to 20). The Court suggested that it would save time if the whole matter were heard at the same time (p. 50, lines 20 to 30). Defendants have been put at considerable expense in the defense of complainant's bill. As we have pointed out above, complainant had at the time of the filing of his bill, and still has, an adequate and full remedy at law. Complainant

failed to apply for a direction of an issue at law in the Court of Chancery. If such application had been made, it would undoubtedly have been granted. It would place an undue burden upon defendants to reverse the decree of the Court of Chancery and remit the record, with instructions to direct an issue at law.

It is submitted that inasmuch as complainant has an adequate and full remedy at law, of which he has failed to avail himself, and as he has elected to permit the issue to go to final decree in the Court of Chancery, without having made application for a direction of an issue at law, he is not at this time entitled to a direction of an issue out of Chancery.

Complainant contends that so far as the legal right of defendants in this case is concerned to an easement by adverse possession, the law is settled by the decision of this Court in *De Luca v. Melin*, 4 N. J. Adv. Rep. 1648. Complainant does not set forth clearly his contention that the legal right of the defendants is settled by this case. It seems to be suggested, however, that in view of this decision, defendants have no rights whatsoever in the tract. This contention begs the question. Defendants have offered evidence of a continued, open, peaceable and exclusive, user of the roadways, the pathways and the mail boxes, against complainant and his predecessors in title, for a period of over twenty years. It may well be that defendants' evidence does not establish defendants' rights conclusively. But that does not mean that complainant has such peaceable possession as to sustain the jurisdiction of the Court of Chancery. Nor does it mean that the Court of Chancery could determine whether defendants were entitled to such rights in the property by adverse user, as they claim. For, as submitted above, the proper court

for the determination of such rights is a court of law. The important point is that defendants under a claim of right, have for more than twenty years, exercised certain rights of passage over and through Tract H. It is significant, too, that the case of *De Luca v. Melin*, had been previously before this Court upon an appeal from a decree of the Court of Chancery, dismissing the bill of complaint (3 N. J. Adv. Rep. 940). The decree was affirmed by this Court upon the ground that: "Primarily, jurisdiction over controverted legal titles is at law and when doubt as to the title arises on the face of a bill or a final hearing, equity does not adjudicate it" (4 N. J. Adv. Rep. 1650).

Complainant asserts that the statute contemplates that title may be settled to any portion of the land described in the bill, and cites Sections 4 and 5 of the Act, to the effect that the Court of Chancery shall settle and adjudge whether the defendant has any estate, interest or right in, or encumbrance upon said land, or any part thereof. Complainant then states that by the express terms of the statute, it was the duty of the Court below at least to enter a decree for complainant, as against defendants, to that portion of plot H as is not involved in the used roadways. The fallacy of this contention is that Sections 4 and 5 of the Act are not applicable unless complainant be in peaceable possession of all of the land. It has been repeatedly held that the peaceable possession of complainant is a jurisdictional requisite.

Sheppard v. Nixon, supra;
Beardsley v. MacPherson, 58 Atl. 105;
Allaire v. Ketcham, supra;
Beale v. Lake, 45 N. J. Eq. 668.

CONCLUSION.

It is respectfully submitted that for the reasons set forth above, the decree of the Court of Chancery should be affirmed.

GROSSO, BRUNDAGE & ANDERSON,
Solicitors for and
of Counsel with Defendants.

17 MAY 1 1928

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

New Jersey Court of Errors and Appeals

No. 17—May Term, 1928.

Between

ALBERT OEDING,
Complainant-Appellant,

and

JOSEPHINE N. SCHWEINLER,
et als.,
Defendants-Respondents.

On Bill, &c.

On Appeal

from

Chancery.

REPLY BRIEF OF APPELLANT.

(Italics ours except where otherwise noted.)

Respondents throughout their brief insist that the remedy of appellant is at law and that the Court of Chancery has no jurisdiction under the act to quiet title, because the rights of the parties should be settled at law, but they fail to point out how either the nature or the extent of any easement which respondents may have over the used ways on either side of Plot H (Exhibit D. 2, p. 134), or in the central portion of Plot H, may be settled in an action at law.

There is some intimation in the brief at various points that there are cinder paths which are outside the lines of the used roadways traversing Plot H and that there are post boxes erected outside the used roadways, the inference being that these boxes and paths are on the central portion of Plot H and that therefore either ejectment or trespass might be maintained by appellant, which would settle the matter of the legal rights in the central portion of Plot H, but neither inference

is well founded. The cinder paths are *not* on the central portion of Plot H outside of the lines of the driveways, nor are they along those sides of the driveways which are nearest to the central portion of Plot H. They run along the sides of the driveways which are nearest to the property line of the parties, as is clearly shown by Exhibit D. 2 (p. 134) and by the testimony of respondents' witness Tymes, who indicates (p. 134) that, not only are the cinder paths *not* on the central portion of Plot H, but they are included within the property lines of the abutting property owners. Tymes testifies (p. 134)—

“Q You don't know if it is on your property or where it is? You don't know whether it is on your property line or where it is? A My property line joins it.

Q I know. Do you know whether your property line includes it or not? A I think it does.”

There is no evidence that the post boxes are erected on the central portion of Plot H. The evidence is to the contrary.

With respect to the boxes Oeding testifies (p. 24)—

“He says—and I said Mr. Timms and Mr. Ridell put in letter boxes in my ground, *five feet or six feet away from the house line*, and I says, ‘*Well, I object to those letter boxes, being in there. They only were put in recently, for they claim an easement; they have no right whatsoever to put anything permanent in the road, or what they claim is their easement, to travel in and out their places.*’”

And the witness Sulpy testifies (p. 126)—

“Q And where are they (the mail boxes) with relation to the property line? A They are opposite the road, right in front of the houses, opposite the sidewalk line.”

Respondents, therefore, are quite mistaken when they say (p. 14 of their brief)—“It is not clear from the testimony whether the mail boxes are erected in that portion of the tract between the roadways.”

The definite testimony is that they are *in* the roadways, and five or six feet away from the house line, or, in other words, they are on the inner side of the used driveways, *i. e.*, those sides of the driveways nearer the property line, where they should be, and the objection of appellant was that the respondents *had no right whatever to put anything permanent in the road.*

The proof, therefore, shows, beyond dispute, that nothing is being maintained which would support an action either of trespass or ejectment against respondents with reference to the central portion of Plot H and no act has been performed by respondents having relation to the central portion of Plot H for which *any* action at law will lie.

As we stated in our original brief, an action of ejectment or trespass with respect to the maintenance of the post boxes will not settle any rights in the central portion of Plot H, nor will an action of trespass against respondents for their acts of passage over the used driveways over Plot H, and respondents have not passed and do not pass over any other portion of Plot H than the used driveways.

If judgment should go in such an action, therefore, in favor of respondents, all that would be established would be that respondents have the right to pass over the used driveways and, if the action involved the maintenance of post boxes, that as appurtenant to their right of passage they might maintain post boxes within the limits of the used driveways.

Neither by such an action, nor by any other action at law, could the extent of the right of easement, so far as the used driveways are concerned, be determined. No action that can be imagined at law could possibly result in a conclusive judgment settling the rights of the parties to the central portion of Plot H.

It is suggested that, because of the assertion of the right of passage over the used driveways, the peaceable possession of appellant to the entire of Plot H is disturbed, and cases are cited in this court, in which the claim has had reference to an easement over land, and this court has held that the Court of Chancery could not determine the issue and that complainant did not have peaceable possession, *but* an examination of those cases will disclose that the controversy involved *only* the matter of the existence or non-existence of an easement. The right of complainant in the property was conceded in each instance and the controversy revolved around the question as to whether an easement existed. In such a case the only question involved being the existence or non-existence of an easement, that matter might be determined at law. In effect, all that was in dispute was the rights in the land included within the lines of the claimed easement.

But that is not this case. In this case respondents assert not only an easement over the used driveways, which they have used in such a way as that *that* question may be determined at law, but they go further and assert rights in the central portion of Plot H, but, with respect to those rights, they commit no acts for which an action at law will lie.

We have referred to these rights which respondents assert in words but not by deeds on

page 27 of our original brief, and respondents in their brief insist upon rights over the central portion of the tract, and respondents insist (p. 20 of their brief) that complainant is not entitled to a decree settling the title as against defendants to all portion of Tract H not traversed by the driveways and make claim to rights in the central portion of Tract H and suggest that *those* rights must be determined at law, but do *not* point out how they can be determined at law.

So far as the central portion of Tract H is concerned, the case is typically one for quieting title under *Jersey City v. Lembeck*, 31 N. J. E. 254, at p. 272; *Sheppard v. Nixon*, 43 N. J. E. 627.

We considered the building and tearing down of the fences on page 12 of our original brief and showed that it clearly appeared from the testimony that the only portions of these fences which were destroyed were the portions *which closed off the driveways*, and respondents do not suggest that, by reason of anything which occurred with respect to the fences, any action at law resides in appellant.

Respondents suggest that, because the peaceable possession of appellant is disturbed *with respect to the driveways*, he does not have peaceable possession of the whole tract and that, as he is not in peaceable possession of the whole tract he cannot have his title quieted as to any part of the tract. How this can be so, in view of the universal rule that the exercise of a right of easement does not disturb the possession of the owner of the fee, is not apparent.

Perrine v. Berge, 14 N. J. L. 355;

Burnet v. Crane, 56 N. J. L. 285;

Country Homes Land Co. v. De Gray, 71 N. J. E. 289, affirmed on the Vice-Chancellor's opinion, 71 N. J. E. 289.

The statute contemplates the settlement of titles to specific portions of the lands. We have considered this on page 28 of our original brief. Respondents are under the obligation imposed by the statute, Section 4, 4 Comp. Stat. of N. J., p. 4502, in their answer to specifically set forth "the estate, interest or incumbrance so claimed, *and if not claimed in or upon the whole of said land, he shall specify and describe the part in or upon which the same is claimed,*" and the Court is directed, Section 5, 4 C. S. of N. J., p. 5402, to inquire into and determine and settle and adjudge whether "the defendant has any estate, interest or right in or incumbrance upon said lands, *or any part thereof*, and what such interest, estate, right or encumbrance is, *and in or upon what part of said land the same exists.*"

Suppose appellant in his bill, instead of describing the whole of Plot H, had excluded the used driveways and had only described the central portion? Under such circumstances would he not have been entitled, under the proofs in this case, to a decree settling his rights to that central portion?

Is it conceivable that, in such a case, respondents might, by setting up the easements over driveways *not included within the property described in the bill* and by proving physical acts of passage over such driveways, destroy the right of appellant to have the title to the central portion of the tract settled, where there were no physical acts performed to disturb the peaceable possession of appellant to that central portion for which an action might lie at law?

But the fact that appellant has described in his bill more land than he is entitled, under the law, to have a decree quieting the title to, will not

prevent a court of equity from making a decree with respect to that portion of the land described as to which he is entitled to a decree. Equity, if necessary, will mould and amend the pleadings, but no moulding or amendment is needed, for the statute contemplates that the decree may separate the lots into parcels quieting the title as to some parcels and not as to others.

The case, we submit, is to be decided precisely as if the bill of complaint divided Plot H into two parcels—or rather into three—the central portion one and the two used driveways two.

The error, we submit, is in applying to this case the same rule which would be applied in cases where there is an admitted right of the owner of land in the land as such but a claim of others to an easement disputed by the owner of the land and nothing more. In such a case, the rights of the parties may be determined by an appropriate action at law in which action the existence or non-existence of the easement will be conclusively settled. But that is not this case. Respondents do not admit the right of complainant as the owner of the land subject only to their easement in the used driveways. They question appellant's title to the whole of the land. They claim *in words* more than a mere easement of passage, but do not perform acts which would create a basis for an action at law which would determine the existence or non-existence of the additional rights claimed.

It is the general rule that title will be quieted either with respect to a part of the property or with respect to the extent of the title. Thus, although plaintiff claims the entire title, he may obtain judgment for an undivided one-half interest and there may be a judgment adjudging half

of the land to the complainant and half to one of the defendants.

30 Cyc., p. 1380, and notes title "Quieting Title."

Of course, title may be quieted subject to certain rights of respondents, for that is but another way of saying that the Court should determine the rights and interests of the respective parties in the lands. It follows that, if respondents have rights and interests which cannot be determined in equity, title may be quieted subject to those rights to be determined at law.

In *Wilson v. Neligh*, Nebraska, 193 N. W. 704, the Court said:

"The court properly quieted legal title subject to the possessory rights sold to interveners by the contract."

That there may be rights in the public will not prevent the Court from settling title as against respondents.

In *Glos v. Holmes*, 228 Ill. 436, 81 N. E. 1064, the Illinois court said:

"In numerous cases in this court it has been held that an abutting owner may maintain trespass, which action a plaintiff cannot maintain unless he is in possession (*Dean v. Comstock*, 32 Ill. 173; *Ft. Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; 2 *Greenleaf on Evidence* (7th Ed.) 613), against persons interfering with his rights in a public street or highway, when the fee to the lands underlying the street or highway is in the abutter (*Dean v. Comstock, supra*; *Ft. Dearborn Lodge v. Klein, supra*; *Indianapolis, Bloomington & Western Railroad Co. v. Hartley, supra*; *Postal Telegraph Co. v. Eaton, supra*; *Board of Trade Telegraph Co. v. Barnett, supra*). The doctrine of those cases rests upon the principle that the abutter is in possession of the land as the owner

of the fee, subject only to the right of the public to use the same as a public street or highway. Clearly, therefore, appellee established such a possessory right in the premises described in her bill as entitled her to maintain her bill to remove said tax deeds as clouds upon her title, notwithstanding a portion of said premises was occupied for highway purposes."

It is respectfully submitted that the decree should be reversed as suggested in the original brief.

Respectfully submitted,

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