MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

Between
ABRAM SPEER,
Respondent,
and
ERIE RAILROAD COMPANY,
Appellant.
} On Appeal.

Argument for the Appellant.

The question involved is the right of a railroad company to change the elevation of a private crossing of its tracks or to condemn the right of crossing.

It appears that in 1870 John Speer, whose heir the complainant is, owned a long and narrow tract of farm land, about fifteen acres in area, in Montclair, fronting on the east on the Valley Road about four hundred feet and extending back westerly two thousand feet across a swamp and brook and up a steep hill, and having a frontage on Mountain Avenue on the west end. The map should be referred to.

In the year 1870 John Speer granted, in fee, to the Montclair Railway Company the land for a right of way one hundred feet wide across said tract, the railroad

running at such an angle that it crossed the farm of Speer about three hundred feet west of the Valley Road, and also crossed the Valley Road itself about four hundred feet south of the farm.

Mr. Speer had a farm-house and barns on the south-east side of the Valley Road. His deed to the railway company contains a provision that the company should "make and maintain the necessary fences on "both sides of said tract of land, which shall be built "before the work of grading on said tract is com-"menced, and shall provide the party of the first part "with a suitable and convenient road-crossing across the track of said railway, where the party of the first "part may direct" (Case, p. 3, l. 10). The railroad was built with a single track only, about eighteen inches above the natural surface of the ground, and planks were laid by the company for a road-crossing. Fences were also built by the company with bar-ways at this crossing (Case, p. 132). The land west of the railroad was intersected by a brook and was swampy near the railroad, and seems to have been used only for pasture. There was other access to the western part by way of Mountain Avenue, and at some later date by a new avenue called Cliffside Avenue. The planking became decayed and was not renewed and the appellant ceased to use the crossing for wagons, but continued to drive cows across there, down to a recent period. The cessation of use for wagons is variously dated, but is admittedly ten years ago. (Case, p. 31, l. 30; p. 44, ls. 20 to 40; p. 45; p. 116, ls. 20 to 40; p. 117, ls. 1 to 20.)

In recent years, about 1897, a double track was laid on the railroad and no planking was laid for a crossing. The property gradually changed its character and new roads and streets were laid, whereby the occupants of the farm-house could reach the land lying west of the railroad, as the map shows.

In 1899 a decree in Chancery was made on an application of the North Jersey Street Railway Company regulating the crossing of the Montclair Railroad by

the street railroad in Valley Road. The result was, that the railroad company was required to elevate its tracks in order to avoid a grade crossing (p. 175), and this compelled the raising of the tracks and an embankment about twelve feet high on the land of Mr. Speer. He now sues to compel the construction, by the railroad company, of a private crossing under grade for his farm. The Vice Chancellor holds that he has a crossing right by inheritance with the land, that the railroad company cannot change either the location or the elevation of this crossing, and cannot condemn the private right or compel any change in it, even on compensation.

I.

The Elevation of the Crossing is Subject to Change.

In both his opinions the Vice Chancellor cites authorities that the easement of a roadway, once located by mutual consent of parties, cannot be changed laterally, except by such consent, and he declares that it follows that it cannot be changed vertically (p. 136, ls. 20 to 40; p. 152). He says that this is "obvious."

If this is so, it must result that, if we condemn it, we must pay more than if we had power to change the grade, because such a right is worth more to respondent. It is also to be observed that if we must construct a tunnel, we must give respondent a much more valuable and costly right than that which he formerly enjoyed of crossing at grade. The Vice Chancellor in his first opinion remarks this as a reason why it is inequitable to require the construction of a tunnel (p. 138, ls. 27 to 40; p. 139, ls. 1 to 3).

The right of crossing has no such character as that which the Vice Chancellor attributes to it. To begin with, it is not what is ordinarily known as a right of way. Its nature must be determined exclusively by the terms of the covenant and the circumstances under

which it was made. The company agrees merely to provide a suitable and convenient road-crossing across the track at the point where Mr. Speer may direct. This differs from an ordinary right of way given to one man across the land of another, as we will point out.

But suppose it were such a right of way. We do not agree that the owner of the fee cannot change an ordinary right of way vertically. The grantee of a right of way takes no more than the right to a fair enjoyment of his easement. All other uses of the soil remain with the owner of the fee. He may use the way himself and may permit others to use it concurrently with the original grantee of it; he may improve the way or may narrow it, or depress it, or elevate it to any extent and build over it or under it, all subject to the requirement that he must permit its fair use by the grantee.

Jones on Easements, Sections 391, 392.
Grafton v. *Moir, 136 N. Y. 465, 472.*

The owner of the easement on his part must use it reasonably so as to protect the owner from injury. If, therefore, this were, as supposed by the Vice Chancellor, an ordinary right of way given to one over the land of another, it would not follow that the owner of the fee could not make reasonable changes in it for his own convenience in the use of his reserved right in the land, including such vertical changes as would not impair the convenient use of the way.

The case, however, is quite different from that of an ordinary right of way. The grantor of a right of way has no duty of construction or maintenance. The one who enjoys the way must build and maintain for himself.

The words "right of way" are not used at all in the provision in question. We have here the case of a crossing of a railroad and the parties contracted in view of that well-known use. It was not contemplated that

Mr. Speer would be permitted to construct anything upon the tracks; the company must do that and are to provide a road across the tracks. They are not to provide it anywhere else; the approaches to it must be furnished by the adjoining land-owner who is to use it. The company is to permit him to cross at the point he chooses and is to provide the crossing of the tracks; all the rest is left to him. *Williams* v. *Clark, Rec'r, 140 Mass. 238.* It was known that more tracks might be laid, the company having acquired one hundred feet wide for that purpose and having the charter right to lay more tracks. It was known also that the railroad company might need to change its grades and elevation, and that, by its charter, it had the right to do so.

If the Vice Chancellor's view is correct, then the company, by the covenant in question, utterly deprived itself, for all time, of the power to make any change in the elevation of its tracks, except such as would leave the surface, at the time of the location of the crossing, wholly unchanged for this farm road. They could not elevate or depress to the extent of five feet or ten feet, because that would involve a change of the crossing vertically, but they must elevate, if at all, enough to give a bridge clearance for a wagon-way, maintained on its original level.

We submit that there is nothing in the provision in the deed to prevent the railroad from changing the crossing at will. The duty to provide a suitable and convenient road-crossing is a continuing duty to be performed by the company, but there is nothing in its terms to require that it must always be kept at the same level. It is an agreement and it is to be read as any other agreement, in the light of the purpose of the parties, and it is most unreasonable to suppose that they intended that no change of elevation could ever take place. The agreement does not say so and no rule of law requires any such addition to its terms.

The General Railroad Law requires that a suitable and convenient crossing should be provided for an

owner whose lands are crossed in the construction of a railroad under that act. The maintenance of such a crossing is a continuing duty of the company, but the company is not disabled from changing its elevation, and it may be doubted whether it is disabled from changing lits location laterally. They may change such crossings just as they may change public roads, as the need arises, preserving fairly the private use.

People v. *N. Y. Cent. R. Co., 168 N. Y., 187; Schimper* v. *Chicago, &c., Ry., 82 N. W.* (Iowa) —affirmed on re-hearing—*87 N. W., 731.*

II.

The Land-owner Must Provide Approaches on His Own Land.

The grant by reservation in the deed can be no broader than a direct grant of the right, and must be limited to what is expressed.

The active duty and the power of the company is limited to work on its own land. The place of crossing is fixed by the land-owner, and the requirement that it shall be "suitable and convenient" is limited to the road "across the track of said railroad;" that is, it must be properly planked and constructed and proper bar-ways or gates must be provided in the fence which is required.

As stated in *Williams* v. *Clark, Rec'r, 140 Mass. 238, 241,* by Devens, J.: "While the crossing was to "be made convenient, it was to be so within the limits "stated." This case is a close precedent. There, as here, the railroad company, in acquiring its right of way, had agreed to furnish a convenient crossing within the limits of the land conveyed, and this crossing was constructed by the railroad company. There was no provision for a fence; but many years later the company built a fence, with gates—probably in order to prevent the road from becoming public. The company also raised its grade, and suit was brought for damages by

the owner, both for the obstruction of the road by gates and for the expense of raising the approaches to the new grade. In that case the Court held, that as the company had originally built, and for many years operated, the road without gates, they could not make the crossing less convenient by putting them up. As to the approaches the Court held that the duty of the company was limited to its own land, and that the expense to the owner of changing the grade of his approaches, being his own charge, was not recoverable from the company.

It must be observed that in our case the duty of maintaining fences, and therefore of gates or bars, is expressly imposed upon the company; in other respects the precedent is a complete one.

III.

Specific Performance Should not be Decreed.

In the case of *Murdfeldt* v. *N. Y. & West Shore R. Co., 102 N. Y. 703,* the Court refused to compel the specific performance of a covenant by a railroad company in its deed to construct and maintain a passageway under its railroad, the reason assigned being the difficulty of construction and the inutility to the owner.

The Vice Chancellor does not meet the objection that the cost of the tunnel is far in excess of the value of the land to be served by it, but distinguishes the cases relating to the exercise of discretion by the Court, by the argument that here the company had warning that the owner demanded the crossing.

We submit that this does not meet the point. In the New York case above cited, the company deliberately broke an express covenant to put in an undergrade crossing, and yet the Court would not enforce it, but left the owner to his remedy for damages. See also *Goding* v. *Bangor, &c., R. Co., 94 Me. 542; 48 Atl. 114.*

The assumption is unsound that the Court will specifically enforce a vexatious demand merely because of notice that it would be persisted in. It should be remembered that the change of grade, which has given rise to this controversy, was forced upon the company by the decree of the Chancellor in the Valley Road crossing case. It is unreasonable to visit upon the company the consequences of that decree as if obedience to it were a tortious act.

It should also be noted that the demand of the owner which was disregarded, was for a crossing at the present grade, and the argument of the Vice Chancellor is based on the supposition that he was entitled to have such a crossing, whereas we have shown, we think, that the Vice Chancellor was in error in supposing that the right existed to have a crossing kept at the precise level where it was first located.

IV.

The Crossing is a Mere Private Right, and is not Held by Statutory Grant, and is Subject to Condemnation.

If the Montclair Railroad had been built under the General Railroad Law, it might be argued, with force, that the provision for a crossing in the deed was a mere recognition of the statutory duty where a railroad intersects a farm or lands to provide "suitable and convenient wagon-ways" (G. S. 2661, Section 84). But the Montclair Railroad was built under a special charter which contains provisions variant from those of the General Railroad Law, and on foreclosure the charter rights, privileges and franchises passed to the purchaser, and the road is now operated under them, as the decree now under review recites (p. 158, l. 20). There is no statute permitting a railroad company on foreclosure to be organized under the General Railroad Law, and the Vice Chancellor, in his opinion, erred in supposing

that such an organization was made (p. 153, l. 28). But even if the company had been formed under the General Railroad Law of 1873, that fact would not impose any duty to establish a road-crossing where no such duty existed in 1870, when the road was built. The charter (P. L. 1867, p. 306, Section 9) differs very materially from the General Railroad Law. It provides that the company shall "construct and keep in repair good and sufficient *bridges* over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses and cattle across the said railway shall not be impeded thereby; and if the company neglect to perform the same after giving twenty days' notice to the company by the person or the public officers having charge of the repairs or maintenance of said road so to do, such person or public officer may do the work, or cause it to be done, and recover the value thereof from the company by common process of law." This gives to the landowner no statutory right of crossing at all, and would seem to give to the railroad company no right to cross any highway or road at grade. The crossing right given to the respondent by his deed is not "a public or other road," within the meaning of section 9. The General Railroad Law, after providing for "public or other roads," makes further special provision for private crossings called "wagon ways" to the owners of lands intersected (G. S. 2661, Section 84). It is true that the respondent contends that Section 9 of the charter gives him a right to a road, because he says that before 1870 his father had a road for farm purposes running east and west (Case, p. 25), and the Vice Chancellor seems to consider that this is such a road as the charter refers to; but it was a mere farm wagon-way, and is not such a road as is meant by the charter. The interpretation of the term "road" in a railroad charter had been settled before the charter was passed, and that established meaning must, we submit, be given to the word in this charter.

Green v. *M. & E. R. Co., 4 Zab. 486.*

The deed calls for a crossing not at the old farm road, but at the point directed by the owner, so that the fact that there was a farm-wagon track crossed cuts no figure in the case.

In fact, under the broader terms of the General Railroad Law, a private right of way, even though over the land of another, is not a road which must be provided for, but is a right which may be condemned; much more may a mere road on an owner's own land for his own use.

Manning v. *Port Reading R. Co., 9 Dick. 46.*

Evidently the words "other road," in Section 9, is meant to apply to those well-known roads called "by-roads" and "private roads" in our road act, which, nevertheless, are open for use to the public, and differ from other public roads only because the public is not bound to maintain them.

The result is, that the crossing right now in question rests solely on the covenant in the deed, and not on the statute, and may be taken by condemnation whenever a change of conditions requires it. The new conditions are the doubling of the tracks, the great increase in the number of trains and the requirement by the Chancery decree that the tracks at this point shall be elevated.

To require a tunnel at this crossing is most extravagant. The parcel to be benefited is about seven acres, lying between the railroad on the east and the rear of the lots on Cliffside avenue on the west; this is all that respondent claims will be served by the proposed tunnel (p. 169, ls. 20 to 40). The land is worth, with street connections, from two hundred to three hundred dollars per acre (p. 121, p. 126). The undergrade crossing ordered would cost $5,000, and would not be a public road, but, at most, a private crossing, through a barway or gate, for respondent and his grantees. The bill is filed to specifically enforce the crossing right, but a Court of Equity exercises discretion on such a bill and will not, under changed conditions, impose a heavy burden upon the company in order to derive an advantage of

much less value to the land-owners. (See cases cited in Mr. Parker's brief in this case, p. 14.) If the Court should find that a private crossing at grade, offered by the company, is not all that respondent can claim under his covenant, we submit that the Chancellor should determine in the cause, by a reference if necessary, the value of the easement.

The first opinion of the Chancellor was that the crossing right could be condemned, and he stated solid grounds for that view (p. 138, ls. 10 to 40; p. 139). Much of the testimony has been taken with a view to such a valuation, and little more remains to be supplied. The practice fixing the value by reference was adopted in *Carpenter* v. *Easton & Amboy R. Co., 9 C. E. G. 249, 259,* and in *Paterson, &c., R. Co.* v. *Kamlah, 15 Stew. 93,* where the decree on the Master's report for damages for lands taken was affirmed in this Court, *2 Dick. 331.* The practice seems to be now well established. *Sparks* v. *Newton, 12 Dick. 367; 15 Dick. 399.* See cases cited in Mr. Parker's Brief, pp. 21 to 24. Proceedings under the condemnation acts are not adapted to such a taking. Commissioners in such cases can value only the land, leaving the award to be apportioned among the several interests therein. A Court of Equity can value the crossing right apart from the fee.

The power of a railroad company to condemn is continuing, to be exercised as occasion may require. (P. L. 1903, p. 652, Sec. 13.)

The right to be paid for is not a free and open way; it was enjoyed only by opening bar-ways, and, under the agreement to fence, the railroad company can restrict its use by bar-ways and gates as before, even if constructed as directed by the decree. This is a limit on its value overlooked by the Vice-Chancellor when he says that it may be used for all purposes, and that it is "far preferable" to the public roads which afford a more circuitous access. It should be further observed that the theory of the Vice Chancellor that the crossing cannot be condemned because the statute grants it, is fal-

lacious on another ground; even where a statute requires such a private crossing to be given, it need not be provided on the land crossed, if a reasonably convenient means of access across the tracks is afforded on other lands.

Ellsworth v. *Central R. R.*, 5 *Vr.* 94.

The company desires to be relieved of the maintenance of this crossing, which, by reason of the opening of new roads and the change of the character of the property, has become useless. The company is willing to pay to the owner the fair value of his rights, but that should be paid on the basis that his right is merely to cross at grade, and that its value is impaired by the obligation resting upon him to construct and maintain approaches on his own land, and by the privilege expressly given to the railroad to obstruct the crossing by bar-ways or gates, so that it cannot become a public thoroughfare.

C. L. CORBIN,
Counsel for Erie R. R. Co.

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

New Jersey Court of Errors and Appeals.

Between ABRAM SPEER, *Respondent, and Complainant below,* *and* ERIE RAILROAD COMPANY, *Appellant, and Defendant below.*	*On Appeal from Court of Chancery.*

BRIEF FOR RESPONDENT.

The facts in this case are undisputed and are briefly and clearly stated in the opinion of Vice-Chancellor Stevens shown on p. 147 and down to and including line 25 on p. 148 of printed case.

The reasons stated by the appellant for the reversal of the decree made by the Chancellor, are:

1. That the right to a crossing was personal to John A. Speer, the father of the respondent, and that his son Abram Speer, the respondent, as heir at law of his father, did not inherit the right to have the crossing which had been granted to his father, maintained for his own benefit.

2. That if the right to this crossing was inherited by the complainant, the defendant might perform any duty or obligation which they might owe to him or his heirs and assigns by providing a crossing upon and over the defendant's railway embankment, either on their own land or on land partly their own and partly of the complainant, or by opening streets over land to be acquired for that purpose, which would furnish access to the complainant's land and egress therefrom.

3. That if the complainant was entitled to the relief sought in his bill, then the complainant should have been ordered and decreed to accept damages by reason of the destruction of such crossing, such damages to be determined by the Court of Chancery.

The relief which the complainant asks is, that the defendant may be ordered and decreed to provide complainant with a suitable and convenient road crossing across the track of said railway, either at the place where such crossing was established as stated in complainant's bill, or where complainant may direct, in accordance with the rights reserved to complainant's father, John A. Speer, and to his heirs and assigns, as stated in the bill of complaint, and for such other or further relief as the nature of the case may require, etc.

The situation at the time of filing of complainant's bill was that the crossing which had previously been located and established and maintained for thirty years had been totally destroyed, in violation of the reserved rights to such crossing contained in the deed by John A. Speer to the Montclair Railway Company, and the bill is in the nature of one for a specific performance of the agreement to maintain such suitable and convenient road crossing by restoring the same in a manner which shall be suitable and convenient.

Upon the first point, that the right to this crossing was personal to John A. Speer.

The decision of this court in the Pipe Line Case, 33rd Vroom, 254, seems to be conclusive, and as the Vice-Chancellor says, (printed case, p. 149) "The covenant in the case in hand does not differ essentially from that which was the subject of consideration in the pipe line case, so far as it is in the nature of a reservation. Here, as there, the plan proposed was to create or rather to preserve and perpetuate a right for the benefit of the severed parts of the whole tract. It therefore follows that the complainant, who is the sole heir of the grantor of the land, is entitled to the benefit of it."

But in adidtion to this, the Montclair Railway Co.,

which was the company which first built the railroad over the land of Speer, the complainant's father, was incorporated by a special act, Chap. 160, Laws of 1867, approved March 18, 1867. Chapter 9 provides "that it shall be the duty of the said company to construct and keep in repair good and sufficient bridges over or under the said railway where any public *or other* road shall cross the same, so that the passage of carriages, horses and cattle across the said railway shall not be impeded thereby."

From the foregoing it is apparent that by the company's own charter, the private right of way which the complainant's father had across the tract of land conveyed by him to the Montclair Railway Co., which right of way had for many years been used by John A. Speer, could not have been condemned, and even if such private right of way had not been reserved in the conveyance by Speer to the Railway Company, the company would have been obliged to have maintained a suitable crossing at that point, and it cannot be contended that this right, reserved in the charter, was to be enjoyed only by the then present owner of the lands.

The general railroad law, approved April 2nd, 1873, revision, p. 929, provides "that it shall be the duty of any company incorporated under this act, to construct and keep in repair good and sufficient bridges and passages over, under and across the said railroad, where any public *or other* road now or hereafter laid shall cross the same, so that the passage of carriages, horses and cattle on the said road shall not be impeded thereby; and also where the road shall intersect any farm or lands of any individual, to provide and keep in repair satisfactory and convenient wagon ways over, under and across the said railroad, and shall also construct and maintain suitable and proper cattle guards at all road crossings."

This section was subsequently amended, and its provisions as now existing, are found in section 84 of the act respecting railroads and canals, Gen. Stat., page 2661, and are substantially the same.

From this it will be seen that not only in the special charter of the Montclair Railway Company, but also in

the General Acts, farm crossings, either where actually existing, or where the railroad intersects the land of a farmer, are preserved or created, and the Railroad Company is bound to maintain the same; and it is respectfully submitted that when the Montclair Railway Company purchased the land of John A. Speer and reserved to him the right of way above mentioned, by said act of purchase the railway company, by its own act, fixed and established for all time, the right to such crossing as then existed, and as was afterwards located and maintained pursuant to said agreement.

In *Green* v. *Morris & Essex Railroad Co.*, 1st Beasley, p. 165, the court not only sustains the right of the complainant to have a farm crossing maintained by the railroad company, but went further, and reformed the deed, which did not expressly reserve such farm crossing, upon proof being made that the agreement between the parties was that such deed should reserve such crossing; and this case is cited with approval in the Pipe Line case, 33rd Vroom, p. 272.

In *Smith* v. *N. Y. &c. Railroad Co.*, 63rd N. Y., p. 58, the court says: "A conveyance in fee, without reservation or exception, to a railroad corporation, of a right of way for its road across a farm, is not a waiver or release of the obligation imposed upon the corporation by the General Railroad Act, Laws of 1850, Chap. 140, to erect and maintain farm crossings. The statute applies as well to cases where the lands are acquired by purchase as where they are acquired compulsory by the power of eminent domain."

On the second point, as to the right of the defendant to destroy the crossing which had been maintained for thirty years, and to compel the complainant to accept some other form of crossing to be located at some other place upon complainant's lands.

We submit that none of the forms of crossing proposed by the defendant company were either suitable or convenient or in any sense a compliance with the reserved rights contained in the deed above referred to, and that

the Court of Chancery has the power and is bound in equity, to decree a tunnel crossing of the character contained in the decree in this case.

"Specific performance of contracts of railroad corporations with owners of lands along the line of their roads for the erection of farm crossings over their roads, and other conveyances of a local and permanent character, will, when the contract is certain, and an injury, if breach thereof is continuous and of a nature precluding any adequate remedy in damages by a suit at law, be specifically enforced in equity."

Rorer on Railroads, Vol. 2, p. 1457, par. 4.

A long line of cases supporting this principle, both as to the jurisdiction and the duty of a Court of Equity in the premises, and also as to what constitutes a suitable and convenient crossing, fully establishes this principle.

Post v. *West Shore Railroad Co.*, 50 Hun., 301.
Beardsley v. *Lehigh Valley Railroad Co.*, 20th N. Y. Supp. Report., 458.

This latter case relates to the propriety of an under grade crossing where it appears that a grade crossing could only be used with great inconvenience and increased labor. And the court says on p. 459, "that this court has the power to compel a railroad corporation to construct such farm crossings as it deems proper and necessary in a given case, has been frequenty held, and I do not understand that the proposition is now questioned by the defendant."

And in this case the court further said respecting an under grade crossing, "It is a fact which I believe appears in this case, but if it does not the court will take judicial notice of it, that the defendant in constructing its line of road through this state has adopted the overhead or undergrade crossing as the means of getting over every public highway where such means was found practicable. In adopting this course, which was purely voluntary, it is to be noted that all that the plaintiffs seek by this action, is to require that the same policy be pursued toward them

as individuals which the defendant by its own acts concedes is proper toward the public at large, and while it is not designed by this decision to establish a precedent for undergrade farm crossings as a rule, it does seem as though, for the reasons here given, it would be the only suitable crossing in this particular case."

This decision was affirmed by the Court of Appeals in 36th Northeastern Report, p. 877, decided April 10th, 1894.

In *Van Wagner* v. *Central N. E. Railroad Co.*, 30th N. Y. Supp. Report, p. 165, decided July 27th, 1894, the court says:

"The duty of constructing farm crossings is enjoined upon railroad corporations by statute. That duty must be performed with due regard to the necessity and convenience of the land owner, and the corporation is not vested with an absolute discretion as to the kind and character of the crossing it will construct; the necessity of an under or over grade crossing is a question of fact which a Court of Equity may determine. A corporation cannot therefore cause the damages to be assessed upon the assumption that it will construct grade crossings only, and thus deprive the land owner without his consent, of a crossing which is necessary to the proper working and management of the farm, in other words, the corporation cannot substitute a money equivalent in place of that which the statute awards to the land owner."

Attention is called to the case of *Jones* v. *Selligman*, 16 Hun., 230, affirmed in 81 N. Y., 190.

This is an important case and discusses many of the questions involved in the case at bar, and holds that a farmer is entitled to the farm crossing under the track of the railroad, if, under all the circumstances, such crossing is best; and says it is a matter for grave consideration, whether it is not the duty of the Legislature to make a law requiring all crossings to be either over or below grade, and allow none to be made on the same grade, and says

the court has power to direct the construction of a crossing under the tracks of a road.

Wheeler v. *Rochester & Syracuse Railroad Co.*, 12th Barber, p. 227.

This case holds that a passage under the road is to be made where the road is so constructed as to admit of no proper passage over the road; and that the claim that such under grade passage would be expensive, is no answer, nor does it furnish any ground of right in the defendant to locate the crossing where their burthens would be diminished at the expense of the plaintiff. The railroad company must either relinquish its right to use the land, or discharge the duty to which it is subject, and as to the point of locating such crossing, the court says: "The object of that part of the enactment was to enable the owner to enjoy the use of his land by effecting convenient means of access to parts severed by the construction of the road, and it undoubtedly contemplates crossings upon the land taken between such several parcels, and not upon other lands to which such owner never had any right, whether near or remote."

This statement by the court has a bearing upon the suggestion of the defendant that the complainant's rights can be met by having streets opened upon the property of other persons, by means of which he may indirectly reach his own land; and the court further says: "I have no doubt whatever, and am prepared to hold, that if the corporations so construct their road as to render a passage over it to or from the land from which it has been severed, inconvenient or impracticable, they are bound to furnish one under it, however expensive they may find it, unless they elect to render compensation for the specific injury."

In *Clark* v. *Rochester Railroad*, 18th Barber, p. 350, the court says, on p. 355: "I am satisfied that the defendants are under a legal obligation to make such crossings as is intended by the statute for the use of the plaintiff, and probably an under crossing only will be suitable; but it does not necessarily follow that because such an obligation upon the defendants to the plaintiff exists, which

they have refused to perform, the plaintiff is entitled to a judgment for the specific performance of it. The relief is a matter not of absolute right in the party, but of sound discretion in the court, and to sustain such an action the granting of such relief must appear to be entirely equitable."

In this case the court awarded pecuniary damages for the reason that, "a crossing would be of small value to the owner and would entail much expense on the company."

As to the question of constructing approaches to an over grade crossing upon the land of the complainant.

In *Williams* v. *Clark,* 140th Mass., p. 238, the court says: "The defendant was bound to make a crossing entirely within the limits of the land conveyed to it, which was forever after to be maintained by it." No authority was given to the railroad corporation to enter by its servants on any land of the plaintiff, either to raise the grade thereof or to perform any act thereon.

See also *Gray* v. *The Burlington & Mo. River Railroad,* 37th Ia., 119.

Swan v. *Burlington, Cedar Rapids & Northern Railroad,* 77 Ia., 650.

In this latter case the court says: "Crossings are necessary for the public and for individuals, and railroads cannot be built without them. They become a part of the road itself, to which individuals and the public have rights that cannot be defeated by the change of ownership of the railroad, by judicial sale, or otherwise; they are in the nature of easements which go with the land unaffected with the change of title."

Hall v. *Clearfield and Mahoning Railroad Co.,* Sup. Ct. of Pa., May 6th, 1895. 31st Atl. Reporter, p. 940.

Post v. *Huntingdon and Broadtop Railroad Co.,* Sup. Ct. of Pa., May 6th, 1895, 31st Atl. Reporter, 950.

In this latter case the court says: "We are of the opinion that the character of the causeway must be determined by

the location of the railroad, where the necessity requires the causeway to be constructed; if the railroad is built at grade, the causeway can be built at grade; if the railroad is elevated, as by a heavy fill, it is clear that the cheapest and best causeway would be under the railroad; if the railroad is depressed, then an overhead crossing would be proper."

In *St. Paul* v. *Murphy,* 19th Minn., 433, the court says: "We think that the language of this charter proper and necessary, and farm crossings over the line of said road was intended to mean crossings from one side to the other of the railroad, whether by passing over or under the track."

In *Cincinnati Southern Railroad Co.* v. *Hudson,* Court of Appeals of Ky., p. 509, plaintiff conveyed to defendant railroad company a strip of land through his farm for the construction of its road upon promise, in part consideration therefor, to provide a good crossing on said railroad at or near the location of the road leading over the plaintiff's dwelling house to the turnpike.

Held, that the defendant could not avoid his obligation to build a crossing at the place designated because the expense would be considerable.

"In the case now before us, the building of the crossing at a point fixed by the contract, being a part consideration for it, its fair cost was the amount of that much of the consideration. The appellees desired this crossing. If the appellants had not contracted to make it, it is presumable he would have demanded of them the sum necessary to make it, as a part consideration for the deed."

See also *Stewart* v. *Cincinnati Railroad Co.*, 89th Mich. 315. 50 Northwestern Rep. 853.

Omaha & R. V. Railroad Co. v. *Severin,* Sup. Ct. Neb., 30th Neb. 318. 46 Northwestern Rep. 842.

As to the third point, That the complainant should accept damages to be determined by the Court of Chancery.

The complainant is entitled to a crossing, not only by virtue of the reservation in the deed given by his father

to the Montclair Railway Co., but also by virtue of the special charter of the Montclair Railway Co. and the General Railroad Law of the State of New Jersey. He is entitled to a suitable and convenient crossing, and such suitable and convenient crossing, as appears from the cases above cited, in the present instance, is a tunnel. This being true, has the defendant company a right to compel the complainant to accept damages in lieu of a suitable and convenient crossing?

It is admitted by counsel on both sides, that condemnation proceedings cannot now be taken by the Erie Railroad Co. to deprive the complainant of his right to a suitable and convenient crossing. No condemnation proceedings, either under the charter of the Montclair Railway Company or under the general laws, could have deprived the complainant's father of his right to such a crossing; but in the present case, this right was expressly reserved and granted to John Speer, and it is submitted that when the Montclair Railway Co. purchased the land of Speer and reserved to him the right of way above mentioned, by said act of purchase, the Railway Company waived and exhausted its statutory right to take condemnation proceedings, and by its own act has fixed and established for all time, the right to such crossing.

It is further submitted that the exercise of the power of eminent domain only authorizes the condemnation of such property easements and rights as are necessary for the railway company to acquire, and since no actual necessity for the operation and construction of said railway company requires that the farm crossing granted to said Speer should be destroyed or acquired, and the only object in refusing to build a tunnel is to save the expense of such construction, the company could not plead economy and the desire to avoid the expense of a tunnel, as a reason for refusing to build the same, and cannot resort to eminent domain and condemnation proceedings to get rid of its obligation to maintain such suitable crossing.

This point is especially held in this State, in *Jersey City* v. *National Docks Railroad Co.* 26th Vroom 119.

and *Jersey City* v. *L. V. Railway Co.*, 26th Vroom 203.

And on this point, in *Tyler* v. *Hudson*, 157 Mass. 609, it is said—"If the right to make a particular use of the land is a benefit to the owner and put no new burden on him, and does not interfere with the public use for which the land is taken, there is no reason why he should be deprived of that use and be paid its value in damages." And our own court has said, in *Watson* v. *Acquackanonk Water Co.*, 7th Vroom 195, "That which can only exist in connection with the land cannot be taken under a power to condemn land, without taking the land itself."

In the case above cited, the court held that the flow of water cannot be condemned without condemning the land over which the water flows; and it is submitted that in the present case, in as much as the defendant company already owns the land and cannot, therefore, condemn it, they cannot proceed to condemn separately, a use which can only exist in connection with the land, such as the easement or right of way reserved to Speer.

The Vice-Chancellor in his opinion, refers to the case of *New York City* v. *Pine*, 185 U. S. 93, and states sufficiently the facts there determined; and in his oral opinion, (p. 139 printed case) was under the impression that the Pine case might have a bearing on the present case, and afterwards heard argument of counsel respecting same.

In the Pine case there were no reserved rights. The rights were vested rights of the parties, and the application for an injunction was refused solely on the ground of laches, and a delay of two years in making an application to the court for an injunction; and because during that period the owners of the land had sat quietly by and seen expensive construction completed, and large sums of money expended, and had themselves initiated negotiations for a pecuniary compensation for a surrender and transfer of their rights. In that case also, the water sought to be taken was a public necessity, needed for the supply of water to a large portion of the inhabitants of the City of New York, and it was in the highest degree important, if not absolutely necessary, that the right to

use such water should be secured for the City of New York; and the city, in its answer, averred that it was and always had been able and willing to pay any damages that the complainants might suffer from being deprived of the natural flow of water. The dam proper had cost about forty-five thousand dollars, and in addition to that, the city had expended for land and damages in relation to this water supply several hundred thousand dollars.

The court, in determining that pecuniary damages should be awarded, and that the riparian owners should accept the same, placed its decision wholly on the special circumstances of that case, and Justice Brewer, in his opinion, says "This is not a case between two individuals in which is involved simply the pecuniary interests of the respective parties. On the one side are two individuals, claiming that their property rights are infringed—rights which can be measured in money, and that not a large sum; on the other, a municipality undertaking a large work with a view of supplying many of its citizens with one of the necessities of life. It is one thing to state a right and proffer a waiver thereof for compensation, and an entirely different thing to state the same right and demand that it should be respected. In the latter case, the defendant acts at his peril; in the former, he may well assume that payment of a just compensation will be accepted in lieu of the right. In the latter, the plaintiff holds out the single question of the validity and extent of the right; in the former, he presents the right as the foundation of a claim for compensation, and his threat to enforce the right, if compensation is not made, is simply a club to compel payment of a sum he deems the measure of his damages. If this injunction is permitted to stand, the city must pay whatever the plaintiffs see fit to demand, however extortionate that demand may be, or else abandon the work and lose the money it has expended. While we do not mean to intimate that the plaintiffs would make an extortionate demand, we do hold that equity will not place them in a position where they can enforce one."

The case of Speer is wholly different. Not a single parallel exists. Speer was not in laches, and this court

has so found in this case. There is no absolute necessity that the Erie Railway Company shall permanently close this farm crossing; the operation of its railroad line will be just as effective over a tunnel as over an embankment. Speer never made any demand for pecuniary compensation. The company, on the contrary, initiated on its own motion, several propositions for a settlement, both as to another form of crossing than a tunnel, and as to the payment of a sum for damages for the destruction of the right of way. The propositions for another form of crossing were rejected; the suggestion of compensation by way of money was not entertained. The court will not, I am satisfied, hold that because the complainant did not promptly reject all negotiations for a pecuniary settlement for the destruction of his right of way, that therefore he bound himself to accept pecuniary damages. The complainant in this case is not in a position to make extortionate demands, or to use his rights as a club to compel the company to pay such extortionate demands. The amount involved, so far as the company was concerned, is the expense of constructing the tunnel, a matter of a few thousand dollars at most. The company may have assumed that the complainant would accept just compensation, in lieu of his right, but if they made that assumption, they were bound in equity to have offered a just compensation, and the testimony shows that seven hundred or a thousand dollars was the only sum they offered; and the testimony also shows that such sum would be and is utterly inadequate as just compensation for the damage which the complainant has suffered by the destruction of his right of way.

The filing of complainant's bill was only delayed, and the correspondence shows that it was only delayed in the hope that an agreement might be reached by which a suitable and convenient farm crossing should be secured to the complainant. There is not a particle of evidence which shows that there was ever any prospect of an agreement as to pecuniary damages in lieu of such crossing.

With respect to the question of whether this court has power by decree to ascertain and order the payment of

damages by decree of injunction in the alternative, I submit that this court has no such power. In the case of *New York* vs. *Pine,* Circuit Judge Shipman said: "If a court of equity has power in any case by decree to ascertain and order the payment of damages by decree of injunction in the alternative, a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law and without pretense of right to take and retain the property." This fits our case exactly. The defendant has committed a permanent injury, without authority of law and without pretense of right to take and retain the property; and Justice Brewer, in the Supreme Court opinion, concedes that that proposition is generally true when invoked at the inception and before any work has been done, and only says that it is not applicable when the plaintiffs have waited until the work has been progressing for two years and the defendant has expended a large sum of money thereon.

Justice Brewer, in his opinion expressly guards the decision in the Pine case from a wide and extended application. He puts it wholly and exclusively upon the peculiar facts exhibited in that case. Referring to the many cases cited in his opinion, he says: "These cases do not justify the conclusion that under their application one man is at liberty to wrong another upon payment of damages. There is no thought of creating a new rule or of substituting a judicial opinion for an act of Congress. All that can be fairly said in reference to them is that they are an application of the ancient maxim that he who seeks equity must do equity. *Limiting them as we have limited them in the present case,* to conditions which exist after the defendant has proceeded in the completion of its proposed work and has expended a large sum of money therein, they can never be considered as inviting a party to do a wrong with the expectation to escape every penalty save a pecuniary one. On that ground alone the decrees of the Circuit Court of Appeals and the Circuit Court, will be reversed."

From this it will be seen, as has been before stated,

that in the present case the complainant is not seeking to deprive the defendant company of any of its rights or property or privileges, or anything which is necessary to the enjoyment of these rights. The complainant is only seeking the protection of his own rights, and these rights can be protected for him by the injunction of this court, requiring the Railway Company to construct a suitable and convenient crossing at the place designated where such suitable and convenient crossing has already existed for many years, at an expense which will not involve the expenditure of a large sum of money and under conditions which will not impede the operation of the railway.

Under these circumstances I submit that this court has no right to say that the complainant shall accept pecuniary damages as compensation for his legal rights, and this court has no right to say that the railway company shall expend its money in the payment of pecuniary damages instead of in preserving to the complainant his legal rights; and that a court of equity has no jurisdiction either to determine that pecuniary damages shall be accepted, or to sit and determine what shall be the amount of such pecuniary damages.

The suggestion that since the grade crossing has been wholly destroyed, a decree that a tunnel shall be constructed will give to the complainant a better crossing than was secured to him by the reservations in the deed of conveyance, seems to me to have no special weight in determining this matter, for the reason that the court cannot give us less than was secured to us by the reservation in the deed, and if the alternative is to give us more than was secured by said reservation, such new crossing by tunnel is only better, because it is safer, and this alternative has been caused and created by the act of the defendant company, and they are bound by the consequences of their own acts.

For the reasons stated above, it is respectfuly submitted that the decree appealed from should be affirmed.

HALSEY M. BARRETT,
Counsel with Respondent.

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

New Jersey Court of Errors and Appeals.

ABRAM SPEER,
vs.
THE ERIE RAILROAD CO.

The decree of chancery from which we appeal imposes upon the defendant as a duty one of the most expensive tasks such a corporation can be called to perform, an expenditure which is hard upon the defendant in the extreme. The original complainant owned a farm of little value (13 acres), across which the old Montclair Company established its route. Instead of condemning its right of way, the Montclair Company bought an acre and eleven hundredths of this land for $487.50, a big price for that day, in shape of fifty feet on each side of its center line, till that amount of acreage was reached; and in the deed which the company did not sign, but which is contended to be nevertheless binding, the following passage was inserted: "The party of the second part for itself and its successors agrees to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the work of grading on said track is commenced, and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct." The Railroad Company carried out those words. Speer selected a certain place for this crossing, according to complainant's evidence, said to be an old half-abandoned road

over a marsh. It required a little raising in his land to reach the road established by the Railroad Company. This Speer built. When it reached the track the company provided the crossing. This on both sides at first for a single track, and thenceforward the company maintained the fences till in order to elevate the tracks of the railroad as required by the act of the Legislature, a small distance away, the track here had to be abandoned in obedience to the decree of chancery. Then the complainant required that the defendant must tunnel its road, so as to retain its grade for his road as at first. This will cost many thousand dollars. The defendant offered to continue complainant's road from its terminus on its own land on each side of the tract or track along the railroad to a point where the latter cut the land on its new grade on or near the natural level, and then to build a similar road on the other side to the point where the old crossing emerged. The effect of this was to lengthen the farm road some five hundred feet. But the complainant refused. The defendant then said, let a court name what damages the complainant suffers by this change and we will pay it. Again the complainant refuses. "It is not in the bond," he says, and the court below endorses this cry, and decrees specific performance of this alleged agreement.

Bare statement of the case would seem to be enough at least to induce this court to seek an escape from a decree so unjust, though specific performance is a great part of equity jurisdiction. And I trust we may be able to satisfy this court that this decree should not be upheld.

Who were the parties to this transaction? A farmer, father of complainant, seeking a pathway for his cattle over the railway on the two sides of the railroad—"convenient" and "suitable" to use his words—is one party. A railroad company, servant of the public, having the right by law to elevate or depress its grade as commanded or in its own opinion needed, is the other.

Can the court so construe these words, as that the corporations then and there gave up to the farmers their right, held for the public, to change the grade of its railroad? A right, part of the law and therefore in law known to Mr. Speer.

Can this court decide that when a law passed by the Legislature compels a railroad company to change its grade, that a party in the situation of complainant may forbid it, or compel the railroad to build and maintain a tunnel so as to retain a passage which the farmer once possessed?

Can this court be forbidden to say that the complainant should lawfully and equitably be decreed to accept damages in case he has any lawful demand?

These are the questions to be discussed in the argument of this cause.

With these the following:

1. What was the legal contract between the two original parties to the deed. Did the railroad agree, and did the farmer think it agreed to surrender its right to change its grade if it were expedient for itself and the public so to do?

2. Did this contract call upon the railroad to build approaches to its right of way?

3. If not, and if it was bound simply to build and maintain a crossing across its track, does specific performance demand building a tunnel under its tracks? Will that be specific performance?

4. Does the language of the deed create an estate which ran with the land to the heirs or assigns of the grantor named in it, or was it only an agreement personal, and which died with him?

5. Was not the complainant guilty of laches which deprives him of the right to a tunnel?

6. Decreeing specific performance is a right discretionary with the court; when it will result in great hardship and injustice to one party without considerable gain or utility to the other, specific performance

will not be decreed, or when it is a hardship or circumstances have changed.

7. Damages is all that the complainant can have any right to recover, and the court has and should exercise its power to estimate them, if they do not for reasons already given, dismiss the bill.

8. *Pine* v. *New York,* 185 U. S., 193, is conclusive as to the defendant's rights.

9. The conduct of the defendant shows that he was not really a suitor for the making of the tunnel, but that he used this forgotten right to levy blackmail. This court will not assist him.

Let us then take up these many points:

I, II, III.

The construction of the words in the deed upon which the bill is founded.

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

Consider now the character of the parties, and the circumstances. The owner, a farmer, across whose land a railroad was to be built, was one party; the railroad the other. No grade apparently established. The railroad by law authorized to fix or change its grade. No language in the instrument as to what the grade should be or should not be. No mention of heirs or assigns, only the owner to act, or to be acted for.

The language shows that the then owner and nobody else was thought of. The railroad is required to make necessary fences on each side of the railroad track and to build them before the work of grading

was commenced. And the agreement draws a distinction between the tract, and the *tracks*. The fences are to be on each side of the tract; then comes the important sentence "and shall provide"—whom? "The party of the first part," no one else, with a *suitable* and *convenient* (what do these words require?) road crossing, across the tracks of said railway where the party of the first part, (no one else) should direct.

As the matter then stood, a tunnel might have been provided for or against, but evidently it was not thought of, nothing was said of grade. The road crossing was to go *where* the owner directed, but how, that is, upon what grade, the party was to have nothing to say, except that it should be "suitable and convenient"—to what? To whom? The question cannot be answered. There is only one other road which describes how the road crossing should be made, and that is, "across the tracks," *not under*. The road-crossing was to begin with the side of the tract, on each side, but it was to go *across* the *track*. How can that road be carried out any way, but *upon* the track? Suppose the words "road crossing across" related to the tract, and the grade had then not been determined upon, as the deed makes probable, and suppose the company determined to elevate their road, could Speer then compel them to give him a road on the level of the ground, or to build him a tunnel? The character of the crossing was left to the company as to elevation or not.

The words are to be construed as the parties then meant them. It will be noticed that the fences were to be the chief thing. They were to be built and forever maintained. But there is no such word as "maintain" when the crossing of the tracks or the road crossing anywhere is mentioned. Immediate action corroborates. Approaches were made on Mr. Speer's lands to a higher point than the level, 16 inches or so, but a fence was first built, a fact excluding the company from building on the lands of Mr. Speer. Here was recognition of the company's want of rights. And

all the company was required to do, was to make the road on their lands, and where it covers their tracks lay the rails across them. What right had the late Mr. Speer to require a tunnel, which implies the company building approaches? The complainant was bound to build the tract line, and the defendant was to build the road *across* the tracks—recapitulatory.

1. By the agreement, the company was to provide a road crossing, for the owner, not for his heirs or assigns.

2. Approaches were necessary. These the owner had to make over his own lands. When they reached the 100 foot tract, the company was to provide them.

3. When the road provided, reached the track, it was to be made by the company by laying it *across* the rails of the track.

4. No provision made as to grade. The company has the right to fix that or change it by law. The agreement did not meddle with that. Whether it was elevated or not the road must be laid *across the track.*

The road was to be made first by the owner on his own land. It is said that an old road was chosen. That road the owner built. Fences, erected by agreement before constructing the road, prevented the company using the owner's land. Then when the road reached the side of the right of way, the company began making it, and built it *across* the tracks, that is, the rails.

Now this mode of providing the road is within the power of the parties. Let the owner build approaches up to the right of way. The company will then construct approaches if needed and will carry them to the rails and across them. On the other side, the same order of work may occur. This will be specific performance, and the rights of each party will be preserved.

That this solution of the question before this court is the right one, appears from *Williams* v. *Clark*, 100 Mass., 230.

The deed in this case conveyed lands to the railroad company by providing that the railroad should furnish the grantor and his heirs a convenient crossing at a spot to be afterwards designated by the grantor. The grade of the railroad was raised. It was held that the grantor should provide the land necessary for and construct the approaches, and this though the railroad had constructed the original approaches. In that case the deed provided that the crossing should be a crossing at grade. The action was for damages for breach of this contract. One dollar was allowed.

The case is very like this. It differs in that the contract was with the plaintiff and his heirs and assigns, and that it stipulated that the crossing should be at grade. The decision that the plaintiff should make his own approaches, decides this case. See pp. 240-241.

IV.

Did the complainant now deceased, heir of the original owner, possess the right to this road crossing or was the agreement in the deed with his father alone?

This question attracted the attention of the learned Vice-Chancellor more than any other. (See the opinion, pp. 148 to 152.)

He admits that the words used in the Speer deed simply gives the right to the deceased owner. But on the strength of the pipe line case, and Judge Depue's opinion (which admits that the simple words give no more than a personal right for life), he holds that it descended to heirs though they were not mentioned.

Judge Depue and Vice-Chancellor Van Fleet, the judge in the pipe line case, 33 Vroom, 274, the Vice-Chancellor in ~~Condit~~ Cadwalader v. *Sayre*, establish a rule that where the right is granted in a deed in the nature of a reservation, and it is manifest from all the recitals in the deed on the subject that the plain purpose of the parties was to create a right for the benefit of the parties of the whole tract which had been severed by the companies, the grant will be construed as creating

an easement appurtenant to the premises and will pass as such without the word heirs, at least in equity."

But here is nothing to show benefit to the second tract. It was a marshy tract. It had been used for pasture and nothing else and for but a cow or two. It was not described as a wagon road. Its width was not stated. It was fenced up without a gate. There was no proof even that anyone but the elder Speer and his son or servants ever used it. The word reserve or its equivalent is not in the deed, nor even any word to maintain the crossing the track. The complainant in his evidence said his father objected to terms proposed.

Ashcraft v. *Eastern R. R. Co.*, 126 Mass., 190 is a case in point.

Claflin v. *Boston & Albany R. R.*, 137 Mass., 409.

Kister v. *Reiser*, 38 Penn. Stat., 1.

See also the opinion of Mr. Justice Van Syckel in *Hagerty* v. *Lee*, 25 Vroom, 585, and cases cited.

I shall leave this point to the greater industry of my associate. I add one suggestion not in his brief. Suppose Speer the elder had never selected the place for the proposed road, could his heir exercise that privilege? No one will say *yes*. If not. was the agreement a conveyance of right to heirs? Was it not a personal right, not one as owner of interest in land whether in fee or by way of easement that he received?

But even if he did receive a transmissible interest in the land on grade, who deprived him of it? Did the Railroad Company? Not so. The law did it. See the statute of 1895, p. 462. An act to regulate the crossing at points not within the limits of cities of this State, of steam railroads by steam or electric railroads hereafter to be constructed. Defendant's exhibits on pages 172-179, show that on October 31st, 1899, the Court of Chancery decreed that the crossing of the New York and Greenwood Lake Railroad, operated by the Erie Railroad Company under lease, by the North Jersey Street Railway Company at Grade at Valley

Road, in the town of Montclair, should be avoided; that it was necessary and the public required that in order to avoid such grade crossing, the tracks of said steam railroad should be elevated and the grade of said Valley Road should be lowered so as to permit the cars of said Street Railway Company to pass under the said steam railroad.

See decree (Case, p. 176):

"Third. That in order to enable said passage under said steam railroad to be effected it is necessary to reconstruct and rebuild such portion of the railroad tracks and line of the New York and Greenwood Lake Railway Company in the town of Montclair, as is shown upon a certain map marked Exhibit A in this matter, which map is to be filed with and be a part of this decree.

"Fourth. That the portion of said railroad line to be rebuilt shall be constructed as shown upon and in accordance with a certain profile map, marked Exhibit B in this matter, which map is to be filed with and be a part of this decree.

"Seventh. That the grade of such of the streets or highways of the town of Montclair as now cross said railroad at points where the tracks of said railroad are to be elevated, as shown on said maps, shall be raised, and the telford pavements removed from said streets for this purpose shall be relayed, and said portions of said streets shall be left in as good repair and construction as they severally were when said work was commenced.

"Eighth. That provision shall be made for the suitable and proper drainage of any surface water that shall flow into Valley road where the grade of said street shall have been lowered in accordance with the terms of this decree, and provision shall be made for maintaining and keeping open such drain so that the water shall at all times have free exit at said crossing."

See the maps.

Whether or not the articles second, third, fourth, fifth and seventh, tenth, apply for railroads are highways, (and the complainant says his road crossing was to be a street), the elevation of the railroad in conforminy with the direction for elevation at the bridge, was a necessity if the part of the chancellor's decree should be obeyed. Did the defendant then raise their track, or did the law, which for the good of the public gave this jurisdiction to chancery, flanked by the decree of that court, compel the railroad company to interfere with Mr. Speer's crossing? The decree of Chancery placed the company in the condition of breaking the alleged contract on the one side, and of disobeying the law and being guilty of contempt upon the other.

The Railroad Company could not lawfully disobey that decree. Nor could it obey it without doing away with that grade crossing over its tracks. Act of law may be said to have the same effect as a defense in human jurisprudence, as act of God. Law is the God of unbelievers in a divinity. Nor, when a contract is rendered impossible of performance, can even damages be recovered.

The complainant, through the statute, loses all ground of complaint. If he still has a right to a road crossing, it cannot be for a better one, a more costly one than he had. But the statute takes away his right without providing him any remedy. Certainly he has no right of specific performance. The draftsman of the bill said this. The prayer is for a decree to provide the orator with a suitable and convenient road crossing across the tracks of said railroad, either at the place where such road crossing was established, as hereinbefore stated, or where the orator may direct. A change of place is therefore possible for the court to direct; that the complainant should have greater right than the court, is simply unreasonable.

If the language in question is but a contract, it is not binding on this company. This company suc-

ceeds to the rights of the old Montclair, but does not become liable for its contracts.

See the *Mt. Pleasant Cemetery Co.* against *Erie*, where the Paterson Railroad Company entered into an agreement to build a wall around the cemetery, giving a bond so to do, but became insolvent and did not. The Paterson, Newark and New York Railroad Company succeeded, purchasing under a judgment and reorganizing according to the statute, the same way as the Greenwood Lake Company, lessor of the Erie, was organized. (The Vice-Chancellor thought it was an organization under the general railroad law, and in his opinion founded an argument on this mistake). A mandamus was sought for by the cemetery company, but denied because the contract to build the wall was not one which the successor company was bound to carry out.

See the case in Supreme Court, 14 Vroom, 505, and in the Court of Appeals afterward in 43 Vroom, 539.

Specific performance cannot be decreed. It requires not passage through a tunnel but passage on the old grade. If that is impossible, such a decree is discretionary with the court; and where specific performance will result in great hardship and injury to one party without considerable gain or utility to the other, or when it is a hardship and circumstances have changed, the court will demand an inquiry into the damages suffered, either by their own officers, themselves or a jury.

Pine v. *New York*, 185 U. S., 193, and *Simmons* v. *Paterson*, 15 Dick. Ch. Rep., 393, are both in point and cover all that is necessary to urge. They are stated in the Vice-Chancellor's opinion.

As to this matter of damages and as to the conduct of the complainant showing laches, and that it is money he sought and not what he prayed for, and that he was using a forgotten right to levy damages upon the railroad, I shall leave the discussion to my associate. His brief is beyond refutation.

The facts bearing upon the subject are these:

John H. Speer, the grantor of the deed, died in May, 1880. Complainant born in 1832, was 38 years old in 1870. The deed in question bears date June 20, 1870. The decree of chancery dates October 31, 1899. Petition in chancery for elevation, &c., December 6, 1898.

All the notices were given, and all the appearances had, required by the statute. It was a public matter of which every one had notice. The complainant must have known of it.

The company began to fill in November, 1899.

Speer first notified surveyors about crossing when work was in progress and five feet fill out of fifteen was made (pp. 33-39 case). When fill nearly completed, two months after, he spoke to the superintendent of the railroad and proposed, he says, to sell the land to the company for $10,000 (p. 47). Again, proposed sale for that money.

(P. 92) Keegan, an agent, received proposal from Speer to sell all his land for $10,000, and take $7,000 (p. 99) instead of the fill. Elevation then completed. Conversation in September, 1900, (p. 101).

See Exhibit 2, March 23, 1900, asking "please" for repair of fence and a *suitable* crossing, as he wants to turn cattle into pasture, not for a tunnel or a crossing where the former one was. But he seems to have consulted a lawyer and discovered rights, January 18, 1901. Then $4,500 is asked, and as company is not willing to pay so much, suit begun May 12, 1901, 4 months after.

Says *Pomeroy's Eq. Jurisprudence,* Sec. 1, 409—"The doctrine is fundamental that a party seeking the remedy of specific performance * * * must show himself to have been ready, desirous, prompt and eager."

See also—

Meroling v. *Trefz,* 3 Dick., 638, 644.

Van Doren v. *Robinson,* 1 C. E. Green, 256, 263.

The gravaman of damage alleged by complainant in his bill is (see p. 7) that he was not able to turn his *cattle to pasture*. See also p. 7, lines 20 to 30, that he has been unable to use his lands west of the railroad line for the pasturage of his cattle, &c.

The brief filed and given to the counsel for complainant amplifies the points herein taken and enforces them by citation. It must not be understood that this personal brief differs from anything found there. The citations there will be found correct and apposite.

To sum up—

1. This is no easement running with the land. It is only a covenant made by the Railroad Company with the grantor of the 100 feet right of way. Therefore, the complainant has no right of action and the bill should be dismissed.

2. This covenant, even if it be an easement, is restricted by its language, and its intent, shown by circumstances.

3. Therefore, the approaches must be made by the grantor of the deed or his heirs. The company must only lay the crossing across its track, that is to say, its rails. The character of grade is not governed by the words used.

4. Hence, specific performance will be, that the grade being changed, Speer must build approaches to the new grade. The company will perform its contract by laying plank over its tracks, so as to facilitate crossing. This course being offered by the company the bill must be dismissed.

5. The statute of 1895 having compelled the elevation of the track, the defendant has broken no law. Therefore, the bill should be dismissed.

6. The complainant, if he has rights, has lost them by laches. Therefore, the bill should be dismissed.

7. The defendant has offered a crossing by a way along the side of the railroad by a gentle rise to a point where the crossing can be at grade, and without a tunnel. This is an equivalent for any right given by the contract. Therefore, the bill should be dismissed, or held as security for performance, and then dismissed.

8. If all these insistments are erroneous, it is a case where specific performance or restoration of what was, is impossible; where only damages can satisfy—which damages the court will award.

CORTLANDT PARKER,
Of Counsel with Defendants.

New Jersey Court of Errors and Appeals.

BETWEEN

ABRAHAM SPEER, RESPONDENT AND COMPLAINANT BELOW,

and

ERIE RAILROAD COMPANY, APPELLANT AND DEFENDANT BELOW.

On Appeal from Chancery.

Brief for Appellant.

STATEMENT OF CASE.

The Erie Railroad Company leases the New York and Greenwood Lake Railway Company, a successor of the Montclair Railway Company, and owns the property and franchises of the last named Company.

The Montclair Railway was constructed about 1870. Its right of way was laid through lands of one John A. Speer, who died about 1880, leaving Abraham Speer his heir at law.

John A. Speer, by deed dated June 20, 1870, conveyed tot he Montclair Railway Company a tract one hundred feet wide through his lands (p. 2). The conveyance was made to the Montclair Railway Company, "its successors and assigns in fee simple," *habendum* to the same, "its successors and assigns, forever," and warranty to the same, "its successors and assigns." After the description of the land the following provision was inserted in the deed: "The party of the second part doth for itself and its successors agree to make and maintain the necessary fences on both sides of said tract of land,

which shall be built before the work of grading on said tract is commenced, and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct."

It was stated by the testimony of Abraham Speer that at the time of the conveyance a driveway ran across the premises conveyed and other premises retained by the grantor. A plank crossing of the railroad was made at about where the road formerly existed, which remained until about 1890, and was used for farm wagons, horses and cattle to cross the railroad. About 1890, however, the plank crossing was destroyed, and subsequently only cattle could pass across.

At the time of the conveyance to the railroad John A. Speer owned a tract of about eighteen acres, which is shown on the map in the printed case. This was accessible on the east by the Valley Road and on the west by Upper Montclair avenue. Speer resided upon a tract east of the Valley Road, and on this had his barns and farm buildings. He could get to either tract separated by the railroad by the public roads then existing. The greater part of the tract on the west side of the railroad was marshy land suitable only for pasturage.

Before 1897 the railroad was doubled-tracked. In 1898 an electric railroad was sought to be laid through Valled Road, crossing the steam railway at grade. November 1, 1899, a petition having been presented to the Chancellor nearly a year before, a decree was made defining the mode of crossing of the electric railway by the steam railway. The Chancellor decreed that the railroad should raise its tracks, and that Valley Road should be somewhat depressed, so as to cause the steam railway to cross over Valley Road by an overhead crossing. This necessitated the raising of the railroad track adjoining Speer's land. While this elevation was in progress Speer wrote the railroad superintendent (p. 166)

asking to have his fences repaired, also to make him a suitable crossing. About two months afterwards he had conference with the railroad officials, in which he told them he would sell his land west of the railroad for ten thousand dollars, or his alleged right to the crossing for seven thousand dollars.

The company offered to give him his crossing at the level of the tracks by an approach at right angles to be constructed on Speer's land, or by an approach parallel to the railroad constructed upon the railroad's land and ascending to the level of the railroad tracks, then crossing and descending on the other side in the same manner, or to give him a crossing by a proposed road running south on the west side of the railroad to Valley Road, and then allowing him to go back by the Valley Road to his dwelling. A straight course from Speer's house to the tract on the west side of the railroad would be about 500 feet. By this proposed route the distance would be about 1,000 feet.

Speer refused all these propositions and insisted upon a crossing by means of a tunnel to be constructed under the railroad at the place where the alleged former crossing existed, but stated that he would accept in lieu of such crossing the amount that it would cost to build it, at first thought to be ten thousand dollars and later estimated to cost about five thousand dollars.

I.

The company insisted that they were not liable to make a tunnel crossing, although they were willing to make the crossing proposed by them or the substitute for securing above mentioned, but that it was absurd to make so expensive a crossing to allow Speer's cows to pass over the track.

More than a year after beginning this work of elevation, Speer brought his bill for specific performance of the alleged agreement contained in the deed of John A.

Speer to the Montclair Railway Company. The Company answered denying their liability to make the crossing but stating that they had been willing to make the former crossing or substitute therefor, proposed by them which should have been accepted by Speer as performance of any duty which they owed him, and that in case he had a right to the crossing, damages for deprivation therof should be allowed him and paid instead of the crossing itself.

The Vice-Chancellor, after hearing the evidence, rendered his opinion that Speer was entitled to have a tunnel crossing and a decree was made directing the Railroad Company to construct such tunnel crossing. From this decree appeal is now taken.

The complainant below is not entitled to a road crossing.

The provision in the deed from complainant's father was, "The party of the second part * * * * shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct."

The road crossing was to be made for Speer's father, John A. Speer, at the place where *he* might direct. There are no words of inheritance and Abram Speer did not inherit the right to claim or enforce a crossing. If John A. Speer intended to create an easement for himself and his heirs, he should have so expressed in the deed. Taking the words in accordance with the legal rules of construction, the easement was only for John A. Speer's lifetime. Words of inheritance are necessary to create an easement in fee. *Ashcroft* v. *Eastern R. R. Co.*, 126 Mass., 196; *Claflin* v. *Boston & Albany R. R.*, 137 Mass., 489; *Kister* v. *Reeser*, 38 Penna. St., 1.

The deed expresses clearly the estate granted to the grantee. The words of conveyance are to the grantee "its successors and assigns in fee simple" *habendum* and warranty to the grantee "its successors and assigns forever". The agreement makes the railroad agree "for itself and its successors." In conveying so carefully with apt words, an estate in fee, and in taking back an agreement why should the grantor, in making a covenant for his own benefit, if he intended it to be for his own benefit and that of his heirs, have omitted the necessary apt words?

The deed is for value paid, $487.50 for 1 11-100 acres of farm land. This is a good price for such land in 1870 or any other time. Why should the railroad, in buying such land have burdened it with a perpetual easement.

There is no proof in the case to show circumstances which tend to prove that John A. Speer desired anything more than a right for his life to cross the tracks.

The land is low and flat and suitable only for pasturage. Most of it has never been used for anything else, p 25. Speer had access to the back land by public roads, p 28, line 10.

The present use is only for pasturage, Exh. 2, p 166. "I want to turn my cattle into pasture," p 52, top p 45-46, p 39, line 20, &c.; p 41, line 10 &c. The tillable land was all near Cliffside Avenue 800 or 1000 feet from the railroad, p 41, line 10, &c., separated by boggy land, p 41, and not used for wagon since 1893, p 45.

The deed does not declare, and there is not anything that appears in the case, going to show that John A. Speer ever intended that anyone but himself should enjoy this crossing. The reasoning of the Vice-Chancellor, (p 149) that the plain purpose of the deed was "to create, or rather to preserve and perpetuate a right for the benefit of the severed parts of the whole tract" is

without foundation. Nothing appears from the deed or the circumstances of the case, that supports such a contention.

The provision in the deed is not an exception which might descend to John A. Speer's heirs, but an agreement with Speer to be thereafter performed. John A. Speer did not except the road crossing, and grant the balance of his interest in the land. He conveyed the land out and out and took back an agreement to himself to make the crossing where he personally wanted it. This is apparent from the provision as to maintaining fences embodied in the same paragraph of the deed, (p 3). That the Company should maintain the fences is unquestionably an agreement. So also is the clause as to the road crossing.

The cases cited by the Vice-Chancellor are not in point. The Pipe line case, 33 Vr. 254, is relied upon to justify the Vice-Chancellor's conclusions and to sustain the law laid down. But the argument is not applicable. The *Pipe Line Case* and *Coudert* v. *Sayre*, 1 Dick, Chy. 386-395, which it follows, lay down the principle (33 Vr. 274), "where a right is granted in a deed in the nature of a reservation, and it is manifest from all the recitals of the deed that the *plain purpose* of the parties was to create a right for *the benefit of the parts of the whole tract* which have been severed by the conveyance, the grant will be considered as an easement appurtenant to the premises and will pass as such without the words heirs, at least in equity."

In the Pipe Line case the words were that the grantee should construct a "suitable wagon road or crossing, * * * so as to enable said Stewart to cross freely *between his lands*, on each side of said granted premises." The Court says (p. 280): "The easement in this case, in plain terms, is a grant of a right of way between the two parcels of land into which the tract was divided by the grant to the Railroad Company."

In *Coudert* v. *Sayre* (*supra*), Vice-Chancellor Van-Fleet says (p. 395.) "Where *it appears* by the true construction of the terms of the grant that it was the well-understood purpose of the parties to create or reserve a right in the nature of a servitude or easement, in the property granted, *for the benefit of other land owned by the grantor* * * * such right * * * will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus imposed will pass with the lands to all subsequent grantees."

The distinction between the Pipe Line case and the Coudert case and the case in hand is that the two former cases hold, that when the *terms of the grant* make it appear *clearly* that the easement was created for the *benefit of adjacent land*, that *then* the covenant runs with the land. But in this case such intention does not appear clearly or at all; but the contrary intention appears. Applying the maxim, "*Expressio unius, exclusio alterius*, the fee simple expressed as to the grant shows that its omission in the covenant was intentional. Again, it is not that the road crossing shall be provided between the two separate parcels of land, but "where the party of the first party shall direct." John A. Speer might have directed the road crossing to have been at any point on the line of railway. His direction was not limited to the crossing at that particular place. He referred to no other land. He may, for aught that appears by the deed, have owned no other land. He was silent as to his heirs' rights, though particular to express the rights of the railroad's successors. How can it be claimed that by the plain terms of the instrument creating the alleged easement, it was established for the benefit of adjacent or any other land of John A. Speer or for the benefit of his heirs?

The fact that the crossing was established between the two tracts of land does not show that it was intended for the benefit of either of them.

That it was the intention of Speer to provide for a crossing for the benefit of the other lands ought to appear from the deed itself. But no other lands are mentioned in the deed, and the fact that the crossing should be put where Speer directed, shows that he did not have the benefit of the lands in view, but his own personal convenience. He intended the crossing to be anywhere on the railroad that might serve his own comfort. There is no proof that he directed it to be placed where the old wagonway would cross. Had he intended that it should be there placed he would have so stated in the deed.

His house and barns were on the east side of the Valley Road, separated by a public highway from the divided tracts.

Speer's motive for retaining a right to cross was not to enable the two severed tracts to have communication with each other, but to enable him to go from his house and barns to the further tract conveniently. If he had a license to cross at any place which he might direct he might take that crossing at either the north or south side of the tract fronting on Valley Road, and then sell off the Valley Road front as one piece. It would seem to be more valuable as a whole than cut in half by a road down the middle. Or he could sell the whole of the Valley Road front and get other access to the further tract by a crossing on a neighbor's land to be leased or acquired. A personal license would therefore be more advantageous to him than a fixed easement at a certain place.

The circumstances of the case then do not show any facts tending to prove that Speer intended this crossing to be for the benefit of the tracts severed rather than for Speer's personal benefit, but the contrary is shown.

The contention in the Vice-Chancellor's opinion (p. 153, line 25, &c.) that the Montclair Railway Company was bound to provide a crossing for Speer's land,

is wholly erroneous. There are no facts in the case to justify this assertion. There was no road existing on the land at the time the railroad was built. The testimony was only that when the railroad was built there was a wagon track over the pasture which was used when Speer carted hay, &c. The Vice-Chancellor calls this an "old road.'

The Montclair charter (laws 1867, p. 306) provides that it shall be the duty of the company to construct and maintain "good and sufficient bridges over or underneath said railway where any public or other road shall cross the same."

That this provision as to roads does not apply to farm ways was decided in 1854 (*Green* v. *M. & E. R. R* 4 Zab. 486) "Such a way is not a road in the legal sense of the term, nor can anyone have a right of way over his own land." In construing a similar provision the Supreme Court says: "This provision imposes a duty on the company in favor of the public" *Central R.R.* v. *State*, 3 Vr. 220–224. See also *Brearley* v. *D. & R. C. Co*, *Spen.* 238.

It will be noted that in other railroad charters, besides the clause as to roads as contained in the Montclair Charter, provisions as to wagon ways on farms, is made (*Green* v. *M. & E. R. R.*, *supra*, *Ellsworth* v. *Central R. R*, 5 Vr., 93). Such a provision is absent from the Montclair Charter. Nor was any successor of the Montclair Railway or the Erie R. R. Company compelled by statute to make a crossing for Speer as stated by the Vice-Chancellor. He says the "present Company" was formed under the General Railroad law and that therefore the provisions of General Statutes, p. 2661, Sec. 84 applies. The last statute does not apply to railroads already built. And there is no proof in the case whatever that any successor of the Montclair Railway or the Erie Railroad Company was incorporated under the Act to which General Statutes

2661, Sec. 84 is a supplement. And the fact is they were not, but under a supplement to an "Act respecting Railroads and Canals," passed in 1876. (General Statutes, p. 2681). To hold as the Vice Chancellor does that by force of General Statutes, p. 2661, Sec. 84, a railroad constructed in 1870 which did not have to provide crossing for a farm would be compelled to do so by legislation thirty years afterwards because mortgages were foreclosed and a reorganization became necessary, is wholly unwarranted.

Whether there was or was not a wagon way across Speer's farm at the time the railroad was built, is immaterial as the case stands. Speer did not provide that such wagonway should be maintained but reserved to himself the right to select a crossing. That the crossing was finally placed near where the old wagonway ran, if true, has no bearing on the case. The agreement was only that it should be placed where he directed.

II.

The complainant has lost any right which he may have had to a crossing by his neglect to bring this suit promptly.

The facts testified to by Speer were that (p. 25) when the railroad was where the middle of the tract owned by his father there was a driveway, "filled in probably with stone from time to time" and covered up with earth, (p. 27). The company built a crossing where the wagonway had been and planked it (p. 28). It was used for the farm horses, wagons and cattle to get from the barns on the east side of the Valley Road to the land west of the railroad, although there was access to the land west of the railroad by public roads. The driveway was used "somewhat, not a great deal" (p. 30). When the double track was laid, that is before 1897, the crossing was in a rough condition (p. 31). Very unsuitable for a farm road (p. 31, line 30). The planking was torn up and carried away.

(P. 41.) The way was across boggy land, (p. 42). A brook ran across it. The bridge across the brook was down nine or ten years (p. 44, line 35, p. 45, line 8). There was no planking across the railroad for ten years at least and from before the time of the double tracking (p. 45, line30). No wagon went across since 1890.

It was clearly proven by Speer's testimony that more than ten years ago the planking of the crossing was removed and the crossing as originally constructed ceased to exist. After that and until the tracks were raised the alleged crossing was only practicable and used for cows, and no other use was made of it. There were no gates in the fences to indicate a crossing, but some bars (p. 152), that could be taken down to allow the cows to pass. No wagonway was maintained on either side of the railway, nor any provision made to allow a wagon to cross the brook.

In this situation, in November, 1899, the company were ordered to raise their tracks. They began to comply.

When the work was in progress, and when five out of the fifteen feet fill had been made, and ten feet more to be put on (p. 33, line 20), Speer first spoke to the engineer about his crossing (p. 34, line 20). A couple of months after, and when the filling was nearly or wholly completed, he spoke to the Superintendent, Pindell, and told Pindell he wanted a crossing. Pindell told Speer he wanted a ten thousand dollar crossing for two or three loads of hay. Whereupon Speer turned and walked away. Pindell called after him that he would send a man to see him. On p. 47, line 25, Speer testifies that at that time he proposed to sell the land to the railroad for $10,000 (p. 35). When a man came two weeks after to talk to Speer about the crossing Speer showed him where the alleged crossing formerly was. To this man Speer said, "I would do better with him than that; that I would sell him the land on the other side of the road for that money, and they need not make any crossing."

"That money" evidently refers to ten thousand dollars, the cost of the tunnel. (p. 98) Keegan says Speer, at this interview, offered to sell his land west of the railway for ten thousand dollars, and subsequently seven thousand dollars. (p. 99) At this time the elevation was made.

The first document is Speer's letter of March 23. "Won't you please repair your fences, * * * and also make me a suitable crossing, as I want to turn my cattle out to pasture? As it is now it is not safe."

To this, reply was had asking who owned the ground in 1870. He says he replied to that. He then waited for two months for his conversation with Pindell, the Superintendent.

The whole work of elevation, bridging, &c., was completed August 11, 1900 (p. 105). It was not till May 19, 1901, that complainant filed his bill.

The complainant waited eight or nine years after the planking was up without protest or calling the company's attention to the fact that they were not furnishing the crossing. He waits for four months after the Court decrees that an elevation should be had which would destroy his crossing, and for nine months after the Town Council authorized such proposed elevation. When the company has begun the elevation, eight or nine years after the road crossing had been destroyed, he writes a letter calling attention to not repairing fencing, and incidentally requests that they make him a suitable crossing. The matter rests for some time, and when it is about one-third complete he speaks to an engineer about the crossing. He waits for two months, when he speaks to the Superintendent, and then tells him an untruth, that (p. 34, line 30) he wanted a crossing so that he could get through there with his hay and such things (no hay had gone through for nearly ten years), and is silent when he is asked why he wanted an ex-

pensive crossing for hay. He proposes to sell his land. Finally, two weeks after, when a man is sent to ask him about the crossing, he *proposes* to sell the land west of the railroad for ten thousand dollars.

This action, or want of action, the Vice-Chancellor calls "diligence" (p. 154).

We contend that it is a clear case of *laches*. Diligence in law is not asserting verbally or in writing doubtful claims, but in promptly appealing to the Court for protection.

Speer's rights, if he has any, are not plain. He had suffered them to be ignored for years without protest. The deed he shows, on its face, gives only John A. Speer a right to this crossing, and only allows John A. Speer to direct where it should be placed. His rights were doubtful, to say the least, as a matter of fact and of law. Was he not called upon to do more than to merely state his claim?

Nevertheless, he stands by and allows the company to make this great improvement, involving the expenditure of nearly thirty thousand dollars, when he claims that they were disregarding his rights. His house is adjacent to the land, and he saw the dirt filled in fifteen feet high, day by day, over his alleged crossing, and merely speaks to an engineer, or the Superintendent, or writes a letter about fencing.

Of course it will cost much more to undo this work and rebuild the crossing, and this cost will be caused, if specific performance should be decreed in this case, by Speer's conduct in not promptly seeking the aid of this Court when the work was begun or while it was in progress.

We submit that a fair reading of the testimony shows beyond a doubt that Speer does not want or care for this crossing. He wants to compel the company to buy his

land. His actions show that he did not enforce his alleged right by prompt appeal to the Court because he knew that he would more likely sell his land at a high figure if the company destroyed his way and had to create it by tunnel, rather than if they made the tunnel in the first place.

But in any event it would cost a large sum of money to make and maintain this cattle path, far more than it is worth. If Speer wanted to preserve it he should have shown diligence.

"The doctrine is fundamental that a party seeking the remedy of specific performance * * * must show himself to have been 'ready, desirous, prompt and eager.'" Pomeroy Eq. Juris. Sec. 1,409; *Merdling* v. *Trefz*, 3 Dick., 638, 644; *Vandorn* v. *Robinson*, 1 C. E. Gr., 256–263.

In *Leeds* v. *Penrose*, 1 Dick., 296 the Court says: "In the present case the complainant's delayed the filing of their bill for two years and three months after the defendant had warned them that he denied their right, and during this time they saw the defendants making the improvements before mentioned * * * For this delay no explanation is offered, except the unsatisfactory one that the lawyer whom the complainants wished to employ was too busy to proceed. These circumstances should bar specific performance."

Specific performance will not be decreed (a) when it will result in great hardship and injustice to one party without any considerable gain or utility to the other; (b) when specific performance is a hardship, or circumstances have changed. (A) The leading case on this point is *Trustees of Columbia College* v. *Thatcher*, 87, N. Y., 311. This law has been applied in *Muhrfield* v. *N. Y., W. S. & Buffalo R. R.*, 102 N. Y., 703, where the Court says: "In view of the difficulty in construct-

ing a useful passage under the railroad and the unutility to plaintiff of such passage if constructed, it was certainly within the discretion of the Court below, in the exercise of its equitable jurisdiction to deny specific performance of the defendants' contract to construct the passage and leave the plaintiff to their remedy for damages for breach of contract." *Congar* v. *N. Y., W. S. & Buff. R. R.*, 120 N. Y., 29, affirming 45 Hun. 296, was a similar case. Also *Wademan* v. *Albany & Susq. R. R.*, 51 N. Y. 569.

(B) Courts of Equity will not enforce specific performance when it is a hardship or circumstances have changed. *Willard* v. *Tayloe*, 8 Wall 557; *City of London* v. *Nash*, 3 Atk., 512; 1 Ves. Sur. 12; *Costigan* v. *Hastler*, 3 Sch. & Lef. 160; *Leicester Piano Co.* v. *Royal*, 55 Fed. 190.

In *City of London* v. *Nash* (*supra.*) a party covenanted to *rebuild* several houses. He built only two but repaired the others, spending between 2,000 P. and 3,000 P. and putting them in excellent condition, so that they were made substantially as good as new. But still he had not performed his agreement. A bill was filed to compel specific performance. To do so defendant would be obliged, among other things, to pull down all the houses he had repaired, and the money spent would be thrown away, and the additional cost would be very great. Lord Hardwicks held, 1. That the contract was one of which the specific performance could be enforced, but (2) the enforcement would be such a hardship upon the defendant and would be of so little benefit to the plaintiff, that the Court would not grant the remedy either whether the defendant was merely mistaken in his interpretation of the agreement, or whether he had, perhaps, intentionally disregarded it. As to this case Pomeroy's Specific Performance of Contracts, Lecture 187, Note says, "This is a very strong case, indeed, for it will be noticed that the hardship of performance was entirely the result of defendant's own

conduct, and, perhaps, even his designed conduct; and also that the hardship arose wholly from acts subsequent to the contract and independent of its provisions.

III.

If the Company was required to give Speer a crossing, it was not required to build the approaches, when the track was elevated. Speer should build and maintain the approaches himself, and the Company's duty would be performed by giving him a crossing at a level with the track as raised.

The Vice-Chancellor clearly shows (p. 144-152) that the agreement which was made was an agreement for a level crossing. That such agreement cannot be performed as contemplated. Either the Company must give a tunnel crossing which is better than that agreed upon or a level crossing at the new grade, which is thought to be less convenient.

It is plain from Speer's use of the crossing that it was intended only for cattle and farm wagons occasionally using it. There seems to be no material inconvenience in the raised approaches for either cattle or wagons. But granted that the tunnel is better, why should the railroad be the sole sufferer by the necessary change of grade? That the railroad is not required to construct approaches on change of grade, is expressly decided in *Williams* v. *Clark*, 140 Mass., 238.

In that case a grantor had conveyed lands to the railroad by a deed containing a provision that the railroad should furnish the grantor and his heirs, a convenient crossing, at a spot to be afterwards designated by the grantor. The grade of the railroad was raised. It was held that the grantor should provide the land necessary for, and construct the appoaches, and this, though the railroad had constructed the original appoaches.

This case is sought to be distinguished from the case in hand by the fact that the deed provided that the crossing should be constructed "entirely within the limits of the lands conveyed." The Court argues that this shows that it was not the intention of the deed that the railroad should use the grantor's land for the approaches.

It follows that if these words were omitted we might enter on Speer's land to build the approaches, or build approaches wholly on our own land. We did offer to do both of these and more. But all we are legally bound to do is to furnish the level crossing.

IV.

If the Montclair Railway Company or its successors had originally refused to construct a level crossing, or had closed the crossing after it had been constructed, the Court would not grant specific performance.

Clark v. *Rochester R. R.*, 18 Barb., 350.

Muhrfeld v. *R. R.*, 102 N. Y., 703.

Conger v. *R. R.*, 120 N. Y., 29.

Coe v. *Midland Ry.*, 4 Stew., 105, 155, 160.

Goding v. *Bangor & A. R. Co.*, 94 Maine, 542; same case, 48 Atl. Rep., 114. This was a bill for specific performance of an agreement made on the deed for the right of way being given, that the R. R. would build and maintain a crossing on plaintiff's farm.

The Court held that before a railroad should be compelled to make a crossing, it should be satisfied that the danger to public travel will not be thereby much increased, or that the additional burden placed upon the railroad would not be greatly disproportioned to the benefit that would be derived by the individual.

It appeared in this case that the hardship on the railroad would be great and that the benefits to the plaintiff

slight, as he would only have to go 230 feet to reach another crossing, the relief was denied.

Chicago & Alton R. R. v. *Schoeman*, 90 Ill., 258.

In a grant of right of way a railroad agreed to put up swing bridges. It did put them up, but they were little used and were discontinued as swing bridges. The plaintiff demanded that they should be put up again.

The effect of specific performance, so far as now seen, would be to impose on the railroad a large burden of expense without any practical benefit to the plaintiff.

Relief by specific performance was refused and plaintiff left to his action for damages.

Columbus & Shelby R. R. v. *Weston*, 26 Ind., 50. The Court will not compel, by specific performance, a railroad to keep cattle guards in repair.

V.

The Company has lost none of its rights to pay damages instead of specific performance because the railroad is elevated.

It appears that this elevation was done compulsorily under the Act of 1895, Chap. 291, Gen'l Stat's, 2717. The statute provides that when electric railways cross steam railroads, if the Chancellor decides that it is reasonably practicable, and public safety so requires to avoid a grade crossing, he may, in his discretion, "by his decree define and regulate the mode and manner of such crossing, and thereupon such crossing shall be made in the mode defined by such decree, and in no other way"

This statute was construed by this Court in *N. Y. & L. B. R. R.* v. *Atlantic Highlands R. R.*, 10 Dic, 522. Also by the Court of Chancery *in re Saddle River*

Traction Co., 41 Atl. Rep., 107, and *Trenton & Camden R. R.* v. *Philadelphia & R. R. R.*, 44 Atl. Rep., 853. The working of the act has been highly beneficial, and many grade crossings have been abolished under its provisions. Its working should be extended rather than curtailed, as carrying forward the progress of the general abolishment of such grade crossings.

It appears from the case (p. 172) that on petition of the North Jersey Street Railway Co., in December, 1895, an order for hearing was granted. November 1, 1899, the Chancellor, on hearing the steam railroad, Electric railway and the town authorities, decreed that public safety required that the crossing should not be at grade, but that the steam railroad should raise its tracks. This the railroad company proceeded to do. In so doing it conformed to the decree of the Court and abolished a dangerous public road crossing. If it was legally compelled to obey the decree of the Court, a situation of great hardship is created, which should prevent this Court from adding to the hardship by making the railroad provide this costly tunnel for Speer. If it were not legally compelled to do so, then the hardship still exists, and arises from the fact that the railroad has tried to assist in the great public work now going on in this State, of abolishing all level crossings.

But in either case the Company has lost none of its rights. The Court would not interfere and make the Company create or maintain a level crossing if it had agreed to do so, and it could have abolished one already made. (See cases above cited.) The right was one, then, which could have been provided for in damages. It does not become a greater right by now being capable of being performed without danger to the public or the railway. It remains as it was, a right which can be compensated for in damages, and for whose destruction damages, and not specific performance, is the remedy.

VI.

The conditions of the surrounding property have so changed that a crossing of the railroad, as claimed by Speer, is of little or no value or importance.

Such is the testimony of the real estate experts (pp. 122–126). This was not contradicted in any way. A glance at the map shows that the improvements run north and south. A new street, nearly midway between Cliffside avenue and the railroad has been opened up to Speer's line, and if carried across his land would cut the west tract in half. The road proposed by the Railroad Company runs in the direction of the railroad station, so important for suburban property, while the road running through the middle of Speer's land to the Valley Road would not go in the direction of the railroad, and would diminish Speer's frontage on Valley Road.

The assertion of the Vice-Chancellor, that an outlet to the Valley Road, such as a tunnel crossing would afford, would give added value to the complainant's land west of the embankment, is without foundation. The testimony of the experts was that it would not increase the value. The Court (p. 129), directed that no more evidence should be put in on that subject, apparently satisfied with one evidence on the point. There was no evidence offered by Speer, or by any one in his behalf, that there was any damage to Speer's property as property by not having a crossing except that it was not convenient for farm wagons and cows. Yet the Court gave as one of its reasons for a tunnel crossing, and finds as a question of fact, that the land was depreciated in value by not having such crossing.

VII.

The Court of Chancery has power to award damages to Speer for the deprivation of the crossing, if he was entitled to one, and should have awarded such damages in lieu of specific performance.

A. The complainant came into Chancery seeking equity. The agreement is now practically impossible to perform. It will cost the railroad company over $5,000 to provide this cow track for Speer's cattle. The complainant takes advantage of this situation to force the expenditure of this money either in the construction of the crossing or in damages to him through the right to a crossing is of little or no value. The maxim, "he who seeks equity, must do equity" applies. Damages will amply compensate him. The Court at first properly held that damages ought to be accepted in lieu of specific performance, (p. 137). Such ought to be ascertained in the forum chosen by Speer and accepted by the defendant.

B. Damages have long been ascertained by this Court in cases like the one in hand.

The case of *Coe* v. *N. J. Midland R. R. Co.*, 4 Stew. 107, 160, is directly in point.

The Lackawanna projected a route to cross the Midland, which would have done little damage, and the Midland gave a right to cross. But it turned out that the crossing would destroy a drill yard of the Midland.

"If the Lackawanna had come into Court for a specific performance of the agreement, it would have rested in the discretion of the Court, to have decreed specific performance, or not, according as equity demanded, and it would not have been considered in accordance with equity to decree a specific performance of a contract so unequal and unconsiderable. * * * It was deemed proper to permit it to make such crossing on terms that would secure the rights of all. "In my judgment that company should pay such damages *to be ascertained by this Court*, as will compensate for the injury done, over and above the mere right of crossing without pay."

Hayes v. *Waverley & P. R. R.*, 6 Dick., 345, (McGill, 1893) bill to enjoin a railroad from elevating its tracks. The railroad bought land from the grantee in a deed in which there were covenants against nuisances and by construction the Court held that the covenants included such an erection as an elevated railroad. The Court said (p. 352), "I think that the bill presents a meritorious case within the juridiction of this Court. It is obvious that the Court must act by injunction and it may be well here to say, in view of the fact that injunction is asked to stay an important work, that it is the general practice of a Court of Equity in such case to withhold its final decree until opportunity may be given the parties to agree upon proper compensation for the complainent's right, or that failing, until opportunity may be had to take the right by proceedings in condemnation (*Story.* v. *Elev. R. R.*, 90 N. Y., 122) or if for any reason that may not be done, to itself ascertain the value of the right to be protected and decree that unless within a certain time that value be paid to the complainants, the inhabited use shall be restrained (*Carpenter* v. *E. & A. R. R.*, 9 C. E. Gr., 249) *Church* v. *Paterson*, 1 Dick., Chy, 372; 2 Dick. Chy, 600"—(same case affirmed).

The practice above outlined was fifty years ago stated as established.

"The usual course is by reference to a Master "Trenton *W. P. Co.* v. *Chambers*, 1 Stock. 471–6.

Chief Justice Depue, in *N. Hudson R. R. Co.* v. *Booraem*, 1 Stew., 450, where a railroad had occupied land and expended money for improvements, says, "The appellants might have obtained their relief in the Court of Chancery and in this suit, without ever having taken the statutory proceedings to condemn. In *Trenton Water Power Co.* v. *Chambers* an action at law was brought by the owner, and the Court of Chancery stayed the suit by injunction in order to enable the

company to obtain title by the aid of that Court on payment of the value of the land and damages, to be ascertained by that Court, either by an issue or by ref erence to a Master."

The case of *N. Y. & G'w'd L. R'y Co.* v. *Stanley* (7 Stew., 56, on appeal, 8 Stew., 284), is very similar to the case in hand, but stronger for our contention. The railroad accepted land on condition that it build a station. The station was not built. The Stanleys sued in ejectment. The company brought a bill to enjoin. The Court held that the value of the land and damages should be ascertained, and, on paying it, the Stanleys should convey. A reference was ordered. See questions arising under this reference, reported in *Stanley* v. *R. R.*, 12 Stew., 361.

In *Paterson and Newark R. R.* v. *Kamlah*, 15 Stew., 93, the railroad occupied land for which it had no title. Ejectment was brought. The railroad brought suit to enjoin, and an injunction was granted. The Court says (p. 98): "If in this case the company has power to condemn, it may, if necessary, take proceedings in condemnation to gain legal title, and it should, under the circumstances, be protected in its possession by this Court until it shall have done so. If it has not power to condemn, and equity demands that it make compensation, this Court should itself ascertain the compensation, either by means of an issue, or of a reference. And the compensation may thus be fixed, even if the company have power to condemn." The cause was referred to an advisory master, and the value of land and damages ascertained by him, and the Master's decision affirmed by the Court of Appeals. *Paterson and Newark R. R.* v. *Kamlah*, 2 Dick., 331.

The cases above cited are approved in *Sparks* v. *Newton*, 12 Dick., Chy. 367. See also *Ludlum* v. *Buckingham*, 8 Stew., 71-82.

The power of the Court of Chancery to award damages in lieu of specific is accepted as unquestioned in *Church of Holy Communion* v. *Peterson Extension R. R.*, 1 Dick., 372. Same case affirmed, 2 Dick., 600.

The Court of Appeals says in *Attorney General* v. *Paterson*, 15 Dick., 385, "A Court of Equity will, to effect justices, settle unliquidated damages." Citing *Coster* v. *Munroe Mfg. Co.*, 2 N. J. Eq. 467, *Ingersoll* v. *Newton*, 45 Atl., 596.

The rule in our State is the rule in other jurisdictions. *Clark*, v. *Roch.*, *Lockport & N. Falls R. R. Co.*, 18 Barb. 350. The railroad, under New York law, was compelled to provide a crossing where it separated one tract into two by construction of the railroad. The raidroad was constructed on an embankment fifteen feet high. The plaintiff sues for specific performance. "It does not necessarily follow that because such an obligation upon the defendants to the plaintiff exists, which they have refused to perform, that the plaintiff is entitled to a specific performance of it. An action for specific performance is an appeal to the Equitable jurisdiction of the Court. The relief is a matter not of absolute right in the party, but of sound discretion in the Court, and to sustain such an action the granting of relief must be entirely equitable." Held that the plaintiff be remitted to damages.

New York v. *Pine*, 185 U. S., 93. This case is cited in the opinion in the case in hand. It seems conclusive of our rights.

So *McElroy* v. *Kansas City*, 21 Fed. Rep., 257, cited and affirmed in *N. Y.* v. *Pine*.

Pappenheim v. *M. & E. R. R.*, 128 N. Y., 436, an elevated railroad case, where damages were ascertained by the Court in lieu of granting an injunction.

It should be noted that the case in hand is stronger than most of the cases cited. In the cited cases the party who broke the contract usually asked the aid of the Court to obtain an injunction to prevent his adversary from asserting his legal rights. So it was in the Stanley case, the Hayes case, and others. The Court protected the wrongdoer and compelled the party to accept damages.

Our case is much stronger. We were forced to raise the track by decree of the Court and adverse action of a third party. We found no crossing at the point. The planking had long been gone. We go ahead in ignorance of the claim for the crossing and make a very important contract. This was approved by the Town Council, July 31, 1899. Speer was charged with notice of this public proceeding. He was charged with notice of the Chancery decree in December, 1899. He did nothing until the work was actually commenced, when he made claim to a crossing. He knew of the proposed proceeding in time to have provided for a crossing and made the trolley company pay its share, but he did not seek the aid of this Court. Finally, a year after the work was completed, he comes into Court and asks to have equity done to him. He wants the Court to enforce an alleged legal right, no matter at what cost to the company. To enforce it after its performance has become harsh and oppressive. *Pomeroy's Eq. Juris.*, Sec. 400 and 1404; *Plummer* v. *Keppler*, 11 C. E. Gr., 481. If the railroad were built to-day it is not conceivable that we would give him the crossing. But this is what he demands. The maxim "He that seeks equity must do equity" should be enforced. If he has this right, it is one that money can compensate him for, and he should be decreed to accept what money this Court shall adjudge to be compensation therefor.

IX.

The Vice-Chancellor's first conclusion (p. 139), *that if a right to a crossing existed, then that under the prin-*

ciples set down in Pine v. New York, 185 U. S., 93, damages should be awarded, was right. His subsequent conclusion (p. 154–5–6), *that the case did not apply, was erroneous.*

The case is distinguished from the case in hand (p. 156) because (*a*) no public interest is involved; (*b*) negotiations for only two months instead of two years; (*c*) there was no agreement to accept money instead of specific performance.

(*A*) *There is a public interest involved.* A railroad is a place of danger to the public and to the railway. So is an overhead crossing. There is always the chance that it may break down. But the public and the railway are both deeply interested in getting rid of level crossings, for experience has shown that no matter what precautions may be taken, children and fools will get run over on such a crossing. If, then, the railroad could abolish the level crossing without providing a substitute (as we have shown they could), their position is no worse now than it was before. They could now bring their railroad down to a level, re-create a level crossing, abolish it by paying damages and raise the track again. So Speer's position is no better than it was when the crossing was at a level, and the railroad's position no worse. If the Company had condemned Speer's land they would have abolished his wagonway. In the exercise of the railroad officials' judgment, they could have obtained the land, free of the wagon track, by the exercise of eminent domain. And in the exercise of that right only the Legislature could prescribe limits, and it did not provide for the preservation of this wagon track. The Court of Chancery and this Court cannot say that such a taking would not be for the public interest when the Legislature has said they might take it in the public interest as determined by the statute and the judgment of the Company.

The cases are numerous which hold that the company might take the land and everything connected with it

and pay damages, and the Court of Chancery will protect it. Why does it deny its protection for a part of the whole?

(*B*) *As to the lapse of time not being two years but considerably less.*

We have shown that the right he claims was not accorded to Speer for ten years or more. We have shown notice six months before the work commenced. We have shown that he watched the progress of the work with only feeble protests, if any. Equity does not prescribe any fixed time for an application of this sort. The parties however, must show diligence according to the circumstances. We maintain that it is not great diligence in this case to allow a great expenditure to be made before a party's very eyes and not seek the aid of the Court while the work is in progress, but to wait until nearly a year after it is completed.

(*C*) *There was no agreement to accept a money equivalent for the crossing.* This is not the rule as laid down in *Pine* v. *New York*. The words are (p 155, case line 25). "If by his declaration or conduct he leads the other party to believe that he does not propose to rest upon such rights, but is willing to wave them for just compensation."

About May, 1900, Speer had a talk with the Superintendent. The work was then in progress. He is asked (p. 47, line 20), "You told him that they need not build the crossing? That you would take as much as the crossing cost for your rights, didn't you?" A. "Not in that way at all." Q. "What did you tell him?" A. "He told me that it was going to cost ten thousand dollars; he said 'that I wanted a ten thousand dollar crossing for a few loads of hay,' and I said, 'Well, I would do better than that—I would sell him the land for that money, and they need not build me anything.'"

(P. 35.) Two weeks after, to the engineer, he said the same thing. He subsequently reduced his price to seven thousand dollars (p. 49) for the crossing only.

(P. 113.) Further offers were made by Speer, but not accepted.

(P. 169.) The offers to accept money were reduced to forty-five hundred dollars.

How can it be contended that Speer wanted the crossing and not money compensation? From the first meeting with the superintendent to the date of the filing of the bill, over one year, it was his whole desire to get money. The crossing was but a pretence. He declared in the first place that he did not care about the crossing. He could do better and sell the land for the cost of a tunnel. The proposition to take money instead of the tunnel came from him originally, has never been departed from.

X.

The decree of the Court of Chancery should be reversed and the bill of complaint should be ordered to be dismissed with costs, or such other order, not involving the construction of a tunnel crossing, should be made as may be equitable and just.

CORTLANDT PARKER,
CORTLANDT PARKER, JR.,
Of Counsel.

THE JOHN L. MURPHY PUB. CO., Printers, Trenton, N. J.

N. J. Court of Errors and Appeals.

Between
ABRAM SPEER,
Respondent and Complainant Below,
and
ERIE RAILROAD COMPANY,
Appellant and Defendant Below.

On Appeal from Court of Chancery.

BILL FOR RELIEF.

[Filed May 19, 1801.]

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

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

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

[One 50c stamp canceled.]

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

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

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

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

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

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

JOHN A. SPEER. [L. S.]

Sealed and delivered in presence of

Z. S. CRANE.

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

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

Z. S. CRANE,
Master in Chancery.

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

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

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

Your orator further shows that the line of said railroad was constructed across said premises substantially at grade with said premises, and that in compliance with

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

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

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

Your orator further shows that the said Montclair Railway Company, after making the conveyance to it as hereinbefore stated, became insolvent, and that its railroad and other property was transferred to and became subsequently the property of the New York and Greenwood Lake Railway Company, and that said New York and Greenwood Lake Railway Company afterwards became the property of the Erie Railroad Company, and that for some years prior to the time of the injuries complained of, and also since the time of said injuries, the said railway line and property has been owned, operated, controlled and maintained by said Erie Railroad Com-

pany, and is now owned, operated, maintained and controlled by said last-mentioned company.

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

Your orator further shows that at the time of the elevation of said tracks and the construction of said embankment and the destruction of his said road crossing, he spoke to the foreman of the gang of workmen employed by said Erie Railroad Company and informed them that your orator was entitled to have a convenient road crossing across the said tract of railroad land, but that no attention was paid to such notice by said foreman or said railroad

company, and that on March twenty-third, nineteen hundred, your orator addressed a communication to Mr. T. H. Pindell, superintendent of Greenwood Lake Division of Erie Railroad, requesting said superintendent to make a suitable crossing across your orator's said land, so that your orator might be able to turn his cattle to pasture on said land lying west of said railroad line, but that no attention was paid to his said request.

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

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

In consideration whereof, and forasmuch as your orator is without adequate remedy without the assistance of this Honorable Court, and can only obtain relief in this Honorable Court, where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said Erie Railroad Company, the defendant in this suit, may full, true and perfect answer make to all and singular the matters afore-

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

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

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

ANSWER.

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

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

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

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

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

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

the right of way and property formerly of the Montclair Railway Company, and are operating said railroad under and by virtue of the franchises and rights originally of the Montclair Railway Company, in accordance with the terms of said lease.

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

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

VII. And these defendants deny that, by the terms of said deed, or otherwise, there is any agreement or cove-

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

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

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

the bridge of said New York and Greenwood Lake Railway Company, as shown on said profile map.

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

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

XI. And the defendants further answering say that the plan so decided upon was the only practical way in which such overhead crossing could be constructed; that immediately after the signing of said decree they proceeded to raise the said tracks and construct the said overhead crossing, and in so doing built an embankment of about twelve feet in height on the said land so conveyed to the Montclair railway by said John A. Speer; that the said elevation cost more than twenty-seven thousand dollars, two-thirds whereof was paid by said railroad company, and one-third by said traction company; that the said work was done under the supervision of the engineer of the said town of Montclair, and to the satis-

faction of the town council, and has been duly accepted and approved by them, as these defendants are informed. And these defendants say that the said work would not have been done, nor the cost thereof incurred, except for the purpose of rendering said Valley road safe and to protect the life and limb of persons passing thereon, and because of the desire of these defendants and of the town council of Montclair to provide for the public safety.

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

XIII. And the defendants further answering say that thereupon said superintendent communicated with said Speer, and learned that he claimed a right to a crossing by virtue of the said deed. And these defendants say that they were not bound to construct a crossing on said right of way; that the right to a crossing was personal to said John A. Speer, and not to his heir or grantee; and, if it ever existed, has long since been abandoned, and had been extinguished by lapse of time. Nevertheless, these defendants were not disposed to provoke ill feelings or to stand simply on their legal rights, and therefore offered the said complainant to construct a

crossing at a level over their railroad, if said complainant would construct the approaches thereto on his own land. And they say that even if there was any obligation on them to construct the crossing, which they deny, they were not bound to construct the approaches thereto, and they so stated to said complainant. But complainant refused to entertain any such proposition or to construct said approaches, but demanded that these defendants should build a tunnel through the said embankment so that said complainant could drive his cattle and wagons through without the necessity of making any ascent to the crossing. On this proposition for adjustment of these defendants being rejected, these defendants, for the sake of peace, and in order to have the question amicably adjusted, if possible, proposed to said Speer to construct an approach to a level crossing on their own right of way, and to make a road starting from a point in said Speer's land and leading up along and parallel with said embankment to a crossing to be constructed, and then across, and down again, by a like parallel road on the other side of the embankment, to another point in said Speer's land. This plan would cost these defendants about seven hundred dollars, was and is entirely practicable, and would answer every purpose that the said adjoining land is adapted to; but said complainant refused to accept such a crossing as settlement of the dispute, but demanded that a tunnel should be built, or that defendants should buy his unimproved land, of about seven acres, on the west side of the railroad for ten thousand dollars, which was three or four times what it was worth, or pay him seven thousand dollars for a release of his claim to a crossing.

XIV. And these defendants say that to construct the said tunnel would cost between six and seven thousand dollars, and would be a constant danger to the operation of said railroad and a continuous and large expense for maintenance. These defendants refused to make such tunnel, but in order, if possible, to adjust the matter amicably, they secured options on land adjoining their right of way on the west, with which land a road or street

could be constructed from said complainant's land lying west of the railroad, along the west side of said railroad to the Valley road; that the distance from said land to the Valley road by the proposed route is about the same as through a tunnel and across Speer's land lying on the east side of the railroad, and said proposed road would open up his eastern land by a highway free to all and running towards the station, and would furnish a safe and convenient means of communication between said Speer's two tracts of land. And these defendants say that if they are obliged, under the terms of said deed, to furnish said Speer with a road crossing, the said proposed new street or road and connections thereby made between said tracts of land owned by Speer, is and would be a "suitable and convenient road crossing," and a full performance of any agreement contained in said deed. And these defendants say that complainant absolutely and peremptorily refused to consider this proposition, and declined the same, demanding again a tunnel crossing.

XV. And these defendants say that the said complainant is not, in fact, desirous of having a crossing constructed in order to pass and repass over said railroad with his cattle and wagons. He does not, in fact, care anything about such a crossing. On the contrary, he is desirous of selling his property at a high price; and to that end wishes to compel these defendants to buy out his land at a price far above its value, or to construct a tunnel crossing. Such tunnel crossing he proposes to use in connection with a highway which shall run from Valley road westwardly, through the said tunnel and up to Cliffside avenue. This road would divide his whole land in about equal portions and allow him, as he thinks, to sell building lots fronting on each side of said highway, throughout its entire length. Said complainant claims that by force of said deed, these defendants are compelled and compellable to provide a "suitable and convenient road crossing," not only for said John A. Speer and his said son, the complainant, but for each and every person

who may hereafter become seized or possessed of any portion of said land, and for the public at large.

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

XVII. And these defendants further say that the claim of said complainant that a tunnel should be constructed under said tracks is wholly unreasonable. The land, at the time said deed was made, was and is now generally low, marshy and wet, and suitable only for pasture, and has been chiefly used as such for the last thirty years; that the intention of the parties to said deed was only for a crossing suitable for cattle. Such a crossing was not necessary in order to enable the owner of said land to get access to the land on either side of the railroad, for both tracts fronted on public roads, and communications between them could be easily effected by use of such public roads. And these defendants further say that since the execution and delivery of said deed by John A. Speer to the Montclair Railway Company a new street or road has been laid out and opened, called Cliffside avenue, which said avenue crosses the westerly part of the tract through which said railroad was built at the distance of about eleven hundred feet westerly from said railroad; that by opening of Cliffside avenue the said westerly portion of said tract has been given a frontage on two sides of a public street which did not exist at the time of said deed, and a shorter and more convenient means of communication provided, by means of public

roads, between the easterly and westerly parts of said whole tract than was possible when said deed was made. And these defendants say that recently a new street has been laid out, graded and opened, running about at right angles from Valley road to Cliffside avenue, which said street is nearly parallel to said Speer's southerly line and about two hundred feet distant. Also another new street, crossing the last-mentioned street at right angles, has been laid out, graded and opened, which last-mentioned street runs from Watchung avenue up to said Speer's southerly line, and there stops; that the same can be easily extended across said Speer's land, and would, if so extended, cross said Speer's land about midway between the railroad and Cliffside avenue; that should said new street across said Speer's land be so opened, the said tract lying between Cliffside avenue and the railroad, if capable of improvement, will be improved and developed in lots fronting on Cliffside avenue and said new street, and a right of way through said land and across the said railroad will not only be useless, but detrimental to the said lots fronting on said new street. Said new streets now also afford a closer connection between said Speer's various tracts of land, by public roads, than formerly existed, and a better route between said tracts lying on the east and west of said railroad than by a way across said railroad and the said low marshy tracts. And these defendants annex hereto a rough sketch map of the said Speer's tracts of land and of the various roads now existing in the vicinity thereof, marked *Schedule A;* and they say that by said deed it was not intended that the public should have any rights in any crossing then provided for, nor was it intended that the right then given, if any, should be divided up and parceled among all persons that might thereafter own any portion of said lands.

XVIII. And these defendants say that the construction of a crossing at grade or by a tunnel would be of no benefit to the adjacent lands or to the complainant, and the value of any right thereto, if complainant has such

right, is of trifling value; that these defendants are still able and willing to dedicate and lay out a roadway or street adjoining their right of way on the west, from said complainant's land to Valley road, as described in paragraph XIV. of this answer. Said roadway or street would be a full and complete performance of the stipulation of said deed, and also of great advantage to said complainant and his land lying on the west of the railroad, and give such land a short and convenient access to the Valley road and a convenient means of communication with the various other tracts owned by said Speer, by roadways or streets graded and worked without expense to said Speer, whereas the land of said Speer, being marshy and low, any road that might be constructed over the same, and across or under the railroad, would have to be raised above the surrounding marsh, and would necessitate expensive ditching and filling to lay out and open for use.

XIX. And these defendants say that they are exercising public franchises, and any inconvenience or damage which said Speer has suffered or may hereafter suffer by not having a crossing over or under their railroad, has been caused by the necessity of providing for the public safety, as decreed to be done by the Court of Chancery, and that these defendants ought not to be caused to suffer by reason of such necessity and said order. And they say that the said complainant is not entitled to any crossing, whether over or under their said railroad, but in case this court should hold otherwise, then they say that he is not entitled to a tunnel crossing or to compel these defendants to build approaches to a level crossing, and these defendants are only bound to construct a crossing over their tracks at the present level; and if said complainant wishes to use the same it is his duty to construct the approaches thereto and provide the land therefor. And in any event, the construction and opening of a road along their railway, or the level crossing, with parallel approaches, as described in paragraph XIV. of this answer, would be a full compliance with any rightful

demand which said Speer may have by reason of said deed.

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

And these defendants pray to be hence dismissed, with

their reasonable costs and charges in this behalf most wrongfully sustained.

ERIE RAILROAD COMPANY,
BY T. D. UNDERWOOD,
President.

Attest [L. S.]
O. W. MIDDLETON,
Secretary.

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

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

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

TESTIMONY.

Before his Honor Vice Chancellor Stevens.

Mr. Halsey M. Barrett, for the complainant.

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

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

Abram Speer, sworn in his own behalf.
Direct examination by Mr. Barrett.
Q. You are the complainant in this suit?

A. Yes, sir.
Q. Are you a son of John A. Speer?
A. Yes, sir.
Q. And you reside on Valley road, Montclair?
A. Yes, sir.
Q. You are a son, you said, of John H. Speer?
A. Yes, sir.
Q. Where did he reside during his lifetime?
A. Upper Montclair.
Q. On the same premises that you now reside on?
A. The same premises.
Q. When did your father die?
A. 1880.
Q. Can you fix the date any nearer than that—do you remember the day of the month?
A. It was in spring—in May, I think.
Q. In May, 1880?
A. Yes, sir.
Q. At the time of his death did he leave a will—your mother survived him, didn't she?
A. No, sir.
Q. Did he have any children other than you?
A. No, sir; not at the time of his death.
Q. He had had other children?
A. Yes, sir.
Q. How many?
A. Two.
Q. Were they both dead at that time?
A. Yes, sir.
Q. Had either of those children been married, or left children surviving them?
A. No, sir.
Q. Neither of them had been married?
A. No, sir.
Q. Then, at the time of your father's death, you were his sole heir-at-law?
A. Yes, sir.
Q. Do you know whether your father left a will or not?

A. He left none.

Q. Was an administrator appointed of his estate?

A. I administered it.

Q. Were you born on the premises on the Valley road where you now reside?

A. Yes sir.

Q. How long did you continue to live there?

A. I was born there and lived there, with the exception of six, seven or eight years, all my life.

Q. When was that period of six, seven or eight years that you lived somewhere else?

A. After I was fifteen or sixteen years old I went to learn my trade, at Newark.

Q. Did you reside in Montclair while you learned your trade?

A. No, sir; I was here in the city of Newark.

Q. How old are you?

A. Seventy years old if I live until the 26th day of May, next.

Q. You were born May 26th, 1832?

A. Yes, sir.

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

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

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

A. Yes, sir.

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

A. Yes, sir; he died in 1880.

Q. Yes?

A. Then he must have owned it in 1870.

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

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

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

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

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

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

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

Q. Back of the house?

A. Yes, sir.

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

A. Probably fifteen acres, or in that neighborhood.

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

A. Farming.

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

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

Q. What was that used for?

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

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

[Objected to as leading.]

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

The Court—Have you a map of the property?

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

Mr. Parker—You may use it.

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

A. Yes, sir.

Q. This map shows, in nearly the center, a dotted

wagon track; state whether or not that represents the place where the roadway was that you have described?

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

Q. Is it near the center of the tract?

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

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

A. Yes, sir.

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

A. Yes, sir.

Q. Have you ever sold them?

A. Not this land; no, sir.

Q. You own it still?

A. I own it still.

Q. On both sides of the railroad?

A. Yes, sir; both sides.

Q. Do you remember when that Montclair railroad was constructed through Montclair and across this tract of land?

A. About 1870.

Q. Where were you living then?

A. I was living there.

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

A. Yes, sir.

Q. Do you know that of your own knowledge?

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

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

A. Yes, sir

Q. By your father?

A. Yes, sir.

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

A. Yes, sir.

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

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

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

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

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

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

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

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

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

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

Q. To what extent was it planked?

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

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

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

Q. After the crossing was thus completed, was it used

by your father, during his lifetime, or the remainder of his lifetime?

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

Q. And used for what purpose?

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

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

A. I think there was.

Q. What was it?

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

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

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

Q. Any other way?

A. No other way that was very convenient.

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

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

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

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

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

A. I was farming.

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

A. In the neighborhood of forty acres all told.

Q. All in this immediate vicinity?

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

Q. But that was the farm?

A. Yes, sir.

Q. How much was there west of the railroad?

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

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

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

Q. That is the way you understood my question?

A. Yes, sir.

Q. About fourteen acres then?

A. Somewheres in that neighborhood.

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

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

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

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

Q. West of the railroad?

A. West of the railroad.

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

A. No live stream.

Q. What was it?

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

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

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

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

A. That would be pretty hard for me to tell; I don't know just how often, but every time the road was tracked or leveled up, &c., the planking was generally torn up

and put down again; sometimes the planking was brought down from Valley road, and I was speaking to the man who constructed it and had charge of that branch of it when it wasn't in favorable condition, and he told me that sometimes he was bothered to get materials to put down, but as quick as he could get it he would attend to it.

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

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

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

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

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

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

Q. A few years?

A. Yes, I think so.

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

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

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

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

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

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

Q. Yes.

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

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

A. Why it was in a rough condition.

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

A. Well, there was the railroad track there.

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

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

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

A. At that time?

Q. Yes.

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

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

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

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

A. There was nothing particular done about that.

Q. I mean by the railroad company?

A. No, sir.

Q. Was there anything done by you?

A. No, sir.

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

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

Q. It was taken away, was it?

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

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

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

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

A. Yes, sir; cattle.

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

A. Yes, sir.

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

A. About three years.

Q. Three years from when?

A. Three years from now—last season.

Q. Then along in 1900?

A. From last fall, say.

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

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

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

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

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

A. I think it was about that time.

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

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

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

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

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

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

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

A. It was constructed solid—filled in.

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

A. No, sir; I do not.

Q. Did it take several months?

A. Probably more than a year.

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

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

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

A. No, sir; I cannot.

Q. Do you know the name of the man?

A. No, sir.

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

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

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

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

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

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

[Objected to.]

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

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

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

A. Right on the railroad track—that place.

Q. Directly opposite, where the crossing had been?

A. Nearly so.

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

A. I spoke to the superintendent of the road.

Q. Do you know what his name was?

A. Pindell, or something of that knid.

Q. Pindell?

A. Something of that sort.

Q. Where did you talk to him about it?

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

Q. When was that conversation?

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

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

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

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

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

Q. What reply did Superintendent Pindell make to you?

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

Q. What reply did you make to that?

A. I turned around and walked away from him, and when I got away a short distance he says, "We will send somebody out to see about this;" some time after, probably a week or two, a gentleman called on me and wanted

to know where the crossing was, and I went down and showed him; I don't know what his name was.

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

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

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

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

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

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

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

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

A. I haven't used it at all.

Q. Why not?

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

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

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

Q. Now the first way, by going up Watchung avenue and then west, and then down Cliffside avenue, how great

a distance would that be from your house until you could get to the westerly side of your land on Cliffside avenue?

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

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

A. Well, there is not much difference.

Q. Is it about the same distance?

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

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

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

[Witness handed counsel a letter.]

Q. Who made this copy?

A. I had that made.

Q. Did you compare it with the original?

A. Yes, sir.

Q. And signed by yourself?

A. Yes, sir.

Q. And mailed the original?

A. Yes, sir.

Mr. Barrett—I offer this copy in evidence.

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

Q. Did you get a reply to that letter?

A. Yes, sir.

Q. What is the date of your reply?

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

Q. Is that the first reply you have?

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

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

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

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

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

Q. Was that all you wrote him?

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

Q. Did you keep a copy of that letter?

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

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

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

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

A. I think not; no, sir.

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

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

A. No, sir.

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

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

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

A. I think it was before.

Q. You had had a conversation, then?

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

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

A. No, sir.

Q. Did anybody else, representing the company, come

to see you in response to this letter or in accordance with this letter?

A. Yes, sir.

Q. Who came?

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

Q. When was that?

A. I have no particular date of it, but I think I left his address with you at that time on a telegraph dispatch; I asked him for his address.

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

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

Q. You are not sure about that?

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

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

A. No, sir; I do not.

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

A. No, sir.

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

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

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

A. Well, it was shortly after that.

Q. Was it during that summer?

A. Yes, sir; I think it was.

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

A. No, sir.

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

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

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

A. Well, two months.

Q. It is directly opposite your house?

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

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

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

Q. That is all.

Cross-examination by Cortlandt Parker, Jr.

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

A. Pretty much except a few years.

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

A. No, sir; not now.

Q. Were you ever in any business?

A. I am a carpenter by trade.

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

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

Q. You keep cows there?

A. Yes, sir.

Q. How many cows do you keep?

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

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

A. Well, when my father was living.

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

A. Sometimes I have two, sometimes three.

Q. Do you keep a horse?

A. One, at the present time.

Q. How many have you heretofore kept?

A. Two.

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

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

Q. At any one time?

A. Yes, sir.

Q. How many?

A. I think I had four.

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

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

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

A. At the present time?

Q. Yes.

A. Probably twenty-five acres.

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

A. No, sir.

Q. Where are they?

A. Some on the west side.

Q. Whereabouts?

A. Right opposite this.

Q. Opposite your house?

A. Opposite my house.

Q. Between your house and the railroad?

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

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

A. Yes, sir.

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

A. Yes, sir; I have.

Q. Where?

A. On the west side of the railroad.

Q. Whereabouts?

A. West of the railroad.

Q. How far west?

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

Q. Do you call that farming land?

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

Q. What part of it did you farm?

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

Q. Up near Cliffside avenue you farmed it?

A. I did not farm that.

Q. How far from Cliffside avenue did you farm?

A. Probably four hundred to five hundred feet.

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

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

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

A. Yes, sir.

Q. It is boggy land, is it not?

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

Q. What kind of land would you call it?

A. Pasture land.

Q. Which is suitable for pasture?

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

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

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

Q. What kind of willows do grow there?

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

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

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

Q. Well, do they grow there?

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

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

A. What is that?

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

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

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

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

A. They would grow there, yes.

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

A. Yes, sir; a road.

Q. How did you get across the brook?

A. There was a bridge across it.

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

A. No, sir.

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

A. Probably nine or ten years.

Q. Since the bridge was there?

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

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

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

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

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

Q. Well, could you drive across the brook?

A. Yes, sir.

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

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

Q. Was it not three or four feet wide?

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

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

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

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

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

Q. Is not Bellevue avenue nearer to your house?

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

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

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

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

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

Q. You don't—don't you know there is?

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

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

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

Q. Then you say there is such a street?

A. They have opened something of that kind.

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

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

Q. When was it built?

A. This spring.

Q. It is there now?

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

Q. Before the filing of your bill?

A. What is that?

Q. Before your bill was filed?

A. No, sir.

Q. What?

A. No, sir.

Q. When was your bill filed?

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

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

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

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

A. You mean on the ground?

Q. Yes?

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

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

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

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

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

Q. How many years?

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

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

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

Q. Well, just before?

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

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

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

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

A. No, sir.

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

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

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

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

Q. Yes.

A. Well, I cannot tell you about that.

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

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

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

A. It was a little marshy in some places.

Q. Exactly.

A. Yes, sir.

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

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

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

A. Less time than that.

Q. Less than what?

A. Ten or fifteen years ago.

Q. Ten years ago?

A. Somewhere about ten years ago.

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

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

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

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

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

A. I rented it to different people.

Q. Who did you rent it to?

A. Some of my neighbors.

Q. What are their names?

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

Q. Where do they live?

A. In that neighborhood.

Q. Which side of you?

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

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

A. Certainly you could.

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

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

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

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

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

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

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

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

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

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

A. They probably were afraid.

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

A. No, sir; that wasn't the fact; the fact was they could not get over there; Mr. Boyd and Mrs. Fox couldn't get over there without coming all the way around Cliffside avenue, and my own cattle the same way.

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

A. Yes, some of them.

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

A. Yes, sir.

Q. I mean since the elevation?

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

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

A. No, sir.

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

A. Not in that way at all.

Q. What did you tell him?

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

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

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

Q. How many acres of land?

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

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

A. No, sir.

[Objected to as not cross-examination.]

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

A. Not him.

Q. Who did?

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

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

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

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

A. He said they could do that.

Q. And that they would do it?

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

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

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

Q. He said he would give you a road?

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

Q. What did you say to that?

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

Q. Didn't he say also that the railroad would give you an approach that led up alongside of the bank of the rail-

road on their land to the top of the embankment, and then cross the railroad track and then down the other side?

A. I didn't understand it so.

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

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

Q. Why not?

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

Q. What was your sole objection?

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

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

A. I thought I was entitled to it.

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

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

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

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

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

A. Before there had been any trouble.

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

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

Mr. Barrett—I object to all this testimony, with reference to any efforts of compromise or adjustment. Any testimony as to propositions intended to relieve the situation and which might amount to a substantial compliance with the deed I make no objection to, but as to all testimony with regard to pecuniary negotiations for a lump sum, or a waiver of his rights or transfer of the property,

I think, has nothing to do with the case, and is immaterial.

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

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

A. When did I retain him?

Q. Yes.

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

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

Mr. Barrett—Don't answer that question.

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

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

Q. You never knew anything about it?

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

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

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

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

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

Q. When did you know that?

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

Q. When they commenced to do their work there was the first time you knew of the proposed elevation of the tracks?

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

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

A. Yes, sir; there are fences there.

Q. How long has that fence been there?

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

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

A. I think so.

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

A. You mean on each side of the track?

Q. Yes, each side of the track?

A. I didn't say that.

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

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

Q. Well, was there a road built up?

A. Do you mean from my land?

Q. Yes.

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

Q. There was no rise then on your land?

A. No rise particularly.

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

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

Q. Then it was about four or five feet on each side?

A. I suppose so; I never measured it.

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

A. $15 a season.

Q. Each cow?

A. Yes, sir.

Q. How many did you have?

A. Five or six, including my own.

Q. That is all.

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

Direct examination by Mr. Barrett.

Q. You are a civil engineer by profession?

A. Yes, sir; civil engineer and surveyor.

Q. How long have you been so?

A. Thirty-five years.

Q. How long in Essex county?

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

Q. How long have you lived in Montclair?

A. Going on thirty years.

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

A. I am; yes, sir.

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

A. It was; yes, sir.

Q. By you in person?

A. By myself; yes, sir.

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

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

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

A. That represents the private roadway through the land.

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

A. That represents the foot of the slope.

Q. It is so marked, is it not?

A. Yes, sir.

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

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

Q. A hundred-foot strip?

A. Yes, sir.

Q. Referred to in the deed?

A. Yes, sir.

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

A. A small stream.

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

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

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

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

Q. Is that a true running stream or brook?

A. Always.

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

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

Q. Commonly called tide-water?

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

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

A. Yes, sir.

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

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

Q. Do all of the red ink figures indicated on this map, including these on the right of way of the railroad com-

pany, indicate the levels above mean high-water mark at Newark?

A. Yes, sir.

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

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

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

A. Yes, sir.

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

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

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

A. Fifteen feet and thirty-nine hundredths.

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

A. In the center?

Q. I mean at this crossing?

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

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

A. Fifteeen and fifty-six hundredths.

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

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

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

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

Q. On each side?

A. Yes, sir.

Q. Of the center line?

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

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

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

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

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

Q. When did you make this map?

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

Q. How did you find the location of the private roadway which you have defined on this map?

A. By measurements.

Q. What was the character of that roadway?

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

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

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

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

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

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

A. Yes, sir.

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

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

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

A. For water purposes; yes, sir.

Q. Was there a roadway there then?

A. Yes, sir.

Q. And it has been there ever since?

A. Yes, sir.

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

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

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

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

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

A. Yes, sir.

Q. Or say fifteen seven?

A. It would average fifteen feet six inches.

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

A. Yes, sir; I think I was.

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

A. About a thousand feet.

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

[Objected to. Admitted subject to objection.]

[Question read.]

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

[Objected to. Objection overruled.]

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

Q. Now, what is the objection to it?

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

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

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

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

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

[Objected to.]

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

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

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

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

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

A. That would be objectionable; yes, sir.

Q. Well now, what other objection do you see in that

connection, besides the lack of safety in this kind of crossing?

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

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

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

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

A. No practical difficulty in that.

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

A. No, sir.

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

A. No, sir.

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

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

The Court—You are asking this question in regard

to a changed condition of affairs from a private right of way to a public roadway for the use of the general public.

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

The Court—I will overrule your question as irrelevant.

Recess.

After recess.

James Owen resumes the stand.

Further direct examination by Mr. Barrett.

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

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

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

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

[After argument]—

The Court—Mr. Owen has so far testified that a road crossing constructed in the particular manner you have described would not, in his judgment, be a suitable and convenient road for a crossing. Now, can't you ask him how this track might be crossed?

Q. In what manner could a suitable and convenient crossing be constructed across the right of way of the

railroad company at the place where Speer's private crossing existed?

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

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

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

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

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

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

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

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

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

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

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

A. Well, to give a fairly decent grade, I wouldn't have anything steeper than seven or eight per cent.; that is

quit a steep grade, still that is a comfortable mountain road grade, and that would take a distance of about two hundred feet from the edge of the track, east and west, on the land of Mr. Speer.

Q. How much of this two hundred feet——

The Court [interrupting]—What do you mean?

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

Q. (By the Court.) From where?

A. From the edge of the track.

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

Witness—Or edge of the track, yes.

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

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

Q. On each side?

A. Yes.

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

A. Well, it would vary.

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

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

Q. Is that the usual allowance?

A. That's the usual allowance.

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

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

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

crossing—would be superior to a grade crossing, in case the tunnel crossing is superior.

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

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

[Objected to as immaterial.]

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

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

[Objected to as irrelevant.]

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

Mr. Chauncey G. Parker—If the action was for damages, and if that was the desire of the complainant, it seems to me it might be material for the court to consider the value of the loss of this land for a farm. Suppose this were a condemnation proceeding, and there were two schemes proposed, one a scheme by which the railroad should run through at grade, and the other a scheme according to which it would run on this embankment, in awarding damages wouldn't the compensation be different in the one case than in the other, if the condemnation proceedings took in such circumstances as these; but in the present case there would not be any such alternative presented, because, under condemnation, we would have to take the entire land.

[After argument]—

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

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

Mr. Barrett—The deed reads "tract."

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

Mr. Barrett—Section 9 of chapter 160, page 306 of the laws of 1867 provides as follows: "That it shall be the duty of the said company to construct and keep in repair good and sufficient bridges over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses and cattle across the said railway shall not be impeded thereby, and

if the company neglect to perform the same, after giving —— days' notice to the company, by the person or the public officers having charge of the repairs or maintenance of said road so to do, such person or public officer may do the work or cause it to be done, and recover the value thereof from the company by common process of law."

The Court—Is that the charter of this company?

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

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

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

The Court—Tentatively; yes, sir.

[Question repeated.]

The Court—That question, strictly speaking, is not

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

[Question read by the stenographer. Objected to.]

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

Mr. Parker, Jr.—We waive that ground.

The Court—Then I will admit the question.

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

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

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

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

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

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

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

Q. (By Mr. Barrett.) What would be the relative effect on the value of the land if approaches were built instead of a tunnel crossing?

A. Well, I can answer it in this way, if the judge

will allow me, that the only difference between the two plans would be that with a tunnel the whole of Speer's land would be in accord with the roadway running through it, while with approaches it would not be, and it would be necessary to fill it also, to make it in accord.

Q. Have you any estimate of the cost?

A. No, I have not gone into that.

The Court—I would not admit that any way. The cost of filling would certainly be a very improper comparison of value.

Q. What would you give as the actual money depreciation to Speer's land, on both sides of this railroad, in having an overhead instead of a tunnel crossing, having regard to the entire value of the tract?

The Court—For use as to its present purposes.

A. I wouldn't like to answer that, because it isn't in my province.

The Court—Yes. You don't know?

Witness—No, sir.

Mr. Barrett—Does the court decline to allow me to ask questions in regard to the relative danger of tunnel and overhead crossings?

Mr. Chauncey G. Parker—That is apparent.

[After argument]—

The Court—I will allow you to ask the question.

Q. What elements of danger are involved in crossing the railroad at grade by approaches, that would be eliminated by crossing the railroad by means of a tunnel.

[Objected to.]

The Court—As I said before, it seems to me that the question can be answered, probably, as well by the court, or by anybody else, as by Mr. Owen. But still I will admit the question. I confess that I am not sure that it is a proper question for the witness to answer.

Mr. Barrett—I will withdraw the question, as counsel have admitted that a tunnel, from another point of view, is the better crossing.

The Court—I do not see how there can be any doubt of it. Everybody knows that there is greater danger cross-

ing a track at grade than there is crossing it above grade or under grade.

Cross-examination by Mr. C. Parker, Jr.

Q. I understand you to say, Mr. Owen, that you noticed a wagon track across this land and put it down on your map?

A. Yes, sir.

Q. It was nothing more than an ordinary wagon track, such as farmers have that go about their land?

A. No, it is a little more definite than that.

Q. You thought so?

A. Yes.

Q. Where did you see it most clearly defined?

A. It is pretty well defined to the railroad track from Valley road—from the railroad track to where the bridge was across Tony's brook, and then for about three or four hundred feet up to an old fence line, and then, beyond the old fence line, about three or four hundred feet to the brook it is more or less defined.

Q. Your map shows a street as running up to Cliffside avenue?

A. Yes, sir.

Q. So, as a matter of fact, Cliffside avenue has been laid out since this land has been taken by the railroad, hasn't it?

A. Yes, sir.

Q. How many years ago?

A. Twenty years or more; Cliffside avenue was opened, I should judge, somewhere about twenty years ago; it might be sixteen; something like that.

Q. Cliffside avenue runs alongside of a hill, doesn't it?

A. Yes.

Q. And the dirt was taken from one side and thrown on the other side to make the road?

A. Yes, sir.

Q. (By the Court.) How far from the crest of the mountain?

A. It must be two thousand, twenty-five hundred feet.

Q. Pretty well down the mountain?

A. Yes, east of Mountain avenue.

Q. (By Mr. Parker.) As a matter of fact that road could not run up to Cliffside avenue?

A. Oh, yes.

Q. Isn't it very steep there; you say you couldn't get up.

A. Oh, no.

Q. Don't you remember quite a steep embankment up to Cliffside avenue?

A. Yes, quite steep, but quite possible to travel.

Q. What is the grade leading to Cliffside avenue?

A. I don't remember particularly, but I should say not more than ten or twelve per cent.; I don't think there is any bar to travel there.

Q. If it could be made ten per cent. there, why not ten per cent. leading to the railroad track?

A. It might be made that.

Q. If it were made that way it would only require one hundred and fifty feet?

A. Yes.

Q. As a matter of fact, doesn't Speer's land, as it approaches Valley road from the railroad, rise toward Valley road?

A. Yes, sir.

Q. So that the embankment on the east side of the railroad would not have to be as long in order to reach the grade of the land.

The Court—I don't know whether I understand.

A. This ground is higher here [indicating on the map]; the ground at Valley road is higher than it is at the railroad, and also higher at Valley road than at the brook, which is east of the railroad.

Q. What is the grade between the brook and Valley road?

A. It rises twelve feet in about two hundred and fifty.

Q. Now what is the grade between the brook and the railroad to the west side of the railroad?

A. Practically level there; almost exactly level between the edge of the brook and the railroad.

Q. Then what is the grade, going west from the brook, up to this old fence that you have described?

A. I didn't take those levels.

Q. Can you recall, about?

A. I should judge it rises—it begins to rise three or four or five feet in the hundred, and then increases to seven, and as you get to Cliffside avenue it might be a little more or less. It begins to rise from the fence described and continues up to Cliffside avenue.

Q. How wide was this wagonway that you speak of?

A. It is about, I think, according to my map, ten feet or eight feet; it is about eight feet, I think—eight or nine feet.

Q. If that was high enough, why should you have a fourteen-foot road to get up to this?

A. You couldn't drive up an eight-feet filling twenty feet high; a little dangerous.

Q. How so; couldn't you have it fenced in?

A. Yes, but you would have to fence it wider then eight feet.

Q. How much would you have to fence?

A. Ten at least to allow room for one wagon; then, if you had a wagon load of hay, you might be bothered with it.

Q. But practically it can be used ten feet fenced in?

A. I don't know of any roads ever fenced in ten feet; they are constructed ten feet wide, but there is a margin on each side.

Q. And doesn't that allow for a post and a bar?

A. Yes, but I should say twelve feet would be better than that; I don't think it would be wise to say ten feet.

Q. You don't think fourteen feet would be necessary?

A. O, no; twelve feet.

Q. How wide is a hay wagon?

A. Well, I don't know exactly.

Q. How far apart are the wheels.

A. Well, that I couldn't tell you; the only knowledge I

have of the capacity of hay wagons, is as bearing on the question on the width of roads and bridges; the data has escaped my mind; Mr. Speer, or any farmer, would tell you about that; you know a load of hay on a hay wagon extends each side of the hubs.

Q. You would have to make all that allowance for a tunnel of course?

A. Yes.

Q. Where the lines are straight up and down at the side?

A. Yes.

Q. But you would not have to make that allowance for the road because the hay could hang out on each side?

A. Certainly.

Q. (By Mr. Chauncey Parker.) Is a hay wagon five feet wide between the wheels?

A. I think over—yes; I think a good many are broader than that, but that I would not be certain of; I am not prepared with figures on that.

Q. How far on Speer's land would you have to go?

A. Ten per cent. would be one hundred and twenty feet.

Q. How wide is it from Speer's line of Valley road to the east side of the railroad, measured along that alleged wagonway?

A. It is about three hundred and thirty feet.

Q. So that there would be room for — this thing wouldn't come within two hundred feet, about two hundred feet of Valley road?

A. Yes, sir.

Q. How far would it extend on Speer's land on the west side of Valley road?

A. Well, the same distance.

Q. Suppose the approach was not constructed at right angles to the railroad, but came up diagonally and had a gentle curve at the top, crossing the railroad track?

A. Well, that's feasible.

Q. That would hardly——

A. [Interrupting.] It doesn't run—the present drive-

way (I don't know if we understand each other) and the railroad now are pretty near on an angle of forty-five degrees.

Q. Well, what I mean to say is this: suppose it came up still more on an angle and then crossed, with a curve?

A. No particular objection to a slight angle there—nothing particular; I don't understand that makes much difference any way; the frontage of land on Valley road, I think, would be clear of the fill under any circumstances —that is, for an ordinary-sized lot.

Q. Now, apart from the difficulty of changing your course when you get up to the top of the embankment, there isn't any practical engineering difficulty about building approaches to go up alongside of and parallel with the railroad, and then cross and go down, is there?

A. No, except that it would be a good deal more costly than a straight drive and a good deal more trouble to take care of, because of your banks all the time washing down; I don't think that plan is feasible, looking at it in the view of the railroad company.

Q. Do you think it would be an unnecessary burden on the part of the railroad company?

A. Yes, I think it would bother them a great deal.

Q. Well, excluding the idea of the burden on the railroad company, and the cost and expense they may be put to, is there any practical difficulty about constructing a crossing in that way?

A. No practical difficulty.

Q. The railroad is straight on each side of Speer's land for a considerable distance, isn't it?

A. Yes.

Q. The land around there is open farm land, without any buildings to obstruct the sight of persons approaching the railroad, isn't it?

A. Nothing in the way, as far as that's concerned.

Q. Persons coming up there, about to cross the railroad, could have a view in both directions for a long distance?

A. Yes; probably he would be coming with his back to one line of travel coming up to the track.

Q. But the thing could be so arranged that as he came up to the track he can have his face towards where the trains came from?

A. No, I don't think so.

Q. The westbound track?

A. Then you would have to fill up pretty wide on top.

Q. Still, you could do that, couldn't you?

A. Oh, you could do it, yes.

Q. (By the Court.) Are there any curves there?

A. Oh, no, sir; there is a straightaway track for a third of a mile one way and a half of a mile the other.

Q. Then it curves?

A. It curves coming up from Washington avenue, and then it is straight from Valley road to a point—straight to within about a thousand feet of Belleville avenue.

Q. (By Mr. Parker.) So, if there were a space sufficient at the top, for one of these parallel roads approaching the crossing, for a wagon to turn, there isn't any practical difficulty about persons getting across that track safely?

A. You asked me if there was any practical difficulty of constructing it, and I say there is none; I think that a structure like that would not be proper under any circumstances.

Q. You don't like it then?

A. Personally I don't like it; I don't think it is proper.

The Court—Isn't the question this: Suppose there was another train in view at the time that a man with a hay wagon was on the bottom of the approach; now he goes with his back toward one of the trains; then when he gets up to the top he has a view both ways. Now, could a train come along in the meantime with so much speed that when he got to the top he found himself in such a position that he couldn't get over the track before the train reached the crossing? I suppose the thing to

consider in reference to an approach constructed in that manner——

Mr. Parker, Jr. [interrupting.]—I think the witness has testified that an approach might be constructed so that the road might go up facing towards the westbound track, coming from the south, going to the north, where it meets the westbound track; then when he is there, before he enters the westbound track he can see the other track. But, of course, that is a matter of opinion.

The Court—I suppose that no approach would be safe, or no crossing would be safe which would not be of such a character as to allow a wagon to get completely over the crossing before a train which was out of view, and was at the bottom of the crossing, came up to the crossing. That would be improper, wouldn't it? You see a hay wagon is a pretty heavy thing. The testimony is that this is a pasture field and that wagons do go into that field occassionally. I suppose it is within the contemplation of the parties that hay wagons and wagons loaded with oats, straw, Indian corn, &c., that that sort of wagons would cross the track very heavily loaded, and it seems to me that an approach, in order to be safe, must be of such a character as to enable a man to cross the track before any train, out of view at the time he commenced to cross, came near the crossing.

Q. (By Mr. Barrett.) Just one question; if these two approaches, one on each side of the railroad track, were concealed from each other, as they would be until one approached the summit, would it not be necessary to have the crossing wide enough for two vehicles to pass each other in order to make it suitable and proper?

A. Yes, it seems to me so.

Q. It would be impracticable to either back down or turn around on a narrow approach?

A. Yes, sir.

[Objected to on the ground that there isn't any evidence that there ever was a crossing of such a character.]

The Court—I don't think that need to be taken into consideration, because I do not think the passage of

wagons is so frequent as not to allow them to pass each other, but I think there is difficulty of the character I have mentioned, to a man sitting on a hay wagon.

Catherine M. Speer, sworn on behalf of complainant.

Direct examination by Mr. Barrett.

Q. You are the wife of Abram Speer, the complainant?

A. Yes, sir.

Q. And you have lived in the homestead of Mr. Speer's father, and his own home, for how many years?

A. Nearly forty years.

Q. And you live there now with Mr. Speer?

A. Yes, sir.

Q. Are you familiar with the property that has been described in Mr. Speer's testimony and which is shown on this map [indicating]—the tract of land lying between Valley road and Cliffside avenue?

A. Yes, sir.

Q. [Indicating.] This map shows, by dotted lines, the location of a private farm road across the property?

A. Yes, sir.

Q. Do you know where that road is?

A. I do.

Q. How long has it been there?

A. Well, it's always been there.

Q. When you say always, you mean as long as you have known the property?

A. Yes, sir.

Q. And was it in use during the period from 1870 up to the time the railroad embankment was raised?

A. It was.

Q. For what purpose?

A. For farming and for cattle.

Q. The roadway I am speaking of.

A. The roadway; we have always used it.

Q. And for what purpose?

A. Well, we had to use it to go up and down to go to Cliffside.

Q. And was it used for hauling farm produce?

A. Yes, sir.

Cross-examination by Mr. Parker, Jr.

Q. You have lived in this house on the other side of Valley road?

A. This side; yes, sir.

Q. You were not concerned much with the property on the other side, were you?

A. Yes.

Q. How so?

A. Why, we used it always.

Q. Used it always?

A. Yes.

Q. You mean to say the cows were driven over it?

A. Yes.

Q. And the wagon went up there when; when did you send the wagons up?

A. They went over it, when we farmed it, two or three times a day.

Q. That is, when you were getting in the crops?

A. Yes, sir.

Q. And when planting the crops?

A. Yes, sir.

Q. What kind of wagons did you send up there?

A. Hay wagons.

Q. When you got in your hay, you sent hay wagons there?

A. Yes.

Q. What kind of crops did you get in?

A. We farmed oats, corn and potatoes.

Q. And the farming land was up toward Cliffside avenue?

A. Yes, sir.

Q. (By Mr. Barrett.) Did you ever see any planks between the rails on the crossing over the track at that point?

A. Yes, sir.

Q. Do you remember for how long a time that planking continued there?

A. I don't.

Q. You don't remember when they were removed?

A. No, sir.

Q. (By Mr. Chauncey G. Parker.) When was the last time you saw the planks?

A. It might have been six or seven years ago.

Q. It might have been longer, might it not?

A. I don't think so; I have went over it.

Q. Is that the last time you went over it?

A. I haven't went over it since the embankment is there; it isn't very nice to look at either.

Lewis Cockefair, sworn in behalf of complainant.

Direct examination by Mr. Barrett.

Q. Do you live in Bloomfield?

A. Yes, sir.

Q. Have you lived there all your life?

A. Yes, sir.

Q. How old are you?

A. I was born in 1826.

Q. And was John A. Speer an uncle of yours?

A. Yes, sir.

Q. Were you in the habit of visiting him at these premises on Valley road in his lifetime?

A. Yes, sir.

Q. How long ago did you commence to visit him there?

A. Oh, well, since I can remember.

Q. And have you continued that habit since his death, with his son, Abram Speer?

A. Yes, sir; but not so often, possibly, as when a boy; I can't tell you how often; possibly once a month sometimes; sometimes possibly once in two months.

Q. [Indicating.] I show you the map made by Mr. Owen, where the dotted lines indicate a farm road——

[The character of the examination is objected to as not proper.]

The Court—Let the witness state his recollection.

Q. Did you ever observe a farm crossing or anything indicating a farm crossing running east and west across this tract of Mr. Speer's?

A. Yes, sir.

Q. How long ago did you observe that farm crossing?

A. As long as I can remember; I suppose sixty-five years ago.

Q. And how clearly was it defined on the surface of the ground?

A. Well, it was like many such roads; it was a wagon road.

Q. Had any work been done, and, if so, what, in the nature of constructing it or making it suitable to drive over?

A. My recollection of that road is that it was graded a little at some time: I don't know when, and I don't know that they continued to keep it in order; but it was a road anybody could see.

Q. Have you ever traversed it yourself?

A. A good many times.

Q. Have you been over it since the railroad was constructed in 1870?

A. Yes, sir.

Q. How recently?

A. I haven't been t'other side of the railroad since the embankment was put there, and I can't tell you; maybe four or five years ago me and Speer worked there together; that's the the last time I remember.

Q. It was there then?

A. It was there then; yes, sir.

Cross-examination waived.

Augustus T. Van Gieson, sworn in behalf of complainant.

Direct examination by Mr. Barrett.

Q. Where do you live?

A. Upper Montclair.

Q. How near to Mr. Abram Speer's house?

A. Oh, four or five hundred yards.
Q. North or south of his place?
A. South.
Q. South of it?
A. Yes.
Q. How long have you lived there?
A. Sixty years at that place.
Q. How old are you?
A. I was eighty last September.
Q. You knew John A. Speer in his lifetime?
A. Yes, sir.
Q. And you have known his son, Abram Speer, all his life?
A. Yes.
Q. Have you ever traversed or been upon this tract of land that was formerly John A. Speer's and is now owned by Abram Speer, which extends westerly from Valley road to Cliffside avenue?
A. Yes, sir.
Q. Did you ever observe a private or farm roadway extending from Cliffside avenue on that land?
A. Yes, about in the center of the land.
Q. How long ago do you suppose you first remember having seen that?
A. Well, sixty-five years ago or over, when I was a boy.
Q. Have you been on that land recently?
A. Yes, sir.
Q. How recently?
A. About six weeks ago.
Q. Was the roadway then perceptible?
A. Oh, yes.
Q. What construction or work, if any, has been done that marks that as a road or indicates that there is a road there instead of a meadow?
A. Well, I don't know of anything, only part of the way it is turned up at the sides.
Q. Did you ever see that roadway used by Mr. Speer—John A. or his son?

A. Yes, sir.

Q. For what purpose?

A. Well, farming purpose, I suppose you would call it.

Q. How often did you see them use it for farming purposes?

A. When Mr. Speer was living I used to see him three or four times a week; my father owned land right close by it, and I used to go backwards and forwards.

Q. And since the death of John A.——

A. [Interrupting.] Yes.

Q. ——who has used it?

Witness—What?

Mr. Barrett—Who has used it since the death of John A. Speer?

A. Abram.

Q. Abram?

A. Yes.

Q. For the same purposes that his father used it?

A. Yes.

Q. Do you remember whether you ever saw any planking between the rails where this private road crosses the track of the Greenwood Lake railroad?

A. No, sir.

Q. You don't remember observing any?

A. I don't remember; I have crossed it, though, a number of times; but I don't remember about the planking.

Cross-examination waived.

[Mr. Barrett, in behalf of plaintiff, offers in evidence the map to which reference has been made in the taking of the testimony, entitled "Land of Abram Speer, at Montclair, N. J. James Owen, civil engineer, 800 Broad street, Newark, N. J.," and the same is marked *"Exhibit 5 for complainant."*]

Complainant rests.

Charles H. Moore, sworn in behalf of defendant.

Direct examination by Mr. Parker, Jr.

Q. What is your business?

A. Civil engineer.

Q. How long have you been such?

A. About sixteen years.

Q. With what railroad are you connected?

A. The Erie.

Q. Have you had to do with the building of railroad bridges and estimating on the cost of them; is that part of your business?

A. Yes, sir.

Q. Did you make any estimate for a tunnel crossing at Speer's land in Montclair?

A. I have; yes, sir.

Q. When did you make it?

A. I made one this morning and another one a year or so ago, I believe it was.

Q. Will you tell us the cost of a proper and suitable tunnel crossing at that point?

A. About five thousand and some odd dollars.

Q. How wide would that crossing be?

A. Twelve feet.

Q. And how high?

A. A clear twelve feet.

Q. And to build approaches to a level crossing, and to build a crossing, starting from Speer's land, running up to the top and so down again, how much would that cost?

A. For a ten per cent. grade, about $600.

Q. That is, for filling in and planking at the top?

A. For filling in and planking.

Q. Is a ten per cent. grade practicable?

A. Yes, sir; it is used.

Q. Assuming that you would make a crossing which you could approach on approaches entirely on the railroad track, and parallel to the railroad track, reaching a summit and so on down in like manner by a roadway constructed parallel with the track, how much would that cost; can you tell us?

A. Approximately $700.

Q. Would that be a practicable crossing?

A. I would consider it so; yes, sir.

Q. (By the Court.) What is your answer?

A. I would so consider it.

Q. Your other crossing contemplated the use of Speer's land, I suppose?

A. Yes, sir; it did.

Q. (By Mr. Parker, Jr.) Did you have charge of the elevation of this track?

A. Yes, sir.

Q. When did it take place?

A. It commenced about the first part of April, in 1900, and—well, yes—I don't remember when the grading was finished; we finished everything in connection with Valley road in January, 1901.

Q. Why was this track elevated?

A. To have the crossing at grade with the North Jersey Trolley Company's tracks.

Q. Where—at Valley road?

A. Yes, sir.

Q. What was the total cost of that elevation?

[Objected to as not material.]

The Court—I don't think it is material. It seems to me that the cost of the construction is irrelevant; I cannot imagine from what point of view it could be relevant. If the railroad company was going to deprive Mr. Speer of a crossing to which he had a right, was it his business to approach the railroad company or was it their business to approach him? As I understand the evidence, it was not only shown by the deed, but it was shown on the ground that he had the right.

Mr. Chauncey G. Parker—We have other testimony on that point, as to the character of the way here.

The Court—I must take the evidence as it stands.

Mr. Parker, Jr.—We expect to show that there was never any planking, but that there were a couple of fences on either side of the track, and that the bars were taken down when Speer wanted to take his cattle across, and

that there wasn't anything to indicate a crossing. I understand that to be the testimony.

The Court—I think that the cost of construction is irrelevant.

Q. Did you go over this land at all, Mr. Moore?

A. I went there and examined the tracks.

Q. When?

A. The first time in '97; at the time the second track was constructed there, I went there, at one time, for the purpose of examining all crossings, underneath or overhead, for the purpose of making estimates.

Q. When was that?

A. In January, '97, was the first time, and the next year I was up and down there continually.

Q. Was there any evidence of a crossing at this point?

Witness—Across the tracks?

Mr. Parker—Yes.

A. No, sir.

Q. Any planking between—anything of that sort?

A. No, sir.

Q. When did you examine them again?

A. I was there probably three or four times a week during the elevation of the tracks.

Q. Did you see any road across Mr. Speer's land?

A. I paid no attention to that, not finding any evidences on the track of a crossing.

Cross-examination by Mr. Barrett.

Q. If you didn't know there was any road crossing there you were not looking for evidence of it on the tracks?

A. I was; yes, sir.

Q. Did you just go along the main line to see what evidence there was of crossings on the tracks?

A. Yes, sir.

Q. Entirely without regard as to whether the land on either side indicated the existence of such crossings?

A. I presumed as there was no evidence between the rails of a crossing that there was no crossing there.

Q. When did you first do this?

A. In January, '97.

Q. And that was at the time of the construction of the double track?

A. Yes, sir.

Q. Speer himself has testified that those tracks were all removed just before the double tracks were laid, hasn't he?

A. I don't know.

Q. That double track was on the same grade as the single track had been?

A. A very slight difference.

Redirect examination by Mr. Parker, Jr.

Q. The double track was laid in '97?

A. Yes, sir.

Q. Did you go there before or after the double tracking?

A. Before; in order to make estimates of the material that would be required for crossings.

Q. (By the Court.) There was some evidence of there being an approach to this track, the evidence being that the approach was two feet higher than the actual level of the land, and that there was an approach to the single track anyway; was there any evidence on the ground of such an approach when you saw it?

A. There was on the east side, but there were no indications, that I could make out, that it was in use at all.

Richard T. Dana, sworn in behalf of defendant.

Direct examination by Mr. Parker, Jr.

Q. What is your business?

A. Civil engineer.

Q. Are you in the employ of the Erie Railroad Company?

A. Yes, sir.

Q. At my request did you make a map of the Speer tract at Montclair, and the surrounding ground?

A. I did.

Q. [Indicating.] Is this the map you made?
A. It is.
Q. When did you make it?
A. In December, last year—last December.
Q. What is the scale of that map?
A. Fifty feet to an inch.
Q. Will you just describe it, please?
A. This map shows the main tracks of the Greenwood Lake Division for a distance of about fifteen hundred feet, including all the property indicated here as being owned, between Valley road and Cliffside avenue, by Mr. Speer; the tracks run north and south approximately, as indicated by "Northbound" in the lower right-hand corner of the map, underneath the title; about four hundred feet from the right of way of the track, on the west side, is a small brook running in a southwesterly direction, which, in fact, drains a portion of this land—the portion from the railroad track half-way down to Valley road; on the east side, included within the boundaries of the Speer property, the land is somewhat marshy, and is drained in wet weather by a very small brook running under the track in a culvert, east, between there and the Valley road crossing, and goes down across Brookfield avenue; the marsh land extends for a distance of about seven hundred feet from the track in the direction of Cliffside avenue, and at that point, where there is a wire fence [indicating] the land rises somewhat, and then rises somewhat abruptly to Cliffside avenue; that portion is dry, pasturage land, I should say; between Valley road and the railroad the Speer land is about in the upper central portion, not shown on the map.

Q. What is the character of this land on one side of the track, marked "marshy ground;" will you describe it?

A. It is essentially level from the railroad track to about seven hundred feet west thereof; it is not very wet, but it is soft ground and marshy, and it is covered with tufts of swamp grass, I should say, these tufts being varying distances apart; in very dry weather, and

of course when frozen, it is not wet; in very dry weather it isn't wet, but in moist weather it is moist and boggy.

Q. Did you examine the ground for any evidence of a road crossing there at all?

A. Yes.

Q. What did you find?

A. I saw on the east side—this road is not shown on the map; I saw on the east side of the tracks, near the fence—the fence is about the center of the property—
10 evidence that there had been a traveled way; it was not very pronounced; on the west side of the tracks I didn't see any thing at all. [Witness indicates on the map.]

Q. You looked for them, did you?

A. I looked for evidences.

Q. When were you there, do you say?

A. I was there about two months—I was there in last December and also about three weeks ago.

Q. You have a private street marked there?

A. Yes, sir.

20 Q. What is that?

A. Well, that is—in making the survey I noticed a street here [indicating], and that is it; it had recently been opened; this house had just been built—was in the course of being finished while I was there.

Q. Otherwise did it look like a street; just describe it?

A. It looked like any kind of a street that had just been opened; as I remember, it was curbed.

Q. That was called Brookfield avenue; is that a street that was opened there then?

30 A. That is a street.

Q. (By the Court.) Curbed, do you mean?

A. Curbed; it was in the process of being paved at this point [indicating].

Q. (By Mr. Parker, Jr.) How far is Brookfield avenue from Speer's land?

A. About in the center of the Speer property; from the inner edge of Brookfield avenue to the edge of the property is a distance of two hundred and seventy-five feet.

Q. Two hundred and seventy-five feet?

A. Two hundred and seventy-five feet.

Q. (By Mr. Parker, Sr.) This yellow line [indicating on the map]——

A. [Interrupting.] The Speer property is enclosed by a yellow line; no house on it whatever.

Q. [Indicating.] Is this where he lives?

A. Yes, sir.

Q. (By Mr. Parker, Jr.) How far is it from the west side of the Greenwood Lake property to Valley road, measured parallel with Speer's line?

A. Four hundred and fifty feet.

Q. How far is it from Speer's line to Valley road, measured along the railroad track, along the west side of the railroad track?

A. Well, Brookfield avenue is the first straight line it strikes; that distance is four hundred and twenty feet.

Q. Four hundred and twenty feet?

A. Four hundred and twenty feet.

Q. How far is it from the south line of Speer's property to the crossing of Valley road by the Greenwood Lake railroad?

Witness—Along Valley road?

Mr. Parker, Jr.—Along Valley road, yes.

A. That's about three hundred and seventy-five feet; it is about three hundred and eighty-five feet; I will correct that.

Q. On the other side of the track, how far is it from Speer's property to Valley road, measured along the railroad?

A. Three hundred and thirty feet.

Q. I see something here [indicating] marked "Spring," at the head of a little brook; what is that?

A. This survey was made when the ground was—when it had rained, rather, a short time previously, and I am not sure that that is a living spring; it is rather more a wet place than anything else; but I have very little doubt that that is a living spring; I am not certain about it.

Q. Did you make an elevation of the track at that point?

Witness—Section?

Mr. Parker, Jr.—Yes, I don't know what your technical name for it is; whatever you call it.

A. Yes, sir.

Q. What does that little map show?

A. That is a little section of the elevation of the track at the point where a crossing is desired by Mr. Speer.

Q. How much elevation is there from the ground to the rails?

A. Fifteen feet.

Q. (By Mr. Barrett.) That fifteen feet is from the base of the rail instead of from the top?

A. Yes, sir.

Q. (By Mr. Parker, Jr.) Are you familiar with the construction of highways and roads?

A. Yes, sir.

Q. Is there anything impractical in building an approach to a crossing at Speer's, over the railroad at that point, on a ten per cent. grade, going with the approaches parallel with Speer's north and south lines?

A. There is not, sir; there are hundreds of cases of that.

Q. I mean substantially at right angles to the track?

A. No, sir; that is perfectly practicable.

Q. How wide would such a road be at the top?

A. Ten or twelve feet.

Q. And how wide at the bottom?

Witness—I don't understand.

Mr. Parker—How much of a fill would be required?

A. It depends on how high up it was at the track itself; with a fifteen-foot embankment the bottom of the slope would be, with a ten-foot road, fifty-five feet wide—between fifty and fifty-five feet wide.

Q. That would be on the railroad right of way fifty-five feet?

A. Yes.

Q. Will you tell us how much of Speer's land it would occupy?

A. I can make a little sketch of that; as you start up, the bottom of the embankment at this point [indicating] would be just the width of the road itself; as you approach the railroad track it would increase to fifty-five feet; half-way up it would be an average between ten feet and fifty-five, or thirty-two and a half feet.

Q. Is there anything impracticable about making an approach to a level crossing about the middle of Speer's land, then by approaches constructed entirely on the railroad's right of way and running parallel with the railroad to the crossing, to the top, then across and so on down on the other side?

A. It would be entirely practicable—perfectly practicable—if you had enough width to start the road at the bottom; it might not be possible exactly at the top of the slope without infringing a little on their right of way; it is practically eighty feet at the bottom there, which would give you only ten feet from the roadway to start from; but the practical problem is simple; it has been done hundreds of times.

Q. Do you know of such crossings as that?

A. Yes.

Q. Have they been used?

A. Oh, yes.

Q. With what kind of wagons?

A. I don't remember of actually having seen loads of hay going across them, or special wagons, but they are undoubtedly used by ordinary farm wagons.

The Court—Isn't it a matter of some consequence to find out whether, standing at a point just below the crossing, a train would come into view from either direction; isn't that important in estimating the suitability of the road? If a train came into view at the bottom of the crossing, for instance, only five hundred feet away, it would obviously be an improper crossing, while, if a train could be seen four or five miles away there would be no danger whatever. Consequently it seems to me important

to know just how far off trains would come into view from either direction, while standing at the bottom of the approach?

Mr. Parker, Jr.—Very well, sir, I will try to get the information for you.

At this point the further hearing of the matter was continued until Thursday, February 20th, 1902, at ten o'clock in the forenoon, at the same place.

Before his Honor Vice Chancellor Stevens.

Mr. Halsey M. Barrett, for the complainant.

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

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

Richard T. Dana, recalled.

Further direct examination by Mr. Parker.

Q. Can you calculate the number of acres of land and meadow on each side of the railroad belonging to Mr. Speer?

A. I can.

Q. Just state what that is?

A. The area between this dotted line marked "fence," —I refer to the first fence east of Cliffside avenue—and Cliffside avenue is approximately three acres.

Q. And what is the character of that land?

A. Upland.

Q. Farming land?

A. Yes, sir.

Q. For tillable purposes?

A. It could be from this fence.

Q. (By the Court.) In your answer you use the words "this fence;" you better describe it, so that it will appear on the stenographer's notes?

A. I mean east, up to the right of way of the railroad, the area is about six acres.

Q. What is the character of that land?

A. Marshy land; east of the railroad track, about half of the tract, between the railroad track and the Valley road is upland, the other half is marshy; the territory comprised in that tract is about three acres, making in all seven and a half acres of marshy land and four and a half acres of upland.

Q. (Further direct.) Now, the highland is on the eastern side—the western side of the track adjoining Cliffside avenue?

A. It is.

Q. The high land on the eastern side of the track is adjoining Valley road?

A. Yes, sir.

Q. Have you testified to the frontage on Cliffside avenue?

A. No, sir.

Q. State what it is?

A. Two hundred and twenty-seven feet.

Q. And the frontage on Valley road?

A. Three hundred and ninety-four feet and five-tenths.

Q. State how far back the upland extends from the Valley road?

A. About one hundred and seventy-five feet.

Q. I think you stated the distance from Cliffside avenue before, didn't you?

A. It is four hundred and forty feet.

Q. Now, state the distance along Brookfield avenue from Cliffside avenue to the railroad?

A. To the right of way?

Q. Yes.

A. Sixteen hundred feet.

Q. How far from the corner of Brookfield avenue and Cliffside avenue is Speer's property?

A. Two hundred and seventy-five feet where the frontage begins on Cliffside avenue.

Q. Can you give us the total distance from Cliffside avenue to Valley road across Abram Speer's place?

A. Seventeen hundred feet.

Q. And what is the total distance around by the road?

A. Twenty-eight hundred feet.

Cross-examination by Mr. Barrett.

Q. When did you enter the employ of the Erie railway?

A. About five years ago.

Q. You testified on your direct examination that you went up and examined this property about three months ago, I think you said?

A. About three weeks ago I went up on one occasion, and then I made the survey last December.

Q. You made the survey last December?

A. Yes, sir.

Q. That was before you went up and examined it?

A. I say I examined it on two occasions, the first occasion when I made the survey, and the second occasion was three weeks ago.

Q. When you made that survey, did you walk through Mr. Speer's property west of Cliffside avenue?

A. Yes, sir.

Q. Did you walk along this roadway?

A. I walked west to about here and I didn't notice it; I walked along here [pointing to the section of the territory between the brooks].

Q. You were not looking for this private road or roadway, were you?

A. On the occasion, three weeks ago, I looked for it.

Q. Well, take the occasion when you first went over there in December, were you looking for it then?

A. No, sir; not particularly, excepting that I was

looking for all signs to put on my map; I was looking for indications——

Q. And is that the reason——

Mr. Parker—Won't you allow him to finish his answer.

Q. Did I cut off your answer?

A. I was going to add that I looked about the ground for signs of roads, brooks and all that sort of thing to put on my map, and I didn't see any such signs of a road that would warrant me in putting any on the map.

Q. That is west of the embankment?

A. West of the embankment.

Q. You did east of the embankment?

A. I did east of the embankment.

Q. If you were looking for the signs of a roadway which would warrant you in putting it on your map, and found none west of the embankment, but did find it east of the embankment, why didn't your map show that roadway east of the embankment?

A. Because I didn't consider it of sufficient importance; when I made the survey I didn't know the importance of this old road; I hadn't heard of it; and in looking for signs on the ground it didn't occur to me that the signs I saw were of such importance as to justify me putting it on the map.

Q. If you had found equal signs of such roadway west of the embankment, as you actually found east of it, you still would not have put it on your map, would you?

A. I think I would; it would depend somewhat upon the definiteness of the trail.

Q. You said you did find certain indications east of the embankment, but did not put it on your map; you did not find any indication west of the embankment and therefore did not put any there?

A. If I had found enough indications to show, or to indicate that there had been a much traveled highway there, or much traveled road, I would have put it on the map; but I did not find any such indications.

Q. Then all you mean to say is that you found no in-

dication of it being a much traveled highway or much traveled road?

A. No, sir; east of the track the road wasn't very well defined, and west of the track the road is practically not defined at all.

Q. But perfectly perceptible, is it not?

A. East of the track?

Q. And is it not west of the track?

A. I did not perceive it.

Q. Then are we to understand that although you were looking for a roadway and intended to show on your map everything of importance relating to the physical character of the ground, you were unable to find any signs that there had been ever a private road west of the railroad track?

A. I didn't say that at all.

Q. Very well then, what did you say?

A. I said that west of the railroad track I did not see evidence of a marked roadway.

Q. Marked roadway; what do you mean by marked roadway?

A. A well-marked roadway.

Q. What day was it you did this?

A. I don't know.

Q. Was there any snow on the ground at the time?

A. No, sir.

Q. Are you sure of that?

A. I am sure of it, but three weeks ago when I was there there was snow.

Q. But there wasn't snow on the ground there in December?

A. No, sir; not on the day I made my survey there was no snow.

Q. (By the Court.) In the line of the old road that you did see on the east side, did you notice fences on each side of the railroad track?

A. Yes, sir.

Q. Now is that fence composed of rails fitted into posts?

A. There had been an old pair of bars there on one side of the track.

Q. Which side of the track?

A. On the east side; I didn't see any on the west side; it is very plain, from the evidences on the ground, that there had been a farm crossing there originally when the track was laid on the ground, and that that farm crossing was used on this side (east side) of the track, but there was no evidence to show that it had been used very much on the other side; of course if it was used for a crossing, it could have been used on both sides; and on this side [indicating], immediately adjacent to the track, it seemed as if it had been used for driving over between the brook and the track.

Q. (Further cross.) When you went on the property in December to make the survey, do I understand you to say you had no knowledge of the purpose for which the survey was being made?

A. No, sir; you do not understand me to say that.

Q. I did understand you to say that you had no knowledge of the purpose?

A. I had no knowledge of the extent to which this ancient road was entering into the question.

Q. Did you know that the question of this road was involved at the time you made the survey?

A. What do you mean by that; do you mean the question of the extent of the old road?

Q. No, I mean the question of the existence of it?

A. I did not know, when I made the survey, that the road had existed, but I knew when I got on the ground that there had been probably a farm crossing there; Mr. Speer himself told me there had been; I did not know there had been before that, and I did not know the extent to which the old road figured in this case.

Q. What did you understand the use for which your survey was being made was?

A. I understood it was to be made to show the property owned by Mr. Speer; I was also informed—he himself told me that he was bringing a lawsuit against the

company in the matter of the construction of a crossing about the middle of his property; that was all I knew about it.

Q. Then you didn't look especially for signs of a road crossing when you went on the ground in December, did you?

A. It is always easy to find the answer to a problem if you have the answer before you; I did not look with special reference and knowledge of a road having been there; I did not know there had been a crossing at that point, but I looked for anything on the ground that would indicate any road there, or anything of that kind —roads or streams, or anything of that sort.

Q. How was it when you went there about a week ago?

A. I tried to say it was three weeks ago.

Q. Well, when you went there three weeks ago, and did not see the road west of the embankment, there was snow on the ground, wasn't there?

A. Yes, sir.

Q. Now, you have testified as to Cliffside avenue, and I think it appears on your map, doesn't it?

A. Yes, sir.

Q. Do you know when that avenue was laid out?

A. No, sir.

Q. Do you know what part of it is laid out now?

A. I know that it is constructed from Cliffside avenue as far as the railroad.

Q. All the way through, then, from Cliffside avenue as far as the railroad?

A. Yes, sir.

Q. What do you mean by constructed; what is its physical condition?

A. It is able to be driven and walked over.

Q. Wasn't that work done last fall?

A. I think it was; some of it; some of it was evidently done before that, because these two houses here [indicating] have been there at least a year.

Q. That is all.

Redirect examination.

Q. How much snow was there on the ground three weeks ago when you went there?

A. Probably an inch and a half.

Q. All over the property?

A. Yes, sir.

Q. What do you mean by saying that there were indications of a driveway there?

A. I mean by that that if the rail on this east side of the right of way—if it was marked up to the railroad land, and not marked on the other side, it would indicate that there had been evidently a crossing at that point, but not being marked on the other side it would indicate that it was not a continuous trail.

Q. You didn't mean to characterize the number of vehicles or the character of the crossing did you?

A. No, sir; I didn't mean that.

Q. That is all.

James Keegan, sworn for the defendant.

Direct examination by Mr. Parker.

Q. What is your business?

A. Special land and tax agent of the Erie Railway Company.

Q. Whose office are you in?

A. Mr. von Moschzisker.

Q. How long have you been employed there?

A. About nine years.

Q. Did you have an interview with Mr. Speer in relation to this crossing?

A. Yes, sir.

Q. When?

A. I don't remember just the time, but several months ago.

Q. Where did that interview occur?

A. On the railroad track between Upper Montclair and Park street.

Q. Just tell us what was said and done by each of you?

A. I called upon Mr. Speer——

Mr. Barrett—I don't know whether that is competent unless there is some foundation laid for it.

The Witness—I called upon Mr. Speer in order to learn the facts in the case, and he walked with me on the track, I think for a long distance, showing me the improvements in one way and another, and he showed me where this old crossing used to be, and he said that in order for to settle the matter he would——

Mr. Barrett—I object to any evidence showing any attempt to compromise this matter.

The Court—Well, any evidence tending to show an attempt to settle the controversy would not be evidence in this case, but it may be admissible for another purpose.

Q. Proceed.

A. He said that in order to settle the matter he would be willing to sell us all his land for $10,000, but later on, before I left him to come back to the office, he told me he would accept $7,000.

Q. What for?

A. For the crossing itself, but not the land.

Q. For the land at the crossing?

A. Yes, sir.

Q. Did he say anything about running a street through his property?

A. Yes, sir; he talked to me about that, and I understood by him to say that his property was quite valuable, and that by running a street through there he could sell off lots.

Q. Did Mr. Speer say how the street was to run?

A. I do not remember him telling me how the street would run.

Q. Did he speak of the street in connection with the crossing?

A. He spoke with me about an undergrade crossing, yes.

Q. Did he say anything about this street connecting with the underground crossing?

[Objected to as leading.]

Q. (By the Court.) Did he say anything more about it?

A. Yes, sir; he said that an undergrade crossing should be built there, and that would give his property an outlet to the Valley road.

Q. Do you say that he pointed out to you where the road was?

A. He pointed out to me where the crossing used to be on the track.

Q. Was there any evidence of an old road being there?

A. I don't remember seeing it.

Further direct examination.

Q. Did you have any further conversation with him on that occasion?

A. We talked in a general way about it, one way and another, and I told him I would report the facts to the office.

Q. What office?

A. The real estate department of the railway.

Q. How was the track at the time of your conversation?

A. Elevated.

Q. Elevated?

A. Yes, sir.

Q. And filled in?

A. Yes, sir.

Q. Did you give him any envelope or did you write your name on any telegraph blank for him or anything of that sort?

A. Yes, sir.

Q. Is this your name [handing witness a paper]?

A. Yes, sir.

Q. Did you have any other conversation with him at any other time?

A. No, sir.

Q. That is the only conversation you ever had with him?

A. Yes, sir.

Q. How did you happen to be up there then?

A. I was instructed by Mr. von Moschzisker, the head of the real estate department, to go there and see Mr. Speer and learn some of the facts of the case and make a report.

Q. That is all.

Cross-examination by Mr. Barrett.

Q. You are a clerk in the real estate department of the Erie railway?

A. Yes, sir.

Q. What department are you in?

A. I am in the real estate department; I am the special land agent and tax agent.

Q. Now, fix the time of this occurrence as near as you can?

A. It was several months ago.

Q. Was it before last summer?

A. I am not positive, but I rather think it was before.

Q. Was the construction of the elevated road—the elevated construction of the track all completed at that time?

A. Yes, sir.

Q. That was completed more than a year ago, wasn't it?

A. I should think so.

Q. Wasn't that completed in the fall of 1900?

A. I don't know when it was completed.

Q. Well, you are familiar with the fact, are you not, of the elevation of the track; I think Mr. Moore testified it was done in the spring of 1900; now, with that in your mind, wasn't this conversation about the time when this track was completed, a good deal more than several months ago?

A. It was a long time, I think, after the work was completed that I had this conversation; I am quite positive it took place within a year.

Q. Within a year from now?

A. Yes, sir.

Q. What makes you think so?

A. Well, it doesn't strike me as being any further back than that.

Q. You have no recollection of the time of the year, whether it was spring or fall, winter or summer?

A. I am not positive in regard to that.

Q. Did you have your overcoat on?

A. I don't remember.

Mr. Parker—I can help you if you like, Mr. Barrett?

Mr. Barrett—I wish you would. That is all I want to get at.

Q. (By Mr. Parker.) Refreshing your memory by this report, can you tell us when this conversation was?

A. In the month of September, 1900.

Q. That is all.

Robert Strauss, sworn for the defendant.

Direct examination by Mr. Parker.

Q. What is your business?

A. Track layer and supervisor of the Erie railway.

Q. Whereabouts?

A. The Montclair section.

Q. How long have you been such?

A. Since the year 1900.

Q. What other work have you done on the railroad besides being section foreman?

A. I am supervisor.

Q. How long have you been supervisor?

A. Eleven months.

Q. And when did you commence?

A. In the year 1900.

Q. When did you go on duty there first?

A. I went on duty there the 1st of October, 1899.

Q. When actually did you begin?

A. The 3d day of July, 1900.

Q. Was the elevation of the tracks going on at that time?

A. Yes, sir.

Q. Do you know Abram Speer, the complainant in this case?

A. I only know him, and that is all.

Q. Have you ever had any talk with him about that crossing?

A. Yes, sir; once about May, 1900.

Q. What did he say?

A. He said he had a right of crossing there.

Q. Did you see any indications of a crossing at that point?

A. No, sir; I never did.

Q. Did you see any indications of a roadway there at all?

A. No, sir.

Cross-examination by Mr. Barrett.

Q. Did you report to the superintendent or any other person above you, in the employ of the Erie Railway Company, the fact that Mr. Speer had told you in May, 1900, that he claimed this crossing?

A. I did not.

Q. That is all.

John Dow, sworn for the defendant.

Direct examination by Mr. Parker.

Q. What is your business?

A. Track foreman and signalman.

Q. Where are you employed now?

A. On the West Arlington tower.

Q. Have you ever been employed on the tracks of the Montclair and Greenwood Lake railroad?

A. Yes, sir.

Q. When were you so employed?

A. To the 11th of May, 1875.

Q. For how long?

A. From 1873 to 1875.

Q. What was your duty then?

A. Section foreman.

Q. Under what section?

A. Sections from Montclair to Little Falls.

Q. Does that include the property, or the line of the

railroad over the property, of Abram Speer in Upper Montclair?

A. Yes, sir.

Q. What were your duties as section foreman; what did you have to do?

A. Look after the tracks.

Q. Did you have anything to do with the crossings?

A. Yes, sir; when they are out of repair I repair them.

Q. Do you know this land of Abram Speer?

A. Yes, sir.

Q. Now, during the time you were there have you ever observed any crossing over the railroad track on his land?

A. No, sir.

Q. Was there any crossing there?

A. Not at the time I was there; no, sir.

Q. Or any plank placed in between the rails at that place?

A. No, sir.

Q. Or any road leading up on each side of the tracks and over the tracks on his land?

A. No, sir; I never saw any.

Q. Have you been familiar with this property since that time?

A. No, sir.

Q. What have you been doing since then?

A. Attending to the drawbridge and the West Arlington tower.

Q. How long have you been there?

A. I have been there about six years.

Q. Before that where were you?

A. On the section between Little Falls and Montclair Heights.

Q. Your section didn't cover this land?

A. No, sir.

Cross-examination by Mr. Barrett.

Q. How often did you go over the track on foot, between 1873 and 1875?

A. I cannot say how often.

Q. Why cannot you say?

A. Why I didn't have to go over it every day, and I cannot tell you how many times I did go.

Q. What was your habit?

A. Well, maybe three or four times a week.

Q. On foot?

A. Yes, sir; and with a handcart.

Q. Was there any fence along the line of the railroad company and Mr. Speer's land on both sides of the roadway?

A. Yes, sir.

Q. Do you remember that?

A. I think I do.

Q. Do you know whether there were any bars or anything of that nature in the fence?

A. No, sir.

Q. You mean you don't know whether there was or was not?

A. I don't remember seeing any.

Q. Did you ever have any occasion to look and see whether there was a crossing at Mr. Speer's land?

A. I never did.

Q. Then your testimony only means that now, after the lapse of twenty-seven years, you don't recall observing it; is that all your testimony is?

A. I cannot tell you after 1875 what they done, or whether there was a crossing or not.

Q. After the lapse of twenty-seven years you don't remember observing any crossing there, between 1873 and 1875, while you were in the employ of the company?

A. I don't remember, no.

Q. That is all.

James Shelton, sworn for the defendants.

Direct examination by Mr. Parker.

Q. What is your business?

A. Foreman.

Q. Where are you foreman?
A. On the Orange branch.
Q. Have you ever been employed around Speer's place in Montclair?
A. I was employed in 1900 elevating the track.
Q. And how long were you employed there?
A. About four months.
Q. When did you commence?
A. In April, 1900.
Q. What was your duty there?
A. Raising the tracks; elevating it above the Valley road.
Q. When did you complete it?
A. 11th of August, 1900.
Q. Did you ever have any talk with Mr. Speer in regard to this property?
A. No, sir.
Q. Or about the elevation?
A. No, sir.
Q. Or about the crossing through his land?
A. No, sir.
Q. Did you ever observe any roadway or track through his land?
A. I did not.
Q. That is all.

Not cross-examined.

Frank K. von Moschizker, sworn for the defendants.
Direct examination by Mr. Parker.
Q. You are an attorney-at-law of this State?
A. Yes, sir.
Q. And you are in the employ of the Erie Railway Company?
A. Yes, sir.
Q. In what position?
A. Real estate agent.
Q. You have charge of the land of the company?
A. I have.

Q. Do you know this land of Mr. Speer's?

A. I do.

Q. How long have you known it?

A. The last ten years.

Q. Have you been through the property?

A. I have.

Q. How often?

A. Well, at least once, and I have passed over it a number of times on the track.

Q. When did you go there once?

A. The first part of September, 1900.

Q. For what purpose did you go there?

A. For the purpose of looking over the property, with a view of a claim that had been presented for a crossing.

Q. Was that claim in your hands?

A. It had been sent to me at that time; yes, sir.

Q. Did you see Mr. Speer then?

A. I did not.

Q. Did you observe the land to see if you could find any evidence of any road or crossing?

A. I did.

Q. What was the result of your examination?

A. I could find no evidence of any crossing.

Q. Was there any evidence of a road across there?

A. Not that I observed.

Q. Have you made any arrangement as to offering Mr. Speer a roadway out from his land parallel with the railroad company's track on the west side, between Brookfield avenue and the Valley road?

[Objected to.]

Mr. Parker—I want to show the railroad company has secured a right for a road out from Mr. Speer's land parallel with the railroad track and the Valley road, which we have offered Mr. Speer and which we are now willing to build and give him in lieu of any crossing under the railroad, and under such terms as the court may think proper.

[Admitted subject to objection.]

Q. Have you made any arrangement as to securing such an outlet?

Mr. Barrett—I object to the form of the question.

Q. What option have you secured for that purpose?

A. I have acquired option or options on a strip of land leading from the land of Mr. Speer to the Valley road, and parallel with the railroad; it is a strip of land fifty feet in width.

Q. Have you got those options here?

A. Yes, sir.

Q. Let me see them?

A. The options are from Nathan Harrison and William H. Parsons, adjoining property owners.

Q. Have you offered those options to Mr. Speer or that road to Mr. Speer, or his solicitor?

A. In the course of the negotiations this was one of the propositions made to the solicitor for Mr. Speer.

Q. What was the proposition?

A. That a street would be opened leading from Mr. Speer's land to the public highway parallel to the railroad.

Q. When was this offer made?

A. I cannot give the exact date of that.

Q. How long ago?

A. Why our negotiations in this matter covered a period from September, 1900, down to a very recent date.

Q. (By Mr. Barrett.) To the filing of the bill?

A. Even after that, I believe.

Further direct examination.

Q. Just describe those negotiations?

The Court—I cannot imagine how negotiations leading to no result can affect this case.

Mr. Parker—It affects Mr. Speer in this way: he appeals to the judgment of this court, and we contend that we are not obliged to make the crossing he demands, but if we are obligated to make it, the cost of the thing is simply out of proportion to any benefit that can be

derived by Mr. Speer, so that the court will not compel us to make it as he wants it, and therefore it comes down to a question of damages to Mr. Speer of being deprived of this crossing, and we think that we ought to be allowed to show that we are willing, and have it in our power to give him an outlet to all his land. We think that this effort on the part of Mr. Speer is not to have us furnish him with a farm crossing, but for the purpose of getting money out of the railroad because of our misfortune in being compelled to elevate our tracks over the Valley road for the safety of the public and for public convenience; therefore, I think we have the right to put the whole facts and circumstances before this court in order that it may be able to judge fairly and equitably whether this claim, on the part of the complainant, is *bona fide* made for the purpose of a farm crossing or for the purpose of oppressing the railroad company. Therefore, I think, in that view, that the arrangements which were made between the railroad company and Mr. Speer are relevant and pertinent.

The Court—If you proposed to Mr. Speer any other plan of crossing than that already in evidence, you may show that.

Mr. Parker—I think our evidence will go to the extent that we can show that Mr. Speer was willing to accept a sum of money largely in excess of what we consider to be the proper amount, in consideration of his right of crossing.

The Court—He had a perfect right to say, if you will give me $10,000 I will give up my right of way; but if the company refused to give it to him, then you have not arrived at any conclusion.

Mr. Parker—We want to go further than that. We will show that he offered to take less than $10,000; that he offered to take $7,000.

The Court—He had a perfect right to put any value he suggested upon any portion of his land. He had a right to say he would sell his right of crossing for so much money.

Mr. Parker—We want to show that it wasn't until after he had received our refusal of what we considered a grossly disproportionate sum, that he commenced any proceedings in this court to obtain this crossing.

Mr. Barrett—Do you want to show that we negotiated as long as we could and then brought suit, when we found we could not agree.

Mr. Parker—No, but we propose to show that he was desirous of getting money out of us, and money simply.

Mr. Barrett—That is not so, and never was, and the bill shows it was not so.

The Court—That doesn't make any difference.

Mr. Parker—I would like to make a specific offer for the record. I offer to show that at the time of the commencing of this work, and after it had progressed to some extent, that Mr. Speer was waited upon by the representative of the Erie Railway Company; that he made certain demands for money compensation from the company in view of his right to a crossing which he claimed that he had under the deed from his father to the Montclair Railroad Company; that at present the railroad is operated by the Erie Railroad Company under a lease to the Montclair and Greenwood Lake Railroad Company, and are the owners of the property; that Mr. Speer was offered, on the part of the company, either a grade crossing with approaches parallel with the track or at an angle with the track—right angles with the track—and that he was dissatisfied with it, and that he sought and insisted that the company should either buy his land or else to give him an undergrade crossing, or else, as a substitute for it, to pay him the money compensation for the right to cross—a money compensation—and that he stated the sum at $7,000.

Mr. Barrett—Now you are getting everything in the case by your statement.

Mr. Parker—I have a right to make my offer, and I will now proceed with it. Subsequently Mr. Speer reduced his claim to a smaller amount, and that that amount was grossly in excess of the value of the right to cross; that

these negotiations lasted while the work was progressing and continued until about the month of November or December, I think, of 1900, or later, and continued, in fact, down to the filing of the bill; that they resulted in a disagreement between the parties, and that the company offered to Mr. Speer various sums—$1,000 in consideration of his right to cross, which Mr. Speer refused to accept, and that in the meantime the company had completed their track and had continued to operate their trains and operate the railroad upon its elevated structure.

The Court—It is quite proper to show the situation—that is, that the Erie Railroad Company is the lessee of this road, and if you can show, as I said before, that the parties agreed upon the money payment as a substitute for the crossing, I will allow you to show that. You may also show that Mr. Speer offered to take a certain sum of money for the crossing which the company did not accept. You may show that they offered a certain sum of money which he did not accept.

Q. (Further direct examination.) Did you offer Mr. Speer a right of way to the Valley road?

The Court—I might as well say now that what I desire to exclude is the negotiations for a settlement which preceded the filing of the bill, on the ground that such evidence is incompetent.

Q. [Question read.]

A. I did, through his solicitor.

Mr. Barrett—I object to the question and answer, and I would like to have my objection recorded, on the ground that the question is vague. There is no evidence of any particular roadway put in evidence; they say they had two options from two parties for some land somewhere, but it is altogether too vague.

The Court—I presume the options are in writing and will be put in evidence.

Mr. Parker—Yes, sir.

Q. Now proceed.

A. I offered to Mr. Speer, through his solicitor, a

roadway leading from his property line fifty feet wide over the adjoining property to the Valley road.

Q. Bounding on the road?

A. Parallel with the railroad and bounded by the railroad right of way.

Q. To be a public way?

A. To be a public way and to be placed in condition for use by the public and dedicated and turned over to the proper authorities.

Q. And by that roadway Mr. Speer could go between his two pieces of land without crossing the railroad at grade?

A. That would certainly lead him to the undergrade crossing at Valley road, to his land on the other side.

Q. Did you make any other suggestion as to a crossing at grade?

A. You mean during the course of the negotiations?

Q. Yes.

A. My first offer was to construct a grade crossing with an approach thereto on Mr. Speer's land.

Q. What happened to that first offer?

A. That was declined; my recollection is that I then offered an amount of money that it would cost us to build that crossing—the estimated cost.

Q. Well, that has been excluded, you understand, by the Vice Chancellor's ruling?

A. Yes, sir; and that was declined and then my second offer was to build the approaches on the company's right of way running parallel with the railroad and crossing the rails at grade, and then to go down the other side on a roadway running parallel; that is the approach and descent running parallel with the railroad, and that was declined.

Q. What was the next one?

A. I then offered him a $1,000 compensation for the right to the crossing which he claimed.

Mr. Barrett—The court has excluded that, as I understand it.

The Witness—And that was declined, and then my offer was made of the right of way to the Valley road.

Q. Which you first mentioned?

A. Which I first mentioned, and that was declined after being taken into consideration.

Q. That was your last offer?

A. That was the last offer.

Q. Does that offer still hold good?

Mr. Barrett—I object.

A. It does; yes, sir.

Mr. Barrett—Why don't you refrain from answering when I object?

Witness—Excuse me, sir.

Mr. Parker—Now I wish to offer these agreements referred to by the witness for the options in evidence.

[Marked *Exhibit Option No. 1, Option No. 2.*]

Q. Did Mr. Speer ever agree to receive a money compensation for this right of crossing?

[Objected to and overruled.]

The Court—If you put the question did the Erie Railway Company and Mr. Speer both agree that the right of crossing should be waived and the money consideration paid therefor, it will not be objectionable.

Witness—Well, Mr. Speer, through his solicitor——

Mr. Barrett—One moment; I think you should answer that question yes or no.

Q. Did Mr. Speer and the company agree to receive as a substitute for this right of crossing any sum of money?

A. There was no agreement because a sum was never fixed that he would take; there cannot be an agreement without both agreeing.

Q. Was there an agreement that a money compensation should be accepted without fixing any amount?

[Objected to.]

A. Will you put your question again?

Q. Was there any agreement between Mr. Speer and the Erie Railway Company or its representative that a money compensation—I mean with an amount not fixed

in round numbers or exactly, but that a money compensation was to be accepted by Mr. Speer in lieu of his right to cross?

A. Well, that is a hard question for me to answer; there was an offer made that an amount would be accepted in lieu of Mr. Speer's right to cross.

Q. Was there more than one offer?

A. Yes, sir; two offers.

Q. Were those offers accepted by the company?

A. They were not.

Q. Now, I would like to ask the reason why they were not accepted?

[Objected to and overruled.]

Q. Your last offer was that made previous to the filing of the bill or afterwards?

A. You mean in regard to the right of way?

Q. Yes?

A. I don't remember, Mr. Parker, and I could not say as to that.

Q. Was there any correspondence which will refresh your memory as to the time when this offer was made?

A. I think possibly there is; if you will allow me, Mr. Barrett and I had an interview at his office, and my recollection is it was after the bill was filed, when this proposition was presented of building this road out to Valley road; the proposition at that time seemed to strike Mr. Barrett favorably, and he said he would present it to his client and endeavor to induce him to accept it, and I think there is a letter written immediately after that, either to Mr. Parker or myself, which will fix the date, in which he stated the proposition as made would not be accepted.

Q. All the other efforts were made previous to the bill being filed?

A. I think so; yes, sir.

Cross-examination by Mr. Barrett.

Q. Have you with you the drawing which you submitted to me wholly out of the land of the company and

running parallel with the track and over the track for a crossing?

A. No, sir; I think I left it in your office.

Q. But didn't I return it to you?

A. I don't remember it; at any rate I haven't it with me now; it is not among my papers.

Mr. Parker—I offer the deed from Mr. Speer to the Montclair Railway Company, dated June 20th, 1870.

Mr. Parker—Do you admit, Mr. Barrett, the New York and Greenwood Lake Railway Company acquired this property from the Montclair Railway Company?

Mr. Barrett—Mr. Cortlandt Parker and I had a discussion about the time of the filing of the bill as to whether the Greenwood Lake Railroad Company should become a party to this suit, and I said I thought it wasn't necessary, but we finally agreed that the bill should go in as it was, and that if it became necessary to make it a party, I would amend the bill, and that was the understanding between us.

Mr. Parker—We only want to show the state of the title.

Mr. Barrett—You have proven that the Erie Railway Company did the work that destroyed this roadway.

Mr. Parker—Will you admit that the fact is correctly stated in the answer in regard to that matter just referred to by me.

Mr. Barrett—In regard to the fact that the New York and Greenwood Lake Company is the successor to the Montclair Railroad Company, &c., yes, sir.

Mr. Parker—And that the Erie Railway Company is the lessee of the New York and Greenwood Lake Railroad Company?

Mr. Barrett—Yes, sir; I suppose it is a fact that the Erie Railroad Company also owns a majority of the stock of the Greenwood Lake Railroad Company; that although there has been no actual merger, yet the Erie Railroad Company controls it. I will admit that.

The Court—And you admit that it is the lessee of the

road, and that it is operating it, and that the Erie Railroad Company has itself made this improvement.

Mr. Barrett—Yes, sir.

Mr. Parker—We admit everything except the ownership of the stock.

Patrick Manning, sworn for the defendant.

Direct examination by Mr. Parker.

Q. Where do you live?

A. Belleville.

Q. What is your business?

A. Keep a saloon.

Q. Were you ever employed in the Greenwood Lake Division of the Erie Railroad Company or the Montclair Railroad Company?

A. Yes.

Q. What railroad were you employed by?

A. Greenwood Lake.

Q. When were you employed by the Greenwood Lake Railroad Company?

A. Pretty nearly thirty years.

Q. When did you commence in their employ—how long ago?

A. Shortly after it commenced.

Q. When?

A. Shortly after it was started.

Q. You refer to the old Montclair railway?

A. Yes, sir.

Q. And you commenced in its employment shortly after it was started?

A. Yes, sir.

Q. How long were you employed there and where were you employed?

A. I was section foreman of No. 2.

Q. Where was section No. 2?

A. Just around the other side of the cut to Montclair.

Q. This side of what cut?

A. The Arlington cut and Montclair.

Q. That was called section No. 2?

A. Yes, sir; at that time.

Q. How far up did that section go when you were first employed on the road?

A. As far as Mr. Taylor's crossing.

Q. Is that above Mr. Speer?

A. No, I ran over that section for ten years, and I guess I ran the rest of the time after I was moved one mile further ahead; the meadow section was moved up a mile, and that moved my section another mile up to Upper Montclair.

Q. When was it you worked from Montclair to Upper Montclair?

A. Well, I used to run up from Forest Hill to Upper Montclair.

Q. When was it you ran from Forest Hill to Upper Montclair; what years?

A. I can't tell you.

Q. How long ago was it?

A. I guess it is twenty years ago.

Q. Over twenty years ago?

A. I guess so about that time.

Q. How long were you on that section from Forest Hill to Upper Montclair?

A. About twenty years, I think, but I kept no date of it.

Q. But you were employed there for twenty years as section foreman?

A. Between the other section and the time they moved me up, I mean.

Q. Well, do you know Mr. Speer's place?

A. Yes, sir; I know it.

Q. Now, what have you to do as section foreman on the railroad?

A. I have to do all the repairings to the railway and do all the repairs.

Q. Have you charge of the private and public crossings of the road?

A. Yes, sir; any part of the track that has to be repaired I have to attend to it.

Q. Did you ever have anything to do with the construction of the crossings or the keeping of the crossings in repair?

A. Yes, sir.

Q. What did you have to do with them?

A. I had to plank them and fix them up and do everything that ought to be done to them.

Q. Can you tell us while you are on this section whether there was any crossing at Speer's land over the railroad?

A. There was no crossing that was planked.

Q. Did you ever see any planking laid across the tracks there?

A. No, sir.

Q. Did you ever see any use made of that crossing?

A. Yes, sir; I saw him drive his cows back and forth.

Q. Did you ever see any wagons go across there?

A. No, sir.

Q. How often did you use to pass this place?

A. Sometimes every day for a week and then for two or three days again I would not be there.

Q. How did you go there, on foot?

A. Yes, sir; I used a hand car part of the time and part of the time I went on foot.

Q. Did you have any other men working for you or under you?

A. I had seven or eight men at times; there was six generally to a gang.

Q. Did you know John Dodd who was employed there?

A. Yes, he had the section above me, the next section above me.

Q. I wish you would explain, if you can to us, when you first went on the road how far your section ran?

A. From Arlington to Montclair, at Mr. Taylor's crossing.

Q. That was the first section you had?

A. Yes, sir; and I was a good many years on that; then I was moved up from there one mile; there was a

mile taken off of my lower end and put on the upper end, so that I went up as far as Upper Montclair.

Q. Is Taylor's crossing above or below Speer's place?

A. Taylor's crossing is in Montclair.

Q. Montclair itself?

A. Yes, sir.

Q. How long did you work on that section which extended up to Montclair?

A. I guess about ten years; somewhere about that time.

Q. And then you commenced to work on the section which extended up to Upper Montclair?

A. Then I went from Forest Hill to Upper Montclair.

Q. How long did you work on that section?

A. I guess about twenty years.

Q. When did you cease working for the railroad?

A. I guess about four years ago.

Not cross-examined.

I. Seymour Crane, sworn for the defendants.

Direct examination by Mr. Parker.

Q. Where do you live?

A. Montclair.

Q. How long have you lived there?

A. Forty years.

Q. What is your business?

A. Hardware.

Q. Do you have any connection with any financial institution in Montclair?

A. Yes, sir.

Q. What?

A. I am on the building and loan committee of the Bank of Montclair and on the same committee of the savings bank and trust company.

Q. What are your positions in those institutions?

A. Well, the savings bank I am one of the managers and directors, and the same in the trust company and in the building loan.

Q. How long have you been so employed?

A. The building loan, about fourteen years, I think, and I am chairman of the securities committee of the savings bank, and I have been in the trust company since its organization.

Q. How long has it been organized?

A. I think the savings bank has been there about ten years.

Q. Did you ever deal in real estate in that vicinity?

A. Yes, sir; I have.

Q. How long have you done that?

A. More or less of it for ten or fifteen years past.

Q. In your business connected with these various institutions, did you make loans on real estate?

A. Yes, sir.

Q. Is that part of your business?

A. I don't know whether you would call it part of my business; I have done a great deal of it.

Q. Is it part of your duty as such officer?

A. Yes, sir.

Q. Then your duties require you to become informed as to the values of property and as to sales of property up around Montclair and that vicinity?

A. Yes, sir; I think so.

Q. Have you kept yourself informed as to such sales and valuations?

A. Most of them; yes, sir.

Q. Do you know the property of Abram Speer in Upper Montclair?

Mr. Barrett—I object to that. I don't think this inquiry is proper, because this witness has not been sworn to be an expert as to the value of complainant's land.

[Admitted.]

A. Yes, sir; I do.

Q. How long have you known it?

A. About four years.

Q. Do you know the property surrounding it?

A. Yes, sir.

Q. Have you lately gone and looked at it?

A. Yes, sir.

Q. When?

A. Within a week.

Q. Just describe the character of the land?

A. Well, it has been considered farming land; the property facing on Valley road, for a distance, I should think, back one hundred and fifty or two hundred feet, and about the same distance back from Cliffside avenue, is what I would call upland property, and the property in between is low, swampy land.

Q. Will you state what it is adapted for; I mean the property in between there; is it adapted for anything?

[Objected to.]

Mr. Parker—I want to show whether there was any damage to his property by reason of his not having a crossing over the railroad track as demanded by him. We expect to show also the pecuniary interest at stake by reason of the denial of this crossing.

The Court—The evidence may go in subject to your objection.

Mr. Barrett—Then I also object to this witness on the ground that he has not qualified himself to speak as an expert.

The Court—You may cross-examine him if you choose, as to his knowledge.

Cross-examination by Mr. Barrett.

Q. Are you familiar with the value of land in the vicinity of Mr. Speer's land?

A. Yes, sir.

Q. Where did you get that familiarity?

A. I own some property right near it.

Q. How near?

A. On Watchung avenue.

Q. That is a half a mile, pretty nearly, is it not?

A. No, sir; it is right down on the same line of the road adjoining the water company's place.

Q. Are you familiar with the value of land, except your own, in that neighborhood?

A. Not from any sales that have taken place there.

Q. Have you any more information than what you consider your own property worth, and by that, judging relatively, the value of other property?

A. My opinion is based on sales of other property in that township.

Q. Well, in the immediate vicinity of this land?

A. There have been no sales of any land in the immediate vicinity of this land.

Q. Then your information is based wholly on the sales in the township, not in the vicinity of this land, and on the fact that you own a piece of property in that vicinity yourself?

A. Yes, sir.

Mr. Barrett—Then I object to this testimony.

Q. (By the Court.) Do you know of the value of property within a mile of this place?

A. Yes, sir; I know the value of a number of them.

Q. Have you ever passed upon the question of mortgaging properties in that vicinity?

A. Yes, sir.

Q. And upon the question of the land as security for mortgages?

A. Yes, sir.

The Court—I think the witness is competent.

Q. (Further direct.) Are you familiar with and did you examine this ground between the railroad company and this fence [indicating upon the map] across the track?

A. Yes, sir.

Q. There is about six acres there; now, can you tell us what the value of that land is, without connection through to this piece of land on the east side of the railroad track, in its present condition?

Mr. Barrett—What do you mean by value?

Q. I mean its fair market value?

A. I should say $200 an acre.

Q. Now, suppose it had connection across the railroad

by a crossing which goes up here [indicating] and crosses over the railroad at a level and then down again on this side to the other piece of land on the east side of the railroad——

[Objected to. Question withdrawn.]

Q. Suppose it had a crossing suitable and convenient across the railroad track or through the bank to the other piece of land on the east side of the railroad, which would be available for the owner of the two pieces of property, would there be any additional value to the property?

Mr. Barrett—I object to the question in that form.

Q. What would the land be worth, first without any access to it?

[Objected to.]

The Court—Let the question be, first, what is the value of the land without the crossing—that is, without any connection between the two pieces, and then what is the value of it with a connection.

Q. Has the question suggested by the court presented itself to your mind before this time?

A. Yes, sir; it has, and it seems to me that if it makes any difference in the price of the property on either side of the railroad before or after the connection is made, it would depend entirely upon the character of the crossing; if the crossing is made on the railroad company's property up and over the track and down on the other side, I think the property is worth no more with it than it would be without it, or if a tunnel were cut through the bank it would make no difference as to the value of the property; if a tunnel were put through there similar to the one on Valley road it would make some difference in the value of the property.

Q. That is, you mean a public tunnel?

A. Yes, sir; clear of the entire street and the sidewalk as well.

Cross-examination by Mr. Barrett.

Q. Do I understand you that Mr. Speer's property was worth $200 an acre in your judgment?

A. The lowland on the west side of the track I was asked about.

Q. Well, you own some land, similar land, don't you, above there?

A. No, sir; below that.

Q. Below it?

A. Yes, sir; and it is not lowland; it is higher than this.

Q. What is your piece of land worth per acre?

A. I should say my piece of land, per acre, was worth about $700.

Q. $700 an acre?

A. Yes, sir.

Q. How many acres do you own there?

A. A little over an acre.

Q. Has it any frontage?

A. Yes, sir; two hundred feet frontage on Watchung avenue.

Q. When did you buy it?

A. I took it for a debt about five or six years ago.

Q. How big was the debt?

A. The debt was $1,200.

Q. Did you take it in full satisfaction for the debt?

A. Yes, sir; it was all I could get.

Redirect examination.

Q. How big do you say that piece of land was?

A. Two hundred and seventy-five feet deep by two hundred feet front.

Q. And how much land do you say there was—about an acre?

A. A little over an acre.

Q. You didn't express any opinion as to the higher land fronting on Cliffside avenue and Valley road?

A. No, sir; I have not.

Q. Your opinion was only as to the pasture land?

A. That was all.

Q. That is all.

Robert C. Ryerson, sworn for the defendant.

Direct examination by Mr. Parker.

Q. What is your business?

A. Real estate agent and insurance, mortgage and loans.

Q. How long have you been in that business?

A. About twelve years.

Q. Where?

A. Montclair.

Q. Continuously?

A. Yes, sir.

Q. Does your business require you to keep yourself informed on sales and of the value of real estate in that vicinity?

A. Yes, sir.

Q. Have you kept yourself so informed?

A. I have endeavored to do so.

Q. Have you made sales in the vicinity of Speer's land?

A. I have sold lots on Cliffside avenue.

Q. Do you know the property owned by Mr. Speer?

A. Yes, sir; I do.

Q. How long have you known that?

A. Twenty years.

Q. Are you familiar with the sales of property of similar character to Speer's land?

A. I am.

Q. Have you made such sales?

A. I cannot recollect any of just similar character of land in that vicinity.

Q. Have you made appraisements and put values on property of that description in that vicinity?

A. I don't know that I have; I think I have made appraisements of lands.

Q. Well, are you familiar with the value of the property?

A. Yes, sir.

Q. Did you go on Mr. Speer's land for the purpose of making an appraisal of that property?

A. I did.
Q. When?
A. Last Saturday.
Q. And did you go over the property?
A. Yes, sir; as far as I could.
Mr. Barrett—I object to his evidence, because he has not testified that he has bought or sold any land in this vicinity.
The Witness—I stated that I sold some lands on the west side of Cliffside avenue. I have made no sales of land down in this lowland.
Q. There has been no such land sold around there, has there?
A. Yes, sir; I think there was some sold adjoining this property; I have been told so, but I don't know of my own knowledge.
Mr. Barrett—I object to this witness testifying as to the value of the land.
[Objection overruled.]
Q. What was the value of Mr. Speer's land, with or without the crossing over it or under the railroad so as to connect the two tracts of land together?
Mr. Barrett—I object; that calls for a judgment which is entirely outside of an expert opinion.
[Question withdrawn.]
Q. Can you give an opinion of the value of Mr. Speer's land at Montclair, New Jersey, without a connection from one side of the railroad track to the other side by a tunnel or overhead crossing suitable and convenient and giving free access to the owners of the property on each side to go from one piece of land to the other; give us an opinion of the value of the property without such tunnel or access first, the property being entirely separated by this solid embankment?
A. I think part of the property is of a very moderate value, and that some of the land near Cliffside avenue is of increased value.
Q. Well, state the value, please?
A. I think the value of the tract on the west side——

Q. Take the whole piece; take this case: here is a farm with land partly on one side of the track and partly on the other; now, the question is as to the value of the land as a whole without any means of access through the embankment; then I want you to tell us what it is worth with such access; that is the problem for you to answer?

A. Do you wish me to give you the value as I consider it worth, east and west of the railroad?

Q. I want you to give us your opinion of the value of the whole farm west and east of the railroad, assuming there is no access between the two properties?

A. I think about $300 an acre.

Q. Now, assuming that there is free access from one part of the land to the other, over across the track or underneath the railroad by a private right of way?

A. In my judgment it doesn't increase the value of the property at all.

Q. Would that property be worth any more, and if so, how much?

A. I don't think it would be worth any more.

Cross-examination by Mr. Barrett.

Q. How would that land adjacent to the railroad here be accessible for any purpose, if there was no railroad crossing?

A. It could be reached from Cliffside avenue.

Q. How far is it from Cliffside avenue to there?

A. Do you mean straight across the land?

Q. Yes.

A. I should think several hundred feet.

Q. What do you mean by several?

A. Between six hundred and eight hundred feet.

Q. For what purpose could that land be used if the access was limited to Cliffside avenue?

A. Do you mean without any outlet to the east side?

Q. Yes, that is the theory we are going on?

A. Nothing except farming and pasturing.

Q. Has it any value for that purpose, or much value

if it has to be used with access only from Cliffside avenue?

A. Well, if that land on Cliffside avenue were sold there would have to be a right of way reserved for it.

Q. It would take off part of the Cliffside avenue front for access?

A. Yes, sir.

Q. How far is this piece of land where Tony's brook crosses it, from Valley road?

A. I don't know.

Q. Have you ever considered whether this rear land could be used, or could be utilized more if there was access to it from Valley road, than it could be with access from Cliffside avenue?

A. It could be better used for any purpose if there was a right of way out of it alongside of the railroad.

Q. Just please answer my question; the stenographer will read it to you?

[The stenographer read the same.]

A. It could not be used any more—you could get at it better.

Q. Would it not be more accessible?

A. It would be easier to get to.

Q. Do I understand you to say you don't consider that a right of way under or over the railroad connecting those two pieces of property of any value to the land on either side of the railroad?

A. Not in the condition in which I found it the other day.

Q. If you owned farm pasture land similar to this and a railroad company wanted to buy the exclusive right to a strip of land one hundred feet wide through it, which would make one piece as inaccessible from your home as this piece is from Mr. Speer's, would you consider that a right of way was of no value and that it would be no object to retain it?

[Objected to.]

A. Yes, I should ask them to provide me with some way of reaching it.

Q. That is all.

Redirect examination.

Q. Have you formed any opinion of what would be the value of the right to cross from one side of that farm to the other if the land was only good for farm purposes, considering the means of access from the public streets?

A. I think the property would be enhanced in value if access were had from the public streets.

Q. You don't understand me; I will withdraw the question; that is all.

I Seymour Crane, recalled.

Q. (Further cross-examination.) Are you now asking $20 a foot front for the land which you mentioned before —two hundred and seventy-five feet front?

A. I would like to get it; I don't know that I ever asked that for it.

Q. But you would like to get it?

A. Yes, sir.

Q. Have you ever fixed a price upon it at all to anybody?

A. No, sir.

Q. Never have?

A. No, sir.

Q. If the land is only worth $700, which I understood you to say was the cost, valuing it by the acre—you said it was two hundred and seventy-five feet by two hundred, didn't you?

A. Yes, sir.

Q. Well, that is about an acre and a third in round numbers?

A. Yes, sir.

Q. Then why do you say you would like to get $5,500 for it; do you mean that seriously that you are contemplating getting that price for it, or do you mean that you would only be too glad to swindle somebody out of $4,500?

A. No, sir; I would be glad to get that amount of money out of it, if I could.

Q. If you could sell it to somebody who didn't know its value?

A. Oh, I don't know about that.

Q. Have you ever offered to sell it for $10,000?

A. No, sir; I never offered to sell it at any price; I never had an application for it.

Q. Are you not now holding, and haven't you said that you expected to hold that land at $20 a foot front?

A. No, sir; I never said any such thing.

Redirect.

Q. Where is it?

A. On Watchung avenue, the next street south of Brookfield avenue.

Mr. Parker—We have two more witnesses to the same effect as the last witness, and we also expect to put in the Chancery proceedings between the North Jersey Street Railway Company and this steam railway company for the raising of the tracks.

The Court—I do not think you need put in any more evidence on the question of value at this time. I will reserve the right to you to put in any further evidence on that question, if it becomes necessary hereafter.

Mr. Parker—Then I will now put in evidence the Chancery proceedings compelling us to elevate our tracks. Is it admitted by the complainant that the allegation in the answer in reference to the Chancery proceedings for the elevation of the tracks are offered?

Mr. Barrett—I cannot answer that general question, but I am willing that the record shall go in evidence.

Mr. Parker—I will offer in evidence the proceedings in Chancery in the matter of the application of the North Jersey Street Railway Company to define and regulate the mode of crossing of the line of the New York and Greenwood Lake railroad at Valley road, in the town of Montclair—first, the petition, verified December 5th, 1895, filed December 6th; second, the order for the hearing, filed December 6th, 1895; third, the decree, with the copy of the resolution of the town council and consent of

the town council to the railroad company's attorneys, filed November 1st, 1899; fourth, the maps accompanying the decree, filed November 1st, 1899; we also want to prove that Mr. Barrett claimed, previous to the filing of this bill, that Mr. Speer was entitled to a crossing which would be available practically as a public way.

Mr. Barrett—I don't think that would be competent.

Mr. Parker—We have a letter here which we propose to offer in which Mr. Barrett speaks on that subject.

Mr. Barrett—That letter was written in reply to the letter of January 19th, from Mr. von Mochzisker, and if that goes in, I think the letter of the 19th ought to go in too, because the one explains the other.

The Court—If one letter goes in, they both should go in.

Mr. Barrett—Here is the letter of the 18th to Mr. von Mochzisker, the representative of the railroad company, with whom I was negotiating, and I said to him that I would rather have the crossing than $4,500, which he had then offered to accept, and his company was unwilling to pay; then I go on to say—[counsel reads same].

Mr. Barrett—I have found four witnesses here whom I expect to call to show the physical condition of the road and the physical condition of the crossing, but in view of what the Vice Chancellor said, that as the case stands he thinks the complainant is entitled to have a crossing, I don't think it worth while to take up any further time of the court now. One of the witnesses is Mr. Halstead, who had his cows pastured there; another is a neighbor. It is all of the same character of testimony as I have previously put in, and is simply cumulative and corroborative.

The Court—As I understand the evidence of the surveyor of the railroad he found evidences of a crossing at the point at which it is claimed there were marks of wagon tracks on one side of the railroad, and it seems to me, as the evidence stands, there would be no doubt as to their having been a crossing there. How far it has

been used, I cannot say. One of the witnesses for the railroad company says that he saw cows crossing at that place but no wagons driven over it. Some of the witnesses say that planks were laid there between the rails and wagons driven over. Since the deed was made there has been a crossing there for some purpose, and that that crossing has never been abandoned I think is the evidence as it stands now. There is another fact that has not been adverted to. I understood one of the surveyors, on the part of the railroad company, stated that there were posts in the fence separating the tracks on the easterly side of Mr. Speer's property in which rails had been placed, but on the other side there was a wire fence. He didn't state whether there was any opening through that wire fence, nor has it been stated how long that wire fence has been there. You may put in any evidence you desire upon that subject.

Recess.

Richard T. Dana, recalled.

Further direct examination by Mr. Parker.

Q. You were up at Mr. Speer's land for the purpose of taking observations of the approach of trains on the track and give us the result of your observations?

A. I stood on the right of way on the east side of the railroad track and observed how far down the track you could observe the approach of trains in either direction; a train approaching from the west can be seen at a distance of about eighteen hundred feet; a train approaching from the east can be seen at a distance of about nineteen hundred feet from the point where the old roadway crosses the track; on the other side of the right of way you could see, if anything, a little bit further in each case.

Q. Can you tell us whether it was practical to make a level overhead crossing at Valley road without raising the railroad track over Mr. Speer's land to the degree to which it was raised?

A. Not in my judgment; Valley road was depressed —the highway of the Valley road was depressed somewhat to avoid the necessity of increasing the elevation.

Q. To what extent was that depression?

A. It looks to be from six to eight feet; I didn't have charge of that work and I haven't got the figures.

[The letter of Mr. von Mochzisker of January 18th and the reply to that letter of January 19th, and the reply of January 21st were offered in evidence.]

Abram Speer, recalled.

Further direct examination by Mr. Barrett.

Q. Mr. Dana testified yesterday afternoon that west of the railroad embankment there was a wire fence across your property running parallel with the railroad; is there any such wire fence there now?

A. Yes, sir; what there is left of it.

Q. When was that put there?

A. Probably ten or eleven years ago.

Q. Were there any openings in it?

A. Yes, sir.

Q. Where?

A. There were bars and they were taken away within the last six months; this gentleman over here [indicating] called on me, and I went down with him, and when I got over the railroad I saw they were gone; on the side next my house they were there yet.

Q. When the wire fence was put there there were posts and bars for the purpose of a crossing through it?

A. Yes, sir.

Q. And when were those bars removed?

A. Well, I don't know when they were removed, but I say when I went over there with this engineer that they were gone, and I spoke of it, and I said those two bars had been taken away, but I said next my house they were there until a day or two ago; there is a wire fence along the side of the railroad.

Q. Who does it belong to?

A. The railroad company; in the first place they put

up a board fence, and that burned down, and I notified Mr. Smith, the superintendent at that time, that his fence was down and out of order, and I asked him to repair it, but I didn't get much satisfaction, and finally I met him up at Upper Montclair, and he said: "If you can show me any good reason why we should build that fence, I don't know but what we will do it"; I said: "Well, I will show you a copy of my deed."

Q. Never mind that; what did Mr. Smith do afterwards; what was——

A. Mr. Smith said that if I could show him any good reason he would repair it.

Q. What was done?

A. The wire fence was sent up there and I nailed it on for them.

Q. Were the posts already there?

A. The old posts were there.

Q. You say there was an opening left where this farm crossing was made?

A. Yes, sir; there was a farm crossing there of about fourteen feet.

Q. With bars?

A. Yes, sir.

Q. And the opening is there still, is it not?

A. The opening is there still and the bars are still on the east side, or they were there within a day or two when I went up there with this young man, and when I was there three weeks ago I saw them, but they were removed on the other side, and when that was done I cannot say.

Q. What is there on the west side?

A. There is a fence.

Q. On the west side?

A. I don't quite catch your meaning exactly.

Q. What is there on the west side?

A. There is a fence on the west side.

Q. Is the fence there yet?

A. Yes, sir; but the bars, where the crossing was, are gone.

Q. What is there in place of it?

A. Nothing, just an opening.

Q. How long has that fence been there?

A. That fence was started in there when the road was built.

Q. I mean the wire fence?

A. Well, I could not tell you just the number of years; I have no date for it.

Q. A long while ago?

A. Well, I suppose ten or fifteen years ago, in that neighborhood, while Mr. Smith was superintendent of the road.

Q. That is all.

Complainant rests.

Richard F. Dana, recalled.

Further examined by Mr. Parker.

Q. You testified you were at this land to-day and you were there about three weeks ago?

A. Yes, sir.

Q. And last September?

A. Yes, sir.

Q. Did you notice any opening in the wire fence on the west side of the track?

A. I did not notice it.

Q. Mr. Speer testifies that there was an opening there on the west side of the track, is that so?

A. I will not swear there was not an opening, but I didn't see the opening.

Q. That is all.

Case closed.

Before his Honor Vice Chancellor Stevens.

Mr. Halsey Barrett, for the complainant.

Messrs Cortlandt & R. Wayne Parker and *Mr. Chauncey G. Parker* for the defendants.

Transcript of shorthand report of the decision of the Vice Chancellor, of the above-stated cause, on Tuesday, the 3d day of June, A. D. 1902, at the Chancery Chambers, Newark, N. J.

The Court—I find, on looking at the English cases and other cases which are referred to in the Pipe Line case, that there is a distinction between an easement which is created for the benefit of the land only and a stipulation giving the right of way in general terms. The English cases hold very clearly, and I understand they are approved in the Pipe Line case—they hold very clearly that where a railroad gives a right of passage, that that is a right of passage for all purposes, and that it is a right which enures not merely to the grantee of the easement for the purposes for which he is then using the land, but it enures to every tenant of the grantee and to every grantee of that grantee however much he may subdivide the land.

The English cases are entirely clear that the land may be subdivided indefinitely, and that every subdivision will be entitled to the enjoyment of the easement. Those cases seem to me to be founded on good sense, and besides that, as I understand it, they are referred to in the opinion in the Pipe Line case as being law.

Now, it seems to me to follow from these decisions that the complainant's right is broader than I had at first supposed it was. The situation is this—the language of the deed is: "The party of the second part doth for itself and its successors agree to make and maintain necessary fences on both sides of said tract of land, which shall be built before the work of grading the said track is commenced,

and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway, where the party of the first part may direct."

Now, the party of the first part did direct that the easement should be where the old road had been, and the company assented to that direction, and constructed a passageway in accordance with that direction. I find a very significant passage in a decision by Chief Justice Beasley in the Morris and Essex Railroad Company's case, 2 Vroom 209: "If A grant to B a right of way over his farm, such way to be laid out by B, it could not be plausibly pretended that after such way had once been located and ascertained by B it could afterwards be relocated or altered or added to by him." That was in a case in which it was held that the Central railroad, having once located their tracks in a certain way, could not afterwards relocate them; that the power that their charter gave them was exhausted, and that the location must remain forever as it was.

Now, I take it that as soon as the grantor gave that direction, and the railroad company assented to that direction, the right of way became fixed; it would not afterwards be changed by either party without the consent of the other. The effect was the same as if the exact location of the crossing had been defined by the deed itself. That being so, what is the consequence? The consequence is that neither party could change that location without the consent of the other. That is the inevitable consequence of this view of the construction of the clause.

Now, that being so, I take it, that inasmuch as the location cannot be changed laterally, it cannot be changed vertically; a vertical change would be more inconvenient and more destructive of the right, as it was created by the stipulation, than a lateral change; and so I take it that what Mr. Speer was entitled to was a crossing practically at grade—a crossing in which the approach was not raised more than eighteen inches above the general level of the land, because, that, according to the evidence, was the grade established by the railroad company. Now,

what the company did was to put up and construct this embankment, sixteen feet high, and destroy the crossing. There is absolutely no crossing there. In other words, they have deprived the complainant of that easement which by his deed he was entitled to, and they did it after notice by the deed itself, which was placed upon record, and by actual notice of the complainant's right.

The evidence seems to be that this notice was given either just before the actual work of grading commenced, or just afterwards. If I believe the testimony of the company's witnesses it must have been given before the work was commenced, because the latter shows that the notice was given in March—I think, on the 23d of March, 1890—and two witnesses on the part of the company said that the work was commenced about the 1st of April. Mr. Speer's evidence seems to indicate that the work of grading had been commenced, but in that he may be mistaken, and he is, if the company's witnesses are right. But whether Mr. Speer is right in that matter or whether the company's witnesses are right in that matter, in either case the notice was given at the earliest possible opportunity, and therefore Mr. Speer has lost none of his rights.

Now, this I take it to be the situation of the parties. The agreement having provided that the crossing should be at that identical point, of course the company was not at liberty to give Mr. Speer another crossing at any other point, and certainly they are not at liberty to say that a crossing over the lands of somebody else, in a more indirect way, is equivalent for the right which he has by his deed.

Under those circumstances the question is, what to do with this case? I have come to the conclusion that in order to meet the equities of the case the company must do one of two things. They must either give an undergrade or tunnel crossing, or they must proceed to condemn the right. They must proceed to condemn the right of which they have now deprived Mr. Speer altogether. I think that I ought to put the decree

in the alternative. The reason why I desired the presence of counsel here this morning was that, after explaining the case as it strikes me, I might say that if there is any question as to whether or not the company can condemn such a right, I would be glad to hear argument on that subject. It wasn't referred to in any way, and has never been discussed. The point is this: whether the company, having agreed to give this crossing, can now ask to come in and condemn the very thing which they have given by deed.

Now, my own impression about it—and in that impression I may be entirely wrong, because I haven't examined the case, and did not examine it, because I desired to give counsel an opportunity to discuss it, if they desired to, before I examined it—my own impression about it would be that, inasmuch as the railroad company could condemn any other right they would also be at liberty to condemn such a right as this. For instance, suppose the railroad company having a piece of land it didn't want for the time being, should convey that land by a general warranty deed to a guarantee. I don't suppose that if they afterwards desired this land, and had the right under their charter to condemn that they would be prevented by their warranty deed from condemning, and if they could condemn the whole interest, I don't see why they cannot condemn a partial interest, even though they themselves had created that interest. It would seem that to compel the company to construct this tunnel without any other alternative, would not be equitable under the circumstances of this case. The right which they would then be obliged, by the judgment of this court, to give Mr. Speer would be a more advantageous right than that which he got by his contract. What he got by his contract was a right to cross the tracks at grade. That right was of course attended with some risk, and it was much less convenient, and of course much less beneficial than a right to cross at grade under the raised tracks, and so if I merely compel the company to give this underground crossing, I would be compelling the company to give

something for which they never stipulated, and something which would be more beneficial to the complainant than he was entitled to by the terms of his original deed. And then perhaps I may advert to one other consideration which at present doesn't strike me as forcibly as the one I have just mentioned. Counsel will find in the May 15th number of the Supreme Court Reporter, that the Supreme Court of the United States has just decided a case of Pine against the City of New York. In that case an owner of land fronting on a stream of water sought to enjoin the city of New York from building a dam, under these circumstances: the stream was partly in the State of Connecticut and partly in the State of New York. The land of this landowner was below the dam. The stream flowed for a certain distance in New York and then went into the State of Connecticut, and the dam was erected at a point within the State of New York. Now, the city of New York was endeavoring to secure the waters of this river for a water-supply and was proceeding to build its aqueduct, with the result that the water would be entirely diverted from the land of this landowner, and would be used by the city of New York. There could be no condemnation in that case, because the city of New York could not condemn in Connecticut. There was, however, some negotiation between the parties before the dam was begun and while the construction of the dam was in progress; and the Supreme Court thought that inasmuch as both parties contemplated a money equivalent for the loss of this water and had been negotiating on that basis for a considerable time, and there had been no absolute assertion on the part of the landowner of his right to the flow of water, that for that reason it would be inequitable to give him anything more than a money equivalent, and so they held in that case that they would enjoin unless the city of New York would pay him such damages as should be assessed by the Court of Chancery. They reversed the decision below which made the injunction absolute. This case perhaps resembles that in some respects. Here, too,

there was considerable negotiation for a money equivalent, and while the complainant never gave up his right yet he did negotiate with this company, on a money basis, to a certain extent. There were negotiations extending, as I understand the evidence, through several months, and they could not come to terms just as they could not come to terms in the New York case, to which I have just alluded. That may be an additional reason for making the order in the alternative as I have suggested.

If counsel desire to be heard on the question of whether or not there can be a condemnation of this right, under the charter of the railroad company, I well hear them on that point, but otherwise the inclination of my mind is to give a decree that the company shall either construct this tunnel or shall condemn. I don't think that a road constructed in the way that the railroad company proposes would be the right of way which was given by the contract. That would, in the first place, not be as convenient, it might be sufficient for the present purposes of the owner, but inasmuch as under the terms of this stipulation, the owner is entitled to have a suitable and convenient crossing, which shall be suitable and convenient in the future as well as in the past, why evidently such a crossing as that would not be either convenient or suitable for such uses as the evidence would indicate the land will be needed for in the near future or may be devoted to. I think that such a crossing would be very much less convenient and suitable than the crossing which Mr. Speer and his father have enjoyed for thirty years.

So far as the crossing, with approaches on Mr. Speer's land is concerned, the evidence shows that in order to make such a crossing, considerable land of his own would be taken. There was no such contract as that. Mr. Speer is not obliged to give more of his land than he has already given for the consideration which he received. The evidence, I may say, appears to indicate that this land is rapidly becoming something other than farm land. The price in itself indicates that. All the witnesses, on both sides, say the very worst of this land is worth $200 an

acre, and the evidence of the company, as well as the evidence on the part of the complainant, indicates that streets are being run through in the immediate neighborhood, which indicates that this is going to be a suburban residential neighborhood, and not merely a farming neighborhood in the near future. Under the English cases we have got to take that into consideration; we have got to give a crossing which could be used by the grantees of Mr. Speer for such purposes as they may then desire to use the land, as well as a crossing for a mere farming purpose, for which Mr. Speer now uses it.

If there is an appeal to be taken in this case, I think I had better announce my decision now, so that it can be taken to the next Court of Errors.

Mr. Parker—Has your Honor considered this case against the town of Newton—this question of alternative relief, where, instead of sending the plaintiff to law in condemnation proceedings, it was referred to a master to ascertain the amount to be paid. There are a list of cases that I submitted to your Honor at the time of the argument, and I think not only that case, but a number of other cases previous to that time say that it wasn't necessary to go to law to have the appointment of commissioners and all that; that the Court of Chancery would take care of the whole affair and carry it through to the conclusion; it seems to be much simpler and a less roundabout matter. I don't know what counsel desires, but that would eliminate the question as to whether there should be any argument in the matter of condemnation. I will say that that question was considered at the time this claim was first made, and it was considered not only by the counsel of the road in this county, but also considered by Messrs. Corbin in Jersey City, who acts for the railroad company; they all seemed to be quite clear that the statutes didn't seem to provide for the situation; therefore, they didn't pursue that method, they thought it was practically useless—taking the view that it was an attempt to use condemnation proceedings for the purpose of defeating every right which the company had

agreed to give. That was the view counsel took in the case, and it seems to me there is a great deal of force in that position. I must say that I am a little surprised at the view the court has taken on the right of complainant; the complainant himself put his right upon the covenant, not by a right of way or reservation at all; his whole bill is framed on that view, and we take very much a similar view, and it makes considerable difference in deciding the question as to the right of condemnation whether it is a covenant or reservation, and I must say the case may be fraught with difficulties if we go to the Court of Errors and contest there as to what this right is. It seems to me that both the railroad and the complainant are desirous of reaching some sort of an adjustment of this affair, and that it would be wiser for the court, if it was within the jurisdiction of the court, as the court holds, to direct that this amount of money should be ascertained by reference rather than insisting upon the condemnation. I think that not only in the Newton case, but in four and five previous cases this court has taken that course, even though it appeared that there was a right of condemnation at law. It says: "Well, the plaintiff is here asking for relief, and if he comes into a court of equity he must do equity, and it is just as competent for us to find out what sum of money would compensate him as it would be for a commissioner, and he must take such sum as that court awards, upon a reference to the master." I must say that this seems to be a very strange position for the court to take, and I would suggest to counsel—counsel practically submitted to that course at the argument—it seems to me that would be a better way to have the decree framed than to order us to condemnation.

The Court—I remember Mr. Parker alluded to the subject on the argument, but I don't think it was discussed at all, certainly not by Mr. Barrett, and I will hear any argument on that question which counsel may desire to present. It is a question, to my mind, that is

not entirely free from difficulty. The peculiarity of this case lies in this circumstance, that I cannot find that Mr. Speer has been guilty of any laches whatever. He is standing on his rights, and he has not lost them by any lack of diligence. Now, this case must be argued on that basis, so far as I am concerned. I know counsel did make the argument that there was some laches, but I have carefully reread the evidence, and I cannot find any laches at all, and so Mr. Speer is not put upon any terms growing out of the fact that he has been in laches. The point to which I allude with regard to the decision of the Supreme Court of the United States is a different point. There may be an argument that Mr. Speer did indicate by his conduct that he was willing to take a money equivalent for his right, but I don't consider that that is any indication of laches on his part. He insisted on his right from the beginning, although he likewise, to a certain extent, signified his willingness to take a money equivalent for that right, if the company was willing to pay him what he thought it was worth.

Mr. Barrett—The evidence shows and the correspondence shows that this suggestion of a money equivalent came wholly from the railroad. Now, the mere fact that Mr. Speer did not refuse to consider that—that he didn't push it all aside and say, "I won't consider any settlement other than giving me such a crossing as I may be entitled to under the agreement"—I don't think that that binds him or changes the situation in any respect, or really gives the court any jurisdiction to assume that that matter should be adjusted by a money equivalent. I think the fact that we did allow the railroad company to present offers to us, which we consented to consider, cannot change the situation at all.

The Court—It is very much like the Supreme Court cases in this: that Mr. Speer allowed the embankment to be constructed while he was negotiating for a money equivalent; he didn't file his bill before they commenced to construct the embankment, or as soon as he saw they

were constructing the embankment. On the contrary, he allowed matters, under this negotiation for a settlement, to drift on for over a year. Now, that was the case in the Supreme Court of the United States. The complainant in that case never gave up his right—insisted upon his right—but at the same time, while the dam was being built, he negotiated with the company, and didn't file his bill to enjoin the construction at the beginning. So, I say, there may be some similarity between these two cases in that respect.

But there is another thing which I tried to make clear, and that is this: that by no action of the court can the complainant be restored to his original right. The court must give him either something less than his original right or something more. If the court gives him merely a way, such as the company proposes to make over the property, it will give him something less than his original right. If, on the other hand, the company gives him a tunnel, they will give him something more than his original right. That, I think, is a circumstance which ought to be taken into consideration when the court deals with this subject.

Of course I don't ask counsel to discuss this matter to-day, but I will be glad to hear any discussion either with respect to the question of whether the company can condemn this right, or with respect to the question of whether the Court of Chancery should, itself, assess the damages. I don't know what the charter of this company provides, whether it provides for a trial by jury or not, but I will hear discussions on that question, and I will fix some early day for the hearing, if counsel desire to argue it.

Mr. Barrett—Just one moment. Inasmuch as the right of way or the crossing was destroyed by the railroad company wholly, the mere fact that the physical situation is such that the court cannot absolutely restore it in the same manner as it was, but either, more or less, it seems to me that as we are innocent and have not committed laches, that you cannot give us as much, you

must necessarily give us more; that that would be the alternative.

With respect to the alternative of a condemnation, as provided in the decree, it seems to me that that is not to be placed in the decree—the right of this company to condemn, if such a right existed, nor be based or depend in any respect upon the decree of this court; it depends on a present right, and that present right now cannot go by reason of this decree, and consequently it seems to me that the decree ought to be made for a specific performance, or in the nature of specific performance as your Honor has indicated, and that there is no basis for an alternative decree there. If the company has that right to compel us to take money or if our negotiations have created such a condition that we ought to take money, then it seems to me it doesn't need to be in the decree at all. That is the only suggestion that I make.

The Court—I don't know what the form of the decree will be; it might be in this form: that the company should be required to construct this tunnel, putting it of course in the negative form that they should be enjoined from continuing the present construction unless within a certain time it applied to condemn, I don't know what the form ought to be. That would have to be considered by counsel.

Mr. Parker—I should like to say a word. I do it with much hesitancy, because I fear I am simply repeating what had been uttered, but has not reached me. I understand your Honor to meditate upon making a decree for the complainant in this case, and at the same time to realize that a decree, such as he asks for, is unjust in its consequences, that to build a tunnel would be pressing into the contract as you hold, exceeding something far greater than was ever contemplated or thought of, and the payment of which is hardship and unjust, and your Honor suggested that under such circumstances if there would be a condemnation under the charter and powers of the company, that that course would be taken. So

that there is doubt, certainly there is grave doubt, it seems to me, as to whether a company can condemn back again the very thing that they have themselves created. That difficulty stares me in the face at once, and I think there are others, in the absence, I think there is an absence probably of a direct law upon the subject; there must be a general law I think, at any rate I am quite sure it cannot be any charter itself. Now, that being so, is not that very difficulty a reason—a controlling reason why your Honor should take this matter of the adjustment between these parties according to right, in your own hands. That is the practice of Chancery in many cases. I can refer to the books in such matter as that, that where the court finds that justice calls for a certain result and no absolute law gives the power of reaching that result, then the court, and it should be so, as a court of equity it is the very object of its jurisdiction, should come in, and, by its action, referring it to a jury perhaps, but with no duty to do that, and still a duty existing in the court to do the exact right between the parties which your Honor can do by your own action, the evidence given and taken for that purpose or through the use of the ordinary means of arriving at a money compensation.

The Court—Well, if Mr. Barrett will consent that the damages should be assessed in the Court of Chancery, provided the railroad elect that alternative, there may be no further difficulty; if he will not then I wish your argument on that subject.

Mr. Barrett—Of course I don't wish to consent now.

The Court—I suppose Mr. Barrett would desire to consider that question, and you can let Mr. Parker know.

OPINION.

[Filed March 26, 1903.]

Mr. Halsey M. Barrett, for the complainant.

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

STEVENS, V. C.

The bill is filed to compel the defendant company to restore a farm crossing over its tracks in Upper Montclair. By deed dated June 20th, 1870, John A. Speer conveyed in fee to the predecessor of the defendant company, for the consideration of $487.50, a strip of land one hundred feet in width running through the middle of his farm. The farm contained about forty acres. In this deed the grantee company stipulated as follows: "The said party of the second part doth for itself and its successors agree to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the work of grading on said track is commenced, and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct."

In conformity with this stipulation the grantee directed that the crossing should be where an old road ran through to the middle of the farm. To this direction the company assented and provided a crossing accordingly. Its single track ran through the farm nearly at grade, the rails being laid about eighteen inches above the natural surface. On both sides of the track planking was laid, and the crossing so constructed that the grantor could cross with his farm wagons, horses and cattle. The way was used by the grantor, and after his death, by the complainant, his sole heir-at-law, up to the month of April, 1900. During the latter part of this period, how-

ever, the complainant seems to have utilized it only as a driveway for cows, so much of the farm as lay west of the track having been devoted to pasturage.

In the year 1897 the company constructed an additional track, and in April, 1900, raised both tracks so as to run over the Valley road at an elevation of thirteen feet (clear head room), pursuant to a decree of this court, regulating the use of that highway as between the North Jersey Street Railway Company and the defendant company. In thus raising them, the latter company was obliged to raise them at the farm crossing, and it constructed across complainant's land a solid earthen embankment about fifteen and a half feet high. It did not bridge the crossing, but completely destroyed it. Complainant can only now go from the easterly to the westerly part of his farm by making a considerable circuit on land not his own.

Just before or very shortly after the work of grading had begun, the complainant notified the agents of the company of his right. The notice of claim is dated March 23d, 1900. The company's first reply is dated March 29th, 1900. Mr. Moore, the company's engineer, says the work of elevating began about the 1st of April of that year. The company, notwithstanding the notice, went on and constructed the embankment across the way.

The stipulation in the deed is only that the company and its successors shall provide the *party of the first part* with a suitable and convenient road crossing. It does not in terms extend to his heirs and assigns, but it has been settled that those terms are not, in a case like the present, necessary to attach the covenant perpetually to the land. In Pipe Line Co. *v.* D., L. & W. R. R. Co., 33 Vr. 254, 274, the stipulation was that the company should erect and forever maintain under the rails of its railroad a suitable wagon road or crossing, &c. Mr. Justice Depue, speaking for the Court of Errors, said: "The grant in terms is to Stewart without the word 'heirs' or words of perpetuity. Such a grant at common law would create only a personal right for the life

of Stewart. Where the right is granted in a deed, in the nature of a reservation, and it is manifest from all the recitals in the deed on the subject that the plain purpose of the parties was to create a right for the benefit of the part of the whole tract which had been severed by the conveyance, the grant will be construed as creating an easement appurtenant to the premises and will pass as such without the word 'heirs,' at least in equity." The covenant in the case in hand does not differ essentially from that which was the subject of consideration in the Pipe Line case, so far as it is in the nature of a reservation. Here, as there, the plain purpose was to create or rather to preserve and perpetuate a right for the benefit of the severed parts of the whole tract. It therefore follows that the complainant, who is the sole heir of the grantor of the land, is entitled to the benefit of it.

In view of the decision in the Pipe Line case, the company does not seriously contest its liability in some form. It says that it is willing to give a crossing in one of three ways: (1) it will undertake to give an outlet to the Valley road over a right of way *to be* acquired by it. This will compel the defendant to make a circuit off his own land, in order to go from his house and barn and from the Valley road to his land west of the raised tracks; (2) it will provide approaches on its own land parallel to its tracks, which will carry the crossing over the road at grade, or (3) it will construct approaches on the complainant's land so as to carry the crossing over the road at right angles to the direction of the tracks. The company suggests further that in case the court shall be of opinion that the complainant is not obliged to accept either of these three modes of crossing, then it shall itself ascertain the damages which the complainant will suffer from the severance and compel him to accept them, in lieu of the specific relief which he asks.

The complainant refuses to accept any of these propositions, and insists upon his right to a crossing at the level at which it existed for the thirty years prior to the raising of the tracks. In reply to this insistment the

company says that such a crossing would cost over $5,000, while any of the other modes of crossing would not cost more than five or six hundred.

It would seem, at first blush, as if a crossing, such as the company offers, would answer complainant's requirements and that the rule should be applied that if subsequent events have made literal performance by defendant so onerous that it would impose great hardship upon the company and be productive of little or no benefit to complainant, then it will not be decreed. Trustees of Columbia College *v.* Thatcher, 87 N. Y. 311. But a little consideration will show, I think, that this case does not fall within the reason of the rule. In the first place, if the company will now be obliged to spend $5,000 upon what I shall call a tunnel crossing, it is only because, in the face of not only constructive but *actual* notice of the complainant's rights, it chose to go on and disregard them. The company's engineers do not tell us what such a crossing would have cost had it been made while the work was progressing. It is obvious that it would have cost very much less than it will now. The company was under no compulsion to construct the embankment as it has constructed it. If the company deliberately disregarded complainant's rights it should not be permitted to stand in any more favorable position for having done so. In the second place, the evidence shows very clearly that the right, as it has heretofore been enjoyed, is gradually becoming more valuable. There is evidence on both sides that the land in the vicinity is coming into the market for residence purposes and that it now possesses a value much above its value as farm land. An outlet to the Valley road, such as the tunnel crossing would afford, would give added value to the complainant's land west of the embankment.

If then the complainant has a legal right to a tunnel crossing, there is nothing in the present situation, created by the defendant itself, after full notice, that would warrant the application of the above rule. I will first consider the nature and extent of the right, and then

whether equity should deprive him of it in the form in which it is given.

The covenant is, that the predecessor of the defendant company will "provide the party of the first part with a suitable and convenient road crossing, across the track of said railway." This right is not, as it was in the Pipe Line case (*supra*) limited "so as to enable said S. to travel and cross freely between his land on each side of said granted premises." It is an unlimited right, a right of passage for all purposes; and the case in hand, as it seems to me, comes within the principle of the cases, cited with approval in the Pipe Line case, which hold that a crossing has been given for all the purposes to which, at the time, or at any future time, the owner or any grantee of the whole or any part of his land may think fit to appropriate it. One of the passages quoted with approval in the Pipe Line case is taken from judgment of Lord Justice Mellish in United Land Co. *v.* Great Eastern R. R. Co., L. R., 10 Ch. App. 587, and is as follows: "When a right of way is created by grant or act of parliament, it must depend on the proper construction of the grant or act of parliament whether the right of way is to be used for all purposes or for only limited purposes. No doubt there are authorities, that from the description of the land to which the right of way is annexed and of the purpose for which it is granted, the court may infer that the way was intended to be limited to those purposes. But if there is no limit in the grant, the way may be used for all purposes." See, also, Newcomen *v.* Coulsen, 5 Chan. Div. 133. A glance at the map makes it apparent that on a subdivision of the land into lots the tunnel crossing would be far preferable as a means of reaching either on foot or by vehicle what is the principal highway in that locality, viz., Valley road. Speer had, by the above-quoted reservation, the right to go from the westerly part of his farm to that road, and the above cases show that his grantees, however numerous, would have the same right.

This brings me to the question, whether the complainant has the right to the tunnel crossing which he now claims.

The deed provided that the crossing was to be "where th party of the first part may direct." It is admitted that the direction was both given and complied with. That irrevocably fixed the place of crossing. The case is identical with that suggested by Chief Justice Beasley in M. & E. R. R. Co. *v.* Central R. R. Co., 2 Vr. 209. He says: "If A grant to B a right of way over his farm, such way to be laid out by B, it could not be plausibly pretended that after such way had been once located and ascertained by B it could afterwards be relocated or altered, or added to by him." The precise location having been once for all settled, it is as binding upon the parties as if it had been fixed by an actual description in the deed itself. But it is obvious that if its location could not be changed laterally, it could be changed vertically. The vertical change here proposed would be much more inconvenient than any lateral change. The way, if changed vertically, would not be the way located and agreed upon by the parties. It has been suggested, however, that while a crossing with raised approaches would not be as convenient as the old crossing, a tunnel crossing would be more convenient because the tracks, not being crossed at grade, the element of danger would be eliminated; and that if complainant ought not to be compelled to accept an inferior crossing, he is not entitled to a better. But certainly this ought not to be urged as an argument why the company should not perform it contract. The crossing would only be better in the sense that it would be less dangerous. In all other respects it would be the same. It would hardly be permitted to defendant to say, "I ought not to be compelled to give you the very way which I have stipulated to give you because I will now be obliged to so construct it as to obviate all danger of collision."

It being clear that complainant has the legal right to the very crossing which his father designated and the

company gave, the question then is whether equity ought to compel him to take something else. I do not see any reason for compelling him to take a roundabout crossing off his own land, nor do I see any reason for compelling him to accept as a substitute a more dangerous and inconvenient one over the tracks of the company, whether that crossing be constructed on the company's land with approaches parallel to the tracks, a very awkward way of getting over them, or a crossing with approaches constructed on complainant's land—land which he never gave for the purpose—at right angles to these tracks, it being remembered that the only ground on which this is asked is that of expense; and the expense having been, to a considerable extent at least, incurred only as a result of the violation of the complainant's right after notice.

It is urged, however, that if complainant cannot be compelled to take a less advantageous mode of crossing, he should at least be compelled to take damages in lieu of performance. If complainant could condemn, there would be much force in the contention; for it has been repeatedly decided, both here and in the Court of Errors, with reference to analogous cases that this court has power to award damages. But it is conceded by counsel on both sides that this right of way cannot be condemned. And the reason is obvious. The charter of the original company preserved the old road to the landowner (Laws of 1867, chapter 160, section 9) and the General Railroad act, under which the present company is formed, requires that suitable wagon ways shall be constructed over, under or across the railroad where it intersects any farm. Gen. Stat., p. 2661, § 84. The company could not condemn that which, in every condemnation proceeding, is expressly reserved or given to the owner. If then the law gives the right to the crossing and if the crossing has been actually located, constructed and maintained under an agreement or covenant which neither party may vary from without the consent of the other, it would

seem plain that the court should enforce the agreement as it finds it and not give something as a substitute unless the company can show that under the particular circumstances of the case, to enforce the legal right would be inequitable.

It is very clear that the mere expense will not, under the circumstances, give rise to an equity.

Long and undisturbed possession may create an equity, but here the possession was with the complainant and not with the company.

Laches might, if present, give rise to an equity, but here there was diligence. It is indeed contended that complainant, anyway, should have acted while the proceedings between the railroad and trolley companies were in progress. But how could he have acted? Even if it were shown that complainant had other than constructive notice of these proceedings he could hardly have anticipated that the company, without necessity, would obstruct his way with an embankment when they might have easily bridged.

There is one other conceivable ground on which it can be claimed that complainant is estopped from claiming the very right which the law and the contract both gave him, and that is the ground suggested by the case of New York City *v.* Pine, 185 U. S. 93. In that case it appears that the Bryam river flowed partly in the State of New York and partly in the State of Connecticut. It had two branches, the east branch being in Connecticut and the west branch being chiefly in New York. The city of New York was constructing a dam near the Connecticut line with the intention of appropriating the waters of the west branch to increase its water-supply. The bill was filed by a riparian owner in Connecticut, lower down the stream, to enjoin the city from making this appropriation. The Circuit Court of Appeals affirmed the decree of the Circuit Court granting an injunction, but the Supreme Court reversed, and

held that the complainant should have damages, and not an injunction unless the damages were not paid.

It is, of course, apparent that the city of New York could not condemn land in Connecticut. The grounds upon which the Supreme Court refused to sanction the injunction, in the first instance, were these: that it was not a case between two individuals, one of whom asserted that his property rights were being infringed by the other; that it was rather a case between an individual having a right that was of small value to him, and a public corporation which was undertaking to supply its citizens with a necessary of life; that the city had been engaged in this work of public utility, to the knowledge of complainant, for two years prior to the commencement of his suit; that during all that time the plaintiffs and the city had been trying to agree upon the amount of compensation, thus showing, as Mr. Justice Brewer says, "that the plaintiffs were seeking *compensation* for the injuries they would sustain and were not insisting upon their alleged right to an abandonment of the work;" and that had the injunction been continued a costly public work would have been rendered useless. In view of these facts, Mr. Justice Brewer says: "If one aware of the situation believes he has certain legal rights and desires to insist upon them he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights, but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waived, especially if it is in respect to a matter which will largely affect the public convenience and welfare, a court of equity may properly refuse to enforce these rights, and in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal." Simmons *v.* Paterson, 15 Dick. Ch. Rep. 393, is, in our own State, decided upon the same principle.

The case in hand differs from the case cited in the very particulars which justified the court in giving compensation rather than an injunction. In the first place, no public interest is involved. It is perfectly immaterial to the public whether the defendant's trains be carried over a bridge or arch twelve or thirteen feet wide or over an embankment. The plaintiff does not ask that the company be ejected from the lands or restrained from running its trains. In the second place, the lapse of time intervening is considerably less. The parties were in negotiation for a few months and not for two years; and the negotiations related not only to a money equivalent, but also to the alternative rights of way proposed and proposed only by the company. In the third place, the parties appear from the start to have been hopelessly at variance because of the opposite views taken of the nature and value of complainant's right, and Mr. von Moschzisker, the company's agent, admits that Mr. Speer did not go so far as to agree to accept a money equivalent. It is not a fair inference from the evidence that complainant waived his right to an injunction. From the outset he insisted upon it. The situation was this: The company, in the face of notice, obstructed the crossing, and having obstructed it, began to propose substitutes for it. Unless it was improper for the complainant to have merely listened to these proposals he was not lacking in diligence. It would seem plain that he has done nothing which the company is in a position to insist upon as being a waiver of the right which the deed and long-continued enjoyment under the deed gave him.

FINAL DECREE.

This cause coming on to be heard at the October, nineteen hundred and two, Term of the Court of Chancery, held at the State House in the city of Trenton, in the presence of Halsey M. Barrett, of counsel with the complainant, and Messrs. Cortlandt & Wayne Parker, of counsel with the defendant, and the pleadings and proofs having been read and the argument of counsel having been heard and considered, and the court having duly considered the pleadings, proofs and arguments, and it satisfactorily appearing to the court that by a certain indenture, made the twentieth day of June, eighteen hundred and seventy, duly acknowledged and recorded in the office of the Register of Essex county July fifth, eighteen hundred and seventy, in Book D 15 of Deeds, for said county, pages 267 and 268, John A. Speer, the father of the complainant, did convey unto the Montclair Railway Company, its successors and assigns, in fee-simple, all that parcel of land in the township of Montclair, county of Essex and State of New Jersey, bounded on the north by land of Clemens Sigler, on the south by land of Bessie L. Rodman, on the east by a line parallel with and fifty feet distant from the located center line of the railway of said company, and on the west by a line parallel with and fifty feet distant from said located center line and the line of I. D. Sigler, containing one acre and eleven-hundredths of an acre; and that in said indenture, the party of the second part did, for itself and successors, agree to make and maintain the necessary fences on both sides of said tract of land, which fences were to be built before the work of grading on said tract should be commenced, and should provide the party of the first part with a suitable and convenient road crossing across the track of said railway, where the party of the first part should direct; and it further appearing that the said John A. Speer did direct that said suitable and convenient road crossing should be located and pro-

vided by the said Montclair Railway Company, across the track of said railway, at the place where a former farm road had been located, and used by said John A. Speer, and that said crossing was thereupon located by said Montclair Railway Company across its said track where said farm road had formerly been, which crossing was at or about grade and was maintained by said Montclair Railway Company and its successors, as located by the direction of said John A. Speer, continuously until about January, nineteen hundred.

And it further appearing that in the year eighteen hundred and ninety-six, the said land and the railroad route, rights, franchises and privileges, originally of said Montclair Railway Company, were leased to the defendant, the Erie Railroad Company, for a long term of years and that the said Erie Railroad Company thereupon entered into possession and occupation of said tract of land formerly of John A. Speer, and of the right of way and property formerly of the Montclair Railway Company, and are operating said railroad under and by virtue of the franchise and the rights originally of the Montclair Railway Company, in accordance with the terms of said lease; and it further appearing that in the said month of January, nineteen hundred, the said Erie Railroad Company determined to elevate its railroad tracks upon the land conveyed to it by the said John A. Speer, and in pursuance of its said plan of elevating its said railway tracks, constructed an embankment for the support of its roadbed or tracks upon the right of way across the premises described in said deed of conveyance, which embankment is about sixteen feet high and is filled in solidly, whereby the said crossing hereinbefore referred to was completely and wholly destroyed; and it satisfactorily appearing that the complainant, Abram Speer, is the only son and heir-at-law of said John A. Speer, and that said complainant is at the present time, and was at the time of the destruction of said farm crossing, the owner of the land formerly belonging to his father, said John A. Speer, located on

both sides of said line of said railroad, and that said complainant has been deprived of all use of said crossing by reason of the said embankment constructed by the defendant and of that easement which, by the deed of said John A. Speer, the said John A. Speer, his heirs and assigns were entitled to enjoy, with respect to said crossing; and it further appearing that the complainant is entitled to a crossing of the tract conveyed to said railway at the point where the same was formerly located and maintained by said railway company, which crossing shall be substantially and practically at grade, and that the only means whereby such grade crossing, practically at grade, can be secured to the said complainant, his heirs, assigns and subsequent grantees, is by the means of a tunnel or opening through the said embankment constructed by the defendant upon its said tract of land, which tunnel or opening should be of sufficient width and height to provide said complainant, his heirs and assigns and subsequent grantees, with a suitable and convenient road crossing across the track of said railway, and that the complainant is entitled to the relief prayed for in this bill of complaint, and is entitled to have a suitable and convenient tunnel or opening constructed and maintained by the defendant at its expense, through its said embankment at the place where said crossing was formerly located:

It is, on this thirteenth day of April, nineteen hundred and three, by William J. Magie, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor, by virtue of the power and authority of this court, doth hereby order, adjudge and decree that the defendant, said Erie Railroad Company, shall be enjoined from continuing its said embankment at the place where said road crossing has been heretofore provided and maintained; and the court doth further order, adjudge and decree that the defendant, said Erie Railroad Company, shall and do forthwith, and without unnecessary delay, construct a tunnel or opening through its said embankment and across its said right of way,

at the place where said road crossing across the track of said railway has been heretofore provided and maintained, which tunnel or opening shall be constructed substantially at grade, and not more than eighteen inches above the grade or level of the lands on both sides of said crossing belonging to complainant, which tunnel or opening shall not be less than twelve feet in width between its sides at the base and of uniform width, and not less than twelve feet in height, the work of such construction of said tunnel or opening to be completed not later than the first day of September, in the year nineteen hundred and three, and that an injunction issue accordingly.

And the court doth further order, adjudge and decree, that the defendant, said Erie Railroad Company, its successors and assigns, shall hereafter at all times maintain said tunnel or opening and said crossing, by way of said tunnel or opening, for the use of the complainant, his heirs and assigns, owners of said tract of land, a portion of which tract of land and premises was conveyed by the said John A. Speer to the said Montclair Railway Company, by the deed hereinbefore referred to, dated June twentieth, eighteen hundred and seventy, recorded in Book D 15 of Deeds for Essex county, pages 267 and 268.

And it is further ordered that the said defendant shall pay the complainant his costs of this suit.

Respectfully advised,

FREDERIC W. STEVENS,
V. C.

Service acknowledged April twenty-first, nineteen hundred and three.

HALSEY M. BARRETT,
Solicitor of Complainant.

NOTICE OF APPEAL.

The defendant hereby appeals from the final decree made in this cause on the thirteenth day of April, nineteen hundred and three, and from the whole and any part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 18th, 1903.

CORTLANDT & WAYNE PARKER,
Solicitors of Defendants.
CORTLANDT PARKER,
Of Counsel.

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

CORTLANDT PARKER,
Of Counsel with Defendant.

Served April 21st, 1903.

HALSEY M. BARRETT,
Solicitor of Complainant.

PETITION OF APPEAL.

To the Honorable the Court of Errors and Appeals in the Last Resort in all Causes:

The petition of the Erie Railroad Company, the appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by the final decree made in the Court of Chancery by his Honor William J. Magie, Chancellor of New Jersey, bearing date the thirteenth day of April, nineteen hundred and three, wherein the said Abram Speer was complainant and the said Erie Railroad Company was defendant, in this respect, to wit:

That the said decree adjudges that the defendant, the said Erie Railroad Company, shall be enjoined from continuing a certain embankment at a place where an alleged road crossing, in said decree above mentioned, was claimed by said complainant to have been theretofore provided and maintained; and in that the said decree adjudges that the said Erie Railroad Company shall and do forthwith, and without unnecessary delay, construct a tunnel or opening through its said embankment and across its right of way at the place where the said road crossing across the track of said railway is in said decree alleged to have been theretofore provided and maintained, which tunnel opening shall be constructed substantially at grade, and not more than eighteen inches above the grade or level of the lands on both sides of the crossing belonging to said complainant, which tunnel or opening shall not be less than twelve feet in width between its sides at the base, and of uniform width of not less than twelve feet in height, the work of such construction of said tunnel or opening to be completed not later than the first day of September in the year nineteen hundred and three; and that an injunction issue accordingly.

And for that said decree adjudges that the said defendant, said Erie Railroad Company, its successors and assigns, shall thereafter, at all times, maintain said tunnel or opening and said crossing by way of said tunnel or opening for use of the complainant, his heirs and assigns, owners of the tract of land in said decree mentioned, a portion of which said tract of land and premises was conveyed by said John A. Speer to the said Montclair Railway Company by deed in said decree referred to, and dated the twentieth day of June, eighteen hundred and seventy, recorded in Book D 15 of Deeds for Essex county, pages 267 and 268.

And for that said decree further adjudges that the defendant shall pay the complainant the costs of the said suit.

Your petitioner humbly appeals from that portion of the said decree of the Chancellor which decrees as afore-

said, upon the ground that the same is erroneous, for that no decree or order for an injunction should have been made in said cause, and said Erie Railroad Company should not have been ordered or decreed to be enjoined from continuing its embankment at the place in said decree mentioned, or at any other place upon the lands and premises described in said deed from John A. Speer to the Montclair Railway Company above mentioned, or elsewhere. And for that the said railroad company should not have been decreed to construct any tunnel or opening through its said embankment and across its said right of way at the place in said decree mentioned, or at any other place on said land and premises, in the manner and of the character specified in said decree or in any other manner or character whatsoever. And it should not have been decreed that said tunnel or opening should be completed not later than September first, nineteen hundred and three, or at any other day. And that said Erie Railroad Company should not have been decreed to maintain said tunnel or opening, at said crossing by way of said tunnel or opening, for the use of the complainant, his heirs and assigns, owners of said tract of land, the portion of which said tract of land was conveyed by the said John A. Speer to the said Montclair Railway Company as aforesaid, or for any other persons or corporations, in the manner specified in said decree or in any other manner, and should not have been decreed to pay the complainant his costs of suit.

And further that it should have by such decree been adjudged and decreed that the said complainant was not entitled to any relief in said cause and that his bill of complaint should have been dismissed, with costs, or in case said court should have held that the said complainant was entitled to any relief as against said defendants, by reason of anything contained in said deed from John A. Speer to said Montclair Railway Company or otherwise, then that the said defendant might perform any duty or obligation which they might owe to complainant, or his heirs and assigns, either (1) by constructing and

maintaining a practicable level crossing or means of passage across the railroad tracks on the land described in said deed, with raised approaches partly on the land of the complainant and partly on the land of said defendant, outside of defendant's right of way, or (2) by constructing such level crossing and approaches thereto wholly on the right of way of said defendant, such approaches ascending the embankment of defendant parallel with the tracks of defendant to such level crossing, and then descending again on the further side of such level crossing and of said tracks in like parallel manner to the level of adjoining land, or (3) by providing a street or right of way over the lands adjoining the right of way of said defendant on the west, southerly from said Speer's land on the west side of said railroad, along such right of way to the Valley road or a street connecting therewith, so as to enable said defendant and his heirs and assigns to pass and repass along the land on the east and west side of said tracks by said streets and said Valley road; and in case it should have been held that either of said modes of crossing or means of communication between complainant's tracts of land so determined upon was not so valuable as any right to a crossing or means of communication between complainant's tracts of land provided for by said deed and formerly existing, then decree should have been made that the difference in value between such new crossing or means of communication and the crossing or means of communication provided for by said deed or formerly existing, and any damages for the deprivation thereof should have been ascertained under the direction of said court or other legal manner, and paid said Speer, in place and substitution of any further relief to which he might be entitled to by reason of anything set forth in said bill. And further, in case said court should have determined that said complainant was possessed of a right to a crossing or means of communication between the said parcels of land, and that said various modes of providing such crossing or means of communication in

substitution for any crossing or means of communication formerly possessed by said complainant, either alone or in connection with the payment of the difference in value aforesaid, did not or could not afford complainant full or adequate relief, then that the value of said right to such crossing and any damages which said complainant might have suffered, or he, his heirs or assigns might thereafter suffer by reason of destruction of said crossing or deprivation of the use thereof, should be ascertained and determined under the direction of said Court of Chancery, and said complainant should have been ordered and decreed to receive the same in full satisfaction and discharge of any right to crossing or damages by reason of the destruction or deprivation to said complainant of said crossing.

Or such other decree should have been made, not involving the construction of a tunnel or opening, as should have been equitable and just.

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

CORTLANDT & WAYNE PARKER,
Solicitors for Appellant.
CORTLANDT PARKER,
Of Counsel.

Service acknowledged May 8th, 1903.
HALSEY M. BARRETT,
Solicitor for Respondent.

ANSWER TO PETITION OF APPEAL.

The answer of the above-named respondent to the petition of appeal of the above-named appellant.

This respondent, not acknowledging all or any of the matters which, in the said petition are contained, to be true, for answer thereto nevertheless says and admits that a final decree was, on the thirteenth day of April, nineteen hundred and three last past, made and entered in the Court of Chancery by his Honor William J. Magie, Chancellor of New Jersey, in the cause for that purpose mentioned in the said petition, as therein stated, that as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said final decree is in all respects agreeable to equity, and prays that the same may be affirmed, with costs to be adjudged to this respondent.

HALSEY M. BARRETT,
Solicitor for and of Counsel with Respondent.

Complainant's Exhibits.

COMPLAINANT'S EXHIBIT No. 2.

UPPER MONTCLAIR, March 23—1900

Mr T H Pindle Sup G. L. Division of Erie R. R.

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

Signed ABRAM SPEER.

COMPLAINANT'S EXHIBIT No. 3.

ERIE RAILROAD COMPANY.

P JERSEY CITY, N. J., March 29th, 1900

Mr. A. Speer,
Upper Montclair.

DEAR SIR:—

Your favor of March 23rd. with reference to fence and also to a crossing. I am unable to locate your ground on our maps between Valley Road and Upper Montclair. Kindly advise me who owned this ground when the R. R. acquired this right of way in 1870. Upon receipt of this information, I will write you promptly.

Yours truly,
WM. PINDELL
Supt.

COMPLAINANT'S EXHIBIT No. 4.

ERIE RAILROAD COMPANY.

P JERSEY CITY, N. J., April 13th, 1900

Mr. A. Speer,
Upper Montclair, N. J.

DEAR SIR:—

Your favor of March 23rd. with reference to fences and crossing between Valley Road and Upper Montclair. I expect to be in that vicinity in a few days, and shall be glad to go over the matter with you.

Yours truly,
WM. PINDELL
Supt.

COMPLAINANT'S EXHIBIT No. 5.

HALSEY M. BARRETT,
Counsellor at Law,
Prudential Building.

NEWARK, N. J., Jan. 18th 1901.

Mr. F. A. von Moschzisker,
26 Cortlandt St., N. Y. City.

DEAR SIR:

In reply to yours of the 17th Mr. Speer says that he would rather have the crossing than $4500. and as the Company is not willing to pay this sum, there is no course left for me except to apply to the Court for the crossing, and this I shall do at the earliest opportunity.

I regret that our negotiations in this matter have not brought us to an agreement, but our differences seem to be hopeless of settlement otherwise than as above indicated.

Yours truly,
(Copy signed) HALSEY M. BARRETT.

COMPLAINANT'S EXHIBIT No. 6.

ERIE RAILROAD COMPANY,
Office of the Real Estate Agent.
26 Cortlandt Street,
New York,

V.-M. January 19th, 1901.

In re claim of Abram Speer.

Mr. Halsey M. Barrett,
Counselor-at-Law,
Newark, N. J.

DEAR SIR;—

Allow me to acknowledge receipt of your favor of the 18th. inst. Will you kindly advise me upon what theory

Mr. Speer considers this crossing of the value at which he places the same,—this in order that I may, before finally declining adjustment, present the whole matter to our General Manager for his determination.

Awaiting your reply, I remain

Respectfully,

F. A. VON MOSCHZISKER

Real Estate Agent.

COMPLAINANT'S EXHIBIT No. 7.

HALSEY M. BARRETT,
Counsellor at Law,
Prudential Building.

NEWARK, N. J., Jan. 21st 1901.

Mr. F. A. von Moschzisker,
26 Cortlandt St., N. Y. City.

DEAR SIR:

In reply to yours of the 19th asking me to advise you upon what theory Mr. Speer considers the railway crossing of the value at which he places it, I beg to say there are two theories as to the value of this property in connection with the crossing, by either of which Mr. Speer estimates the injury to his property by the destruction of the former crossing.

The tract which Mr. Speer owns, which lies west of the railroad, contains about eleven acres of land. Without any crossing, Mr. Speer could utilize the frontage on Clifside Ave. which would contain about four acres; but the remaining seven acres lying east of the Clifside Ave. lots and west of the railroad, would then be absolutely inaccessible and its value almost wholly destroyed. If this seven acre tract could be made accessible from the Valley Road by means of this crossing, Mr. Speer estimates that it would be worth at least a thousand dollars an acre, or at least $7000.; and that when

he offers to accept $4500. as the consideration for surrendering his right to a crossing, he has offered to accept a sum which is less than the difference in the value of these seven acres with or without such crossing.

The second theory of value of the crossing relates to the development and use of his property. If a suitable and convenient crossing were provided to Mr. Speer, as called for by the conveyance made to the Railroad Company, for its right of way, Mr. Speer could open a street through the centre of his property from Valley Road westerly to Clifside Ave. The eleven acre tract is about 1200 ft. deep on Cliffside Ave. to the railroad. Allowing that lots could be sold fronting on Cliffside Ave 300 ft. deep, there would be 900 ft. of frontage on each side of such new street, or 1800 ft. of such frontage. If this street had a suitable and convenient crossing for access to Valley Road, Mr. Speer considers that these lots could be sold for $10. a foot front, or $18000., but if the crossing be destroyed so that access to this street and the lots fronting on it can only be had by way of Cliffside Ave., he believes that these lots fronting as they would upon a blind street, could not be sold for more than $5. a foot or $9000., so that the depreciation for the use of the land in the manner proposed, would be $9000.

In estimating such depreciation it must be borne in mind that Valley Road is an important public thoroughfare on which the trolley road runs, and that nearly all of the persons who would purchase lots west of the railroad would use Valley Road as the means of reaching their property. Mr. Speer has at all times felt that he would greatly prefer a suitable and convenient crossing than to accept any sum from the Railroad Company for the release of his rights to such crossing; and it was only at your request that I asked him to consider the acceptance of a lump sum. The amount which he wanted and which he felt justified in naming, was $7000., and it was only in deference to my urging him to reduce that figure, that I finally prevailed upon him to say that he

would accept $4500., and even this offer on his part is made by way of compromise and is not to be considered binding unless accepted within a short time and before I commence a suit.

You suggest in your letter to me that tenants of Mr. Speer or persons purchasing lots from him would not be allowed to use such crossing if it were furnished by the railroad. I think you are in error there. An agreement of this character has been uniformly held not to be a personal privilege but to be an agreement which runs with the land, and is for the benefit of the property and of enhancing the value of the property, if such crossing shall prove to enhance the value of the property. It is a consideration in lieu of the damage or depreciation which the property would sustain for all time if no crossing were reserved. Courts have held in the consideration of such cases that the future possible use and value of the property was a condition contemplated in securing such crossings, particularly where such crossings were reserved and secured by agreement between the land owner and the railway, and this seems a reasonable interpretation of the intention of the parties. It cannot have been supposed in 1870, when the conveyance of a right of way was made to the Railway Company, that this land would necessarily be useful only for pasturage for all time; and to insist that Mr. Speer shall now, when that portion of Montclair is becoming largely built up and thickly settled and available for building purposes, be required to estimate the value of this crossing on the theory that his property can only be used for purposes of pasturage, is unreasonable and I think indefensible.

In advising Mr. Speer to accept $4500. for the damage to his property by the destruction of this crossing, I have gone as far as I feel justified in going, for the purpose of effecting a compromise and settlement of his claim, for I think a crossing would be worth much more than that sum to his property, and unless we can settle on this basis Mr. Speer prefers to have the Courts determine his legal rights.

It is now more than four months since I first communicated with the officers of the Railway Company respecting this matter, and as the only question is whether the Railway Company will give Mr. Speer $4500. or will give him a suitable and convenient crossing, it ought to be possible to reach a conclusion in a very few days. I might add that in case I begin suit I shall insist and I think that the Court will hold, that Mr. Speer is entitled to an underground crossing by means of a tunnel. The embankment is nearly twenty feet high and I do not believe that any Court will hold that a grade crossing under these circumstances, is either suitable or convenient or safe for the users, or in any respect a compliance with Mr. Speer's rights in the matter.

Please let me hear from you without delay.

Yours truly,

(Copy signed,) HALSEY M. BARRETT.

Defendant's Exhibits.

PETITION.

[Filed December 6, 1898.]

In Chancery of New Jersey.

To the Honorable Alexander T. McGill, Chancellor of the State of New Jersey:

The petition of North Jersey Street Railway Company, a corporation organized under the laws of the State of New Jersey, respectfully shows, that under the authority of law it is now constructing a single-track street railway on Valley road in the town of Montclair, in the county of Essex and State of New Jersey, from the point where said Valley Road intersects Bloomfield avenue, and from thence running northerly along said Valley road to a point where said Valley road crosses the

extreme northerly line of said town of Montclair, upon the county line between the county of Essex and county of Passaic, and there terminating; and that the said line of street railway upon Valley road crosses the railway line of the New York and Greenwood Lake railroad, now, as your petitioner is informed and believes, owned and operated by the Erie Railroad Company.

Your petitioner shows that the point or points of crossing the said railroad company's tracks lie outside of the limits of any of the cities of this State; that the New York and Greenwood Lake railroad is a line of railroad operated by steam; that your petitioner's street railway cars are propelled by electricity supplied by overhead wires; that the line of its construction has approached to and is now near to the right of way of the said steam railroad in Valley road aforesaid, and that it is necessary, in order to operate the same, to effect a crossing of the said steam railroad.

Your petitioner therefore makes application to your Honor to define the mode in which such crossing shall be made and to cause reasonable notice of your petitioner's said application to be given to the municipal authorities of the town of Montclair and also to the Erie Railroad Company, and thereupon to make a decree defining and regulating the mode and manner of such crossing as may be equitable and just and according to law.

And your orator further shows that this application is made under and by virtue of the provisions of an act of the Legislature of this State, approved the twenty-second day of March, eighteen hundred and ninety-five, session laws of eighteen hundred and ninety-five, page 462, entitled "An act to regulate the crossing at points not within the limits of cities of this State, of steam railroads by steam or electric railroads hereafter to be constructed.

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

HALSEY M. BARRETT,
Solicitor and of Counsel with Petitioner.

State of New Jersey, County of Essex, *ss.*—David Young, being duly sworn on his oath, says that he is the vice president of North Jersey Street Railway Company; that he has read the foregoing petition and that the facts set forth in the same are true.

DAVID YOUNG.

Sworn and subscribed to before me this fifth day of December, eighteen hundred and ninety-five.

FREDERICK F. GUILD,
A Master in Chancery of N. J.

ORDER FOR HEARING.

[Filed December 6, 1898.]

North Jersey Street Railway Company having presented its petition to the Chancellor setting forth that it is now engaged in constructing a single track street railway in Valley road in the town of Montclair, extending from Bloomfield avenue along said Valley road in a northerly direction to the northerly line of said town of Montclair, and that the said line of street railway crosses the railway line of New York and Greenwood Lake railroad, a line of railroad operated by steam, and that the line of its construction has approached to and is now near to the right of way of the said steam railroad in Valley road aforesaid, and that it is necessary, in order to operate the same, to effect a crossing of the said steam railroad; and the said petitioner by its said petition, having made application to the Chancellor to define the mode in which such crossing shall be made and to cause reasonable notice of its said application to be given to the municipal authorities of the town of Montclair, and also to the Erie Railroad Company, the corporation owning or operating the railroad intended to be crossed, and

thereupon to make a decree defining and regulating the mode and manner of such crossing as may be equitable and just and according to law: it is, on this sixth day of December, eighteen hundred and ninety-eight, on motion of Halsey M. Barrett, of counsel with the petitioner, ordered that the hearing of the petitioner's said application be brought on before the Chancellor at the Chancery Chambers in Jersey City, on Tuesday, the twenty-seventh day of December, instant, and that notice of said hearing be given to the municipal authorities of the town of Montclair and also to the Erie Railroad Company, at least ten days before the date fixed for said hearing.

ALEXANDER T. MCGILL, *C.*

Respectfully advised,

H. C. PITNEY, *V. C.*

DECREE.

[Filed November 1, 1899.]

North Jersey Street Railway Company, a street railway company using electric power, having presented its petition setting forth that its railway upon Valley road, in the town of Montclair, will cross the railway line of the New York and Greenwood Lake railroad, now operated by Erie Railroad Company under lease, at said point, and praying the Chancellor to make a decree defining and regulating the mode and manner of such crossing as may be equitable and just and according to law, and this matter now coming on to be heard in the presence of Halsey M. Barrett, solicitor and counsel for the petitioner, and of Cortlandt Parker, solicitor and counsel for New York and Greenwood Lake Railway Company, and Erie Railroad Company, and of Alfred S. Badgely, solicitor and counsel for the town of Montclair aforesaid, in pursuance of notice given

as required by law, and it being represented to the court that all of said parties have agreed that the public safety requires that a grade crossing shall be avoided at said point of intersection of said railway lines on Valley road aforesaid, and that said parties have agreed upon a plan and mode of avoiding such grade crossing, which agreement and plan is as hereinafter decreed, and the court having heard the said parties, through their counsel, and having considered the matter: It is thereupon, on this thirty-first day of October, eighteen hundred and ninety-nine, on motion of counsel for said applicants, decreed:

First. That it is reasonably practicable, and public safety requires, that a crossing of said steam railroad by the said electric street railroad at grade at said Valley road in said town of Montclair should be avoided.

Second. That it is necessary, and the public safety requires, that in order to avoid such grade crossing, the tracks of said steam railroad shall be elevated, and the grade of said Valley road shall be lowered so as to permit the cars of said street railway company to pass under the said steam railroad.

Third. That in order to enable said passage under said steam railroad to be effected it is necessary to reconstruct and rebuild such portion of the railroad tracks and line of the New York and Greenwood Lake Railway Company in the town of Montclair, as is shown upon a certain map marked *Exhibit A* in this matter, which map is to be filed with and be a part of this decree.

Fourth. That the portion of said railroad line to be rebuilt shall be constructed as shown upon and in accordance with a certain profile map, marked *Exhibit B* in this matter, which map is to be filed with and be a part of this decree.

Fifth. That the grade of Valley road at said point of intersection shall be lowered so as to allow and leave a clear headroom of thirteen feet between the grade of said Valley road and the bridge of said New York and Greenwood Lake railroad, as shown on said profile map.

Sixth. That the said bridge of said railroad shall be of steel, supported upon stone abutments, with steel columns on the curb lines, with an opening between the abutments equal to the full width of Valley road at said point.

Seventh. That the grade of such of the streets or highways of the town of Montclair as now cross said railroad at points where the tracks of said railroad are to be elevated, as shown on said maps, shall be raised, and the telford pavements removed from said streets for this purpose shall be relayed, and said portions of said streets shall be left in as good repair and construction as they severally were when said work was commenced.

Eighth. That provision shall be made for the suitable and proper drainage of any surface water that shall flow into Valley road where the grade of said street shall have been lowered in accordance with the terms of this decree, and provision shall be made for maintaining and keeping open such drain so that the water shall at all times have free exit at said crossing.

Ninth. That all of the work relating to the change of grade of said streets shall be done to the satisfaction of the town council of the town of Montclair, or of their engineer designated by them to supervise said work.

Tenth. That the said town of Montclair shall be indemnified and saved harmless from any and all claims of owners of property abutting on said streets for damages to their said property by reason of such change of grades of the said streets as shall be made in compliance with this decree.

Eleventh. That the North Jersey Street Railway Company shall pay one-third of the entire cost of elevating the line of said steam railroad, and of changing the grade of said streets, and of damages to property by reason of such changes of grades of said streets, if such damages shall be awarded or recovered against said Erie Railroad Company or said New York and Greenwood Lake Railway Company, or said town of Montclair; provided,

however, that the sum to be paid by North Jersey Street Railway Company shall not exceed the sum of nine thousand dollars; the New York and Greenwood Lake Railway Company consenting to pay two-thirds of said expense and damages; and further consenting that if such total expense and damages shall exceed the sum of twenty-seven thousand dollars, then to pay all of said expense and damages in excess of the sum of nine thousand dollars, which sum is the maximum sum to be paid by North Jersey Street Railway Company in this matter, and the said Erie Railroad Company, lessee of said New York and Greenwood Lake Railway Company, consenting hereto.

And it is further ordered that in case of any disagreement between the parties respecting the terms of this decree, or respecting the actual compliance therewith, in any of the details of said work, any of said parties may apply to this court for further directions.

ALEXANDER T. McGILL, *C.*

Respectfully advised,

H. C. PITNEY, *V. C.*

Consent is hereby given to the entry of the above decree in behalf of the New York and Greenwood Lake Railway Company and Erie Railroad Company, by

CORTLANDT & WAYNE PARKER,
Their Solicitors and Counsel.

A like consent is hereby given in behalf of the town of Montclair by

ALFD. S. BADGLEY,
Its Solicitor and Counsel.

Resolution consenting to plan for avoiding a grade crossing on Valley road in the town of Montclair:

WHEREAS, The Erie Railroad Company and North Jersey Street Railway Company have agreed upon a plan and mode, by which a grade crossing of the tracks

of said railroad companies at Valley road, in the town of Montclair, shall be avoided, and a map showing said crossing, and a profile map showing the proposed method of avoiding said grade crossing have been presented to the council; be it

Resolved, By the council of the town of Montclair, in the county of Essex, that said plan and mode of avoiding such grade crossing at Valley road is hereby consented to and approved, and that A. S. Badgley, Esq., counsel for the town of Montclair, is hereby authorized to consent to the entry of a decree by the Chancellor approving and requiring such mode of avoiding such grade crossing, and James Owen, Town Surveyor of Montclair, is hereby directed to supervise said work so far as the same relates to any change or changes in the grade of streets in Montclair, as shown on said profile map.

I hereby certify the above to be a true copy of a resolution adopted by the town council of the town of Montclair in the county of Essex on the thirty-first day of July, eighteen hundred and ninety-nine.

HARRY TRIPPETT,
Town Clerk.

INDEX.