

NEW JERSEY
Court of Errors and Appeals.

MAX RAND,
Plaintiff in Error,
vs.
SAMUEL ARMM,
Defendant in Error.

Argument for Defendant.

The ground of this action is an alleged trespass by the defendant of lands of the plaintiff, and brought, as appears by statements of counsel made at the trial, to settle the rights, if any, of the defendant in those premises.

The plaintiff's property is designated as No. 51 Broome street, Newark.

The defendant owns and occupies the premises adjoining on the south, and designated as Nos. 53 and 55 Broome street, being formerly two separate lots.

In the year 1851 one Joseph Beihler was the owner of the three lots Nos. 51, 53 and 55 Broome street. Upon each was erected a dwelling-house. Each of the dwelling-houses upon Nos. 53 and 55 covered the en-

tire front of the lot on which it was situate. On the northerly side of the dwelling-house on No. 51 was an alley three feet in width extending from the street to the yard in the rear.

By deed dated November 21, 1851, Beihler conveyed to one Wendelen Keebel the lot known as No. 53 Broome street, and included in the deed this clause: "Also the said Joseph Beihler agrees that the said Keebel, his heirs and assigns, shall have the free use of a passage-way three feet wide running from Broome street thirty-nine feet along the north end of said Joseph Beihler house; also the said Joseph Beihler agrees and reserves fifteen feet in depth along the rear of the house he now occupies, and the two houses adjoining on the south (as will appear by a map on the back of this indenture to be recorded herewith) to be used in common by himself, his heirs and assigns, with Wendelen Keebel and Conrad Beihler, their heirs and assigns forever."

By deed dated December 30, 1856, Beihler conveyed to John Beck the premises No. 55 Broome street. The deed contained a clause identical with that above quoted, except that the name of John Beck was substituted for the name of Conrad Beihler. These deeds are Nos. 1 and 4 in the statement of defendant's title, page 87.

By a deed (No. 3 in statement of defendant's title), the said John Beck became seized of No. 53 Broome street, the deed containing a reference to the reservation and agreement in the deed first above referred to, stating that it was omitted from the deed to the grantor therein named.

On December 30, 1891, John Beck conveyed both Nos. 53 and 55 Broome street to Linna Mendel, the deed containing this clause: "Together with the free use of a passage-way or alley three feet wide running from Broome street thirty-nine feet along the northerly line of the house on the premises belonging to John Traut; thence southerly along the rear of said house fifteen feet in width about sixteen feet to the northerly

line of the premises above described." (No. 5 in statement of defendant's title.)

The subsequent deeds for premises 53 and 55 (Nos. 6 and 7 in statement of defendant's title) conveyed both properties and included the clause last above recited.

No. 51 Broome street was conveyed by Beihler to Urban Holzhauer in September, 1851. This deed was recorded, as will be seen by reference to the statements of the titles of the parties (pp. 85 and 87), prior to the record of the deed to Keebel for No. 53. As stated by the Chief Justice in his charge to the jury, this is probably unimportant, because the testimony seems to show that Holzhauer had knowledge that this property was subjected to a servitude in favor of premises Nos. 53 and 55, and that to some extent the servitude was reciprocal.

Holzhauer conveyed, on January 25, 1867, to one Ziller, who, in turn, conveyed, in June, 1867, to one William Traudt, who died seized of the premises in May, 1894, devising the same to his son, Ernest Traudt.

The period of ownership of the Traudts was approximately thirty-five years, for, on March 7, 1902, Ernest Traudt conveyed to one Susskind, who, in turn, on March 24, of the same year, conveyed to the plaintiff.

None of the deeds in the plaintiff's chain of title makes any reference whatever to the agreement and reservation excepting the last, that is, the deed to the plaintiff himself.

It thus appears that Beihler, the original owner of the entire premises, attempted to execute a plan by which the premises Nos. 53 and 55 would have the use of the alleyway at the north of his house and a strip fifteen feet in width transversely across the lot on which the house stood, and he, with his heirs and assigns, would have the use of the continuation of this same strip over the premises Nos. 53 and 55.

The pleadings are more than usually extended and present several issues, as follows:

1. The fact of the actual trespass.
2. The existence of a right of way by prescription over the lands of the plaintiff, appurtenant to the lands of the defendant.
3. The existence of a right of way by grant over the lands of the plaintiff, appurtenant to the lands of the defendant.
4. Whether defendant extinguished his right of way by constructing over a portion of the said way alleged to extend into defendant's premises a permanent brick building with the intent to extinguish and abandon his right of way over the plaintiff's premises.
5. Whether that portion of the way which extended into defendant's premises having not been used but abandoned, closed up and extinguished for more than twenty years prior to the construction of the said brick building, the defendant and his predecessors in title continued during that period to use the way over the plaintiff's premises.
6. Whether for upwards of twenty years prior to the erection of the brick building the portion of the way extending into defendant's premises had been adversely possessed, the defendant and his predecessors in title during that time using the way over plaintiff's premises.

I.

There is no dispute in the testimony as to the first issue. The trespass was committed.

II.

Nor is there anything worthy of being termed a dispute as to the second issue. There is no dispute but that the way in question was used by the defendant and those to whom he succeeds in title for upwards of fifty years prior to the beginning of the action. The issue is joined directly on the plea justifying under a right of way by

prescription, and none of the subsequent pleadings refer to such way. Unless the Court shall determine that there was a right of way by grant and thus exclude the way by prescription, the direction of a verdict for the defendant was necessary.

III.

In some previous litigation some doubt was expressed as to whether the true construction of the agreements and reservations in the original deed was such as to create an easement of way. The suggestion was that the grant of the use of the land was equivalent to a grant of the land itself, while the reservation of the use, being the reservation of the land itself, would be inconsistent with the terms of the grant, and, therefore, void.

Coke v. Littleton, p. 4 B; *Caldwell v. Fulton*, 31 Pa. St. 404; *Keen's Appeal*, 64 Pa. St. 264; *Den v. Manner*, *Spencer* 142; *Hance v. West*, 3 Vr. 234; *Diamant v. Lore*, 2 Vr. 220, might be referred to as some indication that the grant was of more than a right of way.

Suffice it to say, however, that if by virtue of the grant of the use, the fee in a portion of No. 51 passed to Keebel and Beck, the general issue pleaded by the defendant would be sufficient to cover such a defence.

Therefore, if the grant was for any reason inefficacious to convey anything, there is a right of way by prescription. If, instead of conveying a right of way, it conveyed the land itself, there was no trespass.

IV.

It remains to consider the situation if it be determined that there was granted and reserved a right of way, and all subsequent discussion herein will assume a way so created. To that justification of the alleged trespass the plaintiff replies in effect that the right of

way claimed to have been granted to Beck and Keebel and to have passed eventually to the defendant, extended in a southerly direction not only to the lands of the defendant, but that a part of it, or its continuation, was upon the lands of the defendant, and that he, the defendant, erected over all of the portion upon his lands a permanent brick building with intent to abandon the way which was granted over the plaintiff's land.

It is not denied or disputed that the building was erected or that it did cover all of the portion of the defendant's land originally, if ever, subject to the right of way.

It is denied, however, that the construction was made with the intent of abandonment of the rights of the defendant in the land of the plaintiff.

Upon the direct issue joined on this replication the question of intent is of supreme importance. All authorities agree that abandonment is a question of intention. Intention of abandonment may be variously indicated; cesser of use is sometimes an indication. Cesser of use coupled with some definite act has frequently been held to be an intention to abandon.

To reach the legal result of abandonment it is absolutely essential that the intention shall be determined to exist.

This principle was declared by this Court in *Raritan Water-Power Company v. Veghte*, 6 C. E. Gr., p. 643. The Court said (at p. 480): "To accomplish an abandonment, the facts or circumstances must clearly indicate such an intention. Abandonment is a question of intention. Non-user is a fact in determining it."

There is nothing whatever in this case, except the very construction of the building, which might be alleged to indicate an intention to abandon. The accompanying facts show very clearly that the building was not erected with any such intention.

The very act which is alleged as the foundation of this action was a use of the right of way accompanied by a declaration of the defendant that he had the right,

while the building was in the course of erection. (See testimony of Rand, p. 20, and testimony of Armm, pp. 55 and 56.)

Also as testified to by the plaintiff (p. 29, line 25), "He (defendant) built his house and makes a door to pass out through my yard; he says he got a right to do it."

This is to be taken also in connection with the fact testified to by the plaintiff (pp. 26 and 27) that the defendant considered the right of way very valuable, and after considerable negotiation concerning its release to the plaintiff, had demanded for it the sum of one thousand dollars. In other words, the defendant had absolutely refused to release a right which he and the plaintiff both admitted to be existing for less than one thousand dollars.

Apparently the exact fact of the matter is that the defendant believed that that portion of the way which was alleged to extend over the lands which he purchased had been abandoned and knew that the way over the plaintiff's lands still existed, for it had been the subject of negotiation between the parties. In this belief, he asserted his right to the ownership of his own land free and discharged of any easement, by the erection of this building, at the same time giving positive indication that he intended to use the way over the plaintiff's land.

Under this state of facts, it cannot be assumed (contrary to the exact fact) that the defendant intended to abandon his right. If that were so, it would be practically impossible for the defendant, or a person circumstanced as was he, to make an assertion similar to the defendant's contention in this case, that is, it would be impossible for him by act to assert the extinguishment of a portion of a way while insisting upon the continuance of the other portion. This cannot be the case and has never been so held. In fact the exact contrary has been held. (*White's Bank of Buffalo v. Nichols*, 64 N. Y. 68).

In that case the owner of premises adjoining an

alleged street claimed title to the fee of the street adjoining his premises and the right to occupy it, and in support of his claim enclosed the same. It was asserted that by this enclosure, it being held that he was not entitled to the fee, he had extinguished his right to the easement.

The Court said (p. 73):

“The defendant did not, by his assertion of
 “right to the fee and inclosing the land, destroy
 “his right to the easement. His action, based
 “upon the idea that he owned the fee of the
 “street, that the lesser was merged in the greater
 “estate, was no evidence of his intention to sur-
 “render the easement for the benefit of the owner
 “of the soil, should his claim to the fee prove to
 “be ungrounded. An attempt to use the premises
 “as owner of the fee did not indicate or tend to
 “prove an intent to abandon the easement. Mere
 “non-user would not extinguish the easement,
 “neither does a claim inconsistent with the ease-
 “ment have that effect. *Smyles v. Hasting*, 22
 “*N. Y.* 217; *Hayford v. Spokesfield*, 100 *Mass.*
 “491; *Ward v. Ward*, 7 *Exch.* 838; *Hale v.*
 “*Oldroyd*, 14 *M. & W.* 789; *Lovell v. Smith*, 3
 “*C. B. (N. S.)* 120.

“But it is urged in behalf of the plaintiff that
 “the defendant, by fencing in the locus in quo,
 “abandoned the easement, and that by such
 “abandonment it was extinguished and gone for-
 “ever. It is not easy to define what acts of the
 “owner of an easement could operate to ex-
 “tinguish the same; but in all cases the act must
 “be judged by the intention indicated by it, and
 “nothing short of an intention to abandon the
 “right will operate to extinguish it, unless other
 “persons have been led by such acts to treat the
 “servient estate as if free of the servitude. In
 “such case the easement could not be resumed
 “without doing injustice to those who have acted

"upon the faith that it was abandoned, and upon
 "the appearance of abandonment. *Washb.*
 "*Easem.* 543. *Stokes v. Singers*, 8 *E. & B.* 31;
 "*Corning v. Gould*, 16 *Wend.* 531, and *Crain v.*
 "*Fox*, 16 *Barb.* 184, were decided mainly upon
 "the theory of an estoppel, the court in each of
 "the cases laying stress upon the fact that the
 "owners of the easements claimed had, by their
 "acts and the manner in which they had built
 "upon the premises, induced the parties subse-
 "quently acquiring title to the servient premises
 "to believe that they were free from the burthen
 "of the easement. But where there has been no
 "change in the title, and parties have not been
 "led to change their position or condition in con-
 "sequence of the acts of the owner of the ease-
 "ment, and the latter can resume the easement
 "without injury to the rights of any one, he may
 "do so, although he may temporarily cease to
 "use the same, or his acts may be inconsistent
 "with the existence of the easement."

When the erection of the building in this case was
 begun, the plaintiff was seized of the *locus in quo*, No.
 51 Broome street. It was plainly evident that the build-
 ing would absolutely cover any continuation of the trans-
 verse strip fifteen feet in width. The building had been
 little more than commenced when the defendant made
 use of his alleged right in the plaintiff's premises and
 proclaimed the right. That he intended to continue his
 use of the right the plaintiff himself says was indicated
 by the use of a door opening upon the alleged way.

If the plaintiff then claimed that the way then exist-
 ing, extended over the lands of the defendant, clearly the
 challenge to assert that claim was then offered him
 and no other challenge.

If the way did extend over defendant's premises for
 the benefit of plaintiff, the latter then had the oppor-
 tunity to assert it. So far as appears in this case, he
 never did so. Perhaps it is still open to him. However

that may be, it is certainly not open to him to attribute to the defendant's act a motive and intent which never existed and which he perfectly well knew never existed.

The discriminating discussion by the New York Court of Appeals, in the opinion above quoted, of such cases as *Corning v. Gould*, makes it unnecessary for me to extend this argument by a similar discussion.

Suffice it to say that no case will be found where any act has been taken to be an abandonment of an easement in the absence of intention to abandon. In some cases the act has been of such decisive character that taken in connection with cesser of use for a considerable period, an abandonment has been determined to have been made. In fact an act might be sufficiently decisive to absolutely indicate abandonment without the additional element of time, but I re-assert that no case will be found where it was held that abandonment could be assumed from an act which declared in itself that no abandonment was intended.

Of course, such cases as *Wimbledon et al. v. Dixon*, 1 *Chancery Division* 362, and *Luttrel's case*, 4 *Co. Rep.* 86 A, are not pertinent to the case in hand as there is no suggestion either in the pleadings or evidence that there has been any such change in the use of a dominant tenant as would change the nature of the easement.

Of the same character also is *Allan v. Gomme et al.*, 11 *Ad. & El.* 759, and in that case the plaintiff was only permitted to recover under a new assignment.

As suggested also in the opinion above quoted, there are cases where the rights of third parties having intervened, acts apparently decisive of abandonment have not been permitted to be denied that effect. Such cases are not applicable here for the double reason that the act referred to carried with it its own indication denying abandonment, to wit: the door opening upon plaintiff's land, and, second, there has been no change of ownership. In fact the plaintiff himself purchased his

premises with full knowledge of the right of way and at a price reduced because of it (pp. 24 and 25).

The insistence of the defendant is that there was nothing in the case from which the jury could have inferred an abandonment of the defendant's granted easement in the plaintiff's premises, and that easement was a complete justification of the trespass alleged.

V.

Defendant, in addition to denying abandonment of his rights by the erection of this building, asserts that the building was erected under a claim of right. He asserts that any easement to which premises 53 and 55 Broome street were subject for the benefit of premises 51 Broome street, had been abandoned and extinguished for upwards of twenty years prior to the commencement of the erection of the building, and incidentally asserts that the easement over 51 had been continuously used during that same period. (See Rejoinder, p. 13.)

In reply to this, plaintiff, by his sur-rejoinder (p. 15, beginning at line 5), denies, but the incident and confesses by silence the principal statement of the rejoinder.

1. It is insisted on the part of defendant that under this state of the pleadings the defendant was entitled to a directed verdict in his favor upon the pleadings and the papers in the cause.

a. The deeds establish the easement.

b. The plaintiff alleges erection of building on part of right of way, with intent to abandon rest. Defendant replies that the portion of the way built upon had been abandoned and extinguished. This plaintiff does not deny. The alleged effect of the construction of the building is thereby removed, leaving the only assertion in answer to the defendant's justification under easement to be simply that he has not used it for upwards of twenty years.

An easement created by grant is not lost by mere

non-use without some other evidence of intent to abandon. *Raritan Water Power Company v. Veghte*, 6 C. E. Gr. 463.

Of course, as a matter of fact, the testimony shows a continuous use of the easement over plaintiff's land, and the principle above referred to is not essential to defendant's success.

2. The testimony clearly shows an abandonment and extinguishment of that portion of the right of way which originally, if ever, extended over defendant's land.

a. Any and every use of the portion of the way extending over Nos. 53 and 55, in favor of No. 51, other than for the purpose of going to the well, which is said to have been situated on No. 55, was abandoned and extinguished very many years ago.

Urban Holzhauer bought No. 51 from Beihler, the original owner of all the premises, in 1851. His son, Charles Holzhauer, testifies (p. 28) that he spent his early childhood there; that (p. 30) there was "always more or less of a dispute as to the rights of one and the other" of the occupants of these properties in this way; that as a result his father instructed his children to simply use the way for the purpose of going to the well in the yard of No. 53. The entire testimony of this witness is generally to the effect that the owners of Nos. 53 and 55 objected to the use of the land in the rear of their houses for any other purpose than as a means of reaching the well, and the owner of No. 51 acquiesced in it.

One William Traudt purchased No. 51 in 1867. His step-son, Frederick Knabe, testifies that he well knows the premises from practically 1860 (p. 33, line 40). His testimony is the same as Holzhauer's. Perhaps even more emphatic. He says (p. 36) that Beck, the then owner of both Nos. 53 and 55, prevented everybody from trespassing beyond his line, excepting to use the well, and resisted any use of that, except by the *tenants* of No. 51, not even permitting his step-father,

the actual owner of No. 51, to use it. This is made, perhaps, even more forceful by the cross-examination of this witness (p. 37).

This is further corroborated by the testimony of Mrs. Gill (p. 39), who lived in the house No. 51 for thirteen or fourteen years, beginning 1876. She says (p. 40), when asked as to what, if any, use she, as the occupant of No. 51, made of Nos. 53 and 55: "No person go there; he (Mr. Beck, the owner) wouldn't let us"; and then, in answer to the question as to whether they did not go for water, she said: "Yes, sir, a couple of months."

In *Horner v. Stilwell*, 6 Vr. 307, the Court, at page 314, says:

"Even where the cesser of use has not been
"for twenty years, adverse acts on the part of
"the owner of the servient tenement, which
"have been acquiesced in by the owner of the
"easement, are material for the consideration of
"the jury on the question of abandonment."

In this case there is not anywhere in the testimony even a suggestion that the owners or occupants of No. 51 ever attempted to use Nos. 53 and 55 for any other purpose than to reach the well without such attempt being resisted by the owner. And it is very apparent from the testimony that this resistance was absolutely acquiesced in.

If in general, then, such acts are material for the consideration of the jury, but one result could have been attained in this case, as there is no contrary testimony.

I think, therefore, it is safe to assume that many more than twenty years prior to the beginning of this action the way, if any, over Nos. 53 and 55 had been abandoned for all purposes other than to reach the well.

b. The use of the well was abandoned much more than twenty years prior to the beginning of the action.

Mrs. Gill, on p. 40, says that they went to the well to get water for a couple of months after her tenancy

began, which was in 1876. It is true that upon cross-examination (p. 41) she says that she does not know how long they used the well, yet the character of her testimony and her difficulty in expressing herself in English and her designation of the time in her direct testimony are sufficient to lead to the conclusion that her reply in cross-examination was to the effect that she could not remember the exact time for which they used the well, but apparently its use was discontinued a very short time after her tenancy began.

The same thing is discoverable from Knabe's testimony. He refers, on p. 38, to his father putting up a fence between 51 and 53 about twenty years ago (that is from the time he was speaking), and states that that was after the well was closed. And it is apparent from the testimony of Mr. Gill (p. 42) that the well was not actually closed until sometime after its use was abandoned.

Immediately upon the abandoning of the use of the well the owner of premises No. 51 indicated his intention to permanently abandon its use by introducing city water into the house and installing hydrants, &c., (Knabe, p. 36, line 20. Mrs. Gill, p. 40, lines 12 to 15.)

Immediately after that Beck, the owner of premises 53 and 55, prevented even the tenants of No. 51 from coming upon Nos. 53 and 55.

Mrs. Gill says (p. 40), "Q. Did you go over on Mr. Beck's premises after that? A. No. Q. Why not? A. He wouldn't let us."

Knabe says (pp. 36 and 37) he remembers an occasion when a servant girl of Mrs. Gill, who by accident encroached but a trifle on Beck's land, that he took a stick and drove her off. The general tenor of Knabe's testimony is to the effect that his father assumed that after the well was closed he had no further right in the premises.

The testimony of Mrs. Gill shows (p. 40) that Beck and the occupants of the two houses continued, how-

ever, to cross No. 51 and to go through the alley at the side to reach the street.

After the death of Mr. Traudt the situation apparently remained the same until the trouble which arose over the use by the defendant owning 53 and 55 to make use of the way No. 51. No one claimed on behalf of No. 51 to have any right then in Nos. 53 and 55, and, in fact, there was not the slightest reason why they should, as there could be no reason for it, the way being concluded at the southerly end by premises No. 57, in which there were no rights whatever.

Assuming, then, that from the beginning of Holzhauser's occupation of the premises until the time the use of the well was discontinued no other use had been made of the way than as a means of reaching the well because of the resistance which was offered to every such other use, and that that situation was acquiesced in for much more than twenty years, in consequence of which an extinguishment of the right for every other purpose was effected, it is respectfully submitted that the well becoming unfit for use, the supply by the owner of No. 51 with water from another source, the attempt of Traudt, the then owner of 51, to construct a fence between the line of 51 and 53 (p. 38) and the continued acquiescence of the owners and occupants of No. 51 to Beck's forcible exclusion of them from his premises, in the absence of even a single item of contradictory testimony, or testimony suggesting anything to the contrary, is conclusive indication of the abandonment of the way over Nos. 53 and 55 for all purposes.

It should be noted also that without any notice other than the constructive notice which comes from what may appear in the conveyances in the line of title, premises Nos. 53 and 55 were twice conveyed during this period of acquiescence on the part of the owners of No. 51.

When Isaac Freid bought the premises in 1893, there had been no one demanding any right to cross these

premises nor did any one demand such right during his ownership (p. 44, lines 10 to 15). In the deed to him was mentioned only the right which Nos. 53 and 55 had in No. 51 as set out, p. 89, lines 30 to 40.

When Armm, the defendant, bought it, there was no indication to him that any such right was claimed. He had been living in the vicinity for nineteen years (p. 53, line 21).

Before either Armm or Rand, the defendant or plaintiff, purchased their respective premises, the existence of the way over No. 51 was known to each of them. Rand in company with his agent, Susskind and Ernest Traudt, the then owner of No. 51, went to Isaac Freid, the then owner of Nos. 53 and 55, and negotiated with him for the release of the way across No. 51, but without the slightest suggestion of any reciprocal way over Nos. 53 and 55 (pp. 48 and 49). After Rand bought and before Armm bought, but apparently after he was under contract to buy, Rand, the present plaintiff, negotiated with Armm for the release of this right of way (pp. 26 and 27) without the slightest suggestion on his part to Armm that there was a reciprocal right.

Therefore, it is submitted that whatever might be the fact as to *actual* abandonment, any and every right which No. 51 had in Nos. 53 and 55 must be as between these parties, *taken to be abandoned*, because of apparent abandonment for a very long period of time and the acquirement of property by others upon the faith of this appearance. *Horner v. Stilwell, supra; Washburn on Easements, star page 543 to 550.*

Respectfully submitted,

SAML. W. BELDON,

For Defendant.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

MAX RAND,

Plaintiff in Error,

vs.

SAMUEL ARMM,

Defendant in Error.

*On Error
to Supreme Court.*

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BRIEF FOR PLAINTIFF IN ERROR.

This action is trespass to land of the plaintiff known as Number 51 Broome Street in the City of Newark. The diagram Exhibit P 3 attached to the printed case, shows the location of the property.

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The plaintiff's property is the lot beginning 25 feet from the corner of Mercer Street and Broome Street, and having a frontage of 19 feet 4 inches, and a depth of 57 feet. The Southerly line of the plaintiff's lot, it will be noticed, is broken at the depth of 39 feet from Broome Street, at which point there is a jog of two feet to the North. The plaintiff's land is designated on Exhibit P 3, under the name of Beihler. The defendant owns the adjoining two lots on the South designated under the name of Keebel and Beck. The Beihler tract is known as Number 51 Broome Street; the Keebel tract as 53 Broome Street, and the Beck tract as No. 55 Broome Street. Joseph Beihler, or Bechler, as the name sometimes appears, originally owned the three lots and erected on them three small houses fronting on Broome Street, which appear on the diagram as each of a dimension of 16 feet 4 inches by 24 feet. These houses were each two stories high. On the Northerly side of No. 51

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Broome Street, Beihler opened an alleyway three feet wide, which extended the whole length of the house into a passageway fifteen feet wide, which extended from the Northerly line of the land to the extreme Southerly line of all; which appears on the diagram. In the rear of Number 53 in said passageway there was a well, which according to the testimony in the case, was abandoned and closed up in 1876, or after that time; at least the use of the well was discontinued by the occupants of Number 51 in 1876, and the well was filled up. See testimony of Rosa Gill for the defendant, page 40, line 10 and page 42, lines 30 to 40..

On September 22nd, 1851, Beihler made a deed of conveyance of Number 51 Broome Street to Urban Holzhauer, which deed was recorded September 30th, 1851. See chain of title, page 85. Beihler had previously made a deed on April 30th, 1851 of Number 53 Broome Street to Keebel (page 87) in which deed he included what is claimed to be a grant of a right of way over lot No. 51. It appears that Holzhauer's deed was recorded before Keebel's, the latter not being recorded until November 21st, 1851. Keebel died prior to June 14th, 1859, on which date Beihler, as the administrator of the estate of Keebel, made a deed of Number 53 to Lang (see page 83) in which deed nothing is said specifically about the alley or passageway.

On January 5th, 1867, Holzhauer conveyed Number 51 to Ziller, and the deed was recorded the same day, and nothing is said in it about the alleyway, specifically. On April 9th, 1867, Lang conveyed to John Beck, Number 53, by a deed bearing date August 8th, 1860, which appears to have been kept off the record; and which deed conveys Number 53 subject to reservations and agreement for passageway and alley contained in the deed from Beihler to Keebel. On June 26th, 1867, Ziller con-

veyed to William Traudt and Traudt died May 4th, 1894 and left Number 51 Broome Street by will to his son, Earnest Traudt. It will be observed that in Traudt's will he describes the property as being 17 feet 4 inches front on Broome Street and about 57 feet in depth, showing a discrepancy of two feet in the width of the lot. Earnest Traudt conveyed to Susskind on March 7th, 1902, and on March 24th, 1902, Susskind conveyed to the plaintiff. There is no express grant of a right of way in any of the conveyances through which the plaintiff claims title to his land, except in the deed from Susskind to plaintiff there is a clause giving the plaintiff the right to use that portion of the premises conveyed to Keebel by deed dated April 30th, 1851, and to Beck by deed dated December 30th, 1856. Beck acquired title to Number 55 by the last mentioned deed and as appears above, he afterwards acquired title from Lang to Number 53. In the deed from Beihler to Beck, of Number 55, the same grant of a right of way over Number 51, as that contained in the deed to Keebel on April 30th, 1851, is included. In both of these deeds reference is made to a map at the foot of the deed. Exhibit P 3 was proved to be an exact copy of the map referred to in those deeds and purports to show the location of the land and the right of way; but the words "Right of way—1851" are not on the original map. Beck conveyed Numbers 53 and 55 on December 30th, 1891 to Mendel, and in his deed granted a right of way over Number 51, see page 89. On August 1st, 1893, Mendel conveyed to Fried, and on May 6th, 1902, Fried conveyed to Armm, the defendant, and granted the same right of way that had been granted to him by Mendel and to Mendel by Beck. Some time before Armm bought the land from Fried, a fence was erected on the line between 51 and 53, which of

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course obstructed the use of the 15 foot passageway between those two lots. That fence was still there on March 3rd, 1902, when the plaintiff's lot was surveyed by Mr. Lehlbach, pp. 17 and 18; and it was there when the plaintiff took possession of his property. It appears that houses Numbers 53 and 55 were torn down some two or three years before Fried sold to Armm, which would make it about 1899 or 1900; (see testimony of Fried, page 44, line 1 etc.) Prior to June, 1903, the defendant erected a brick building three stories high, which covers the entire lots 53 and 55 from Broome Street and of course covers over entirely the passageway which originally existed fifteen feet wide in the rear of the two houses, Numbers 53 and 55 Broome Street. The defendant's new house extends along the Southerly line of the plaintiff's property 39 feet and is not built up over the two foot space above referred to, so that there is an opening from the plaintiff's land on to the defendant's land through that two foot jog; and at the point marked on the diagram (a cross in blue pencil), there is a doorway in the defendant's new house from which he can come from his house and along his own land, he having there a space 2 feet wide, on to that part of the plaintiff's land which was originally a part of the 15 foot passageway. There is no opening from the plaintiff's house directly on the 15 foot passageway, except a window some distance from the ground on the Northerly side of the house.

On June 17th, 1905, the defendant with members of his family and people whom he had called in from the street, came out of the doorway above mentioned through the two foot passageway, on to the plaintiff's land and made a great noise and disturbance there, and called out to the people that he owned all the land and that the plaintiff only owned the chicken coop, meaning the little two sto-

ry house then occupied by the plaintiff and his family. Upon the plaintiff remonstrating with him, he struck the plaintiff and then took an axe and broke down the gate at the entrance to the alleyway on Broome Street and threw the gate out in the street. The testimony in the case shows that the gate has been there for many years, as will hereafter be discussed.

The action is in legal effect for trespass to the land and the consequent injuries. The defendant justifies under an alleged right of way over the plaintiff's land and he pleads what is intended to be a right by prescription and a right by grant. The right by prescription is denied and issue joined on the denial. To the plea of a right by grant the plaintiff replies by a special traverse denying the grant and alleging the erection of the building over the alleged passageway, on the theory that the way over the plaintiff's land and the defendant's land constituted an entire way, and that the erection of the building over that part of the way which was on the defendant's land extinguished his right to go on the plaintiff's land.

It will be observed that the special traverse does not admit any grant whatever, and this will be found to be important in the discussion of the case. The defendant denies that he erected the building with the intention of extinguishing the way, but necessarily confesses that he did erect it and that it covers all the ground. He also sets up that so much of the way that went over his ground was abandoned by the plaintiff's predecessors in the title, and also that that same part of the way was lost by the plaintiff by adverse use of the land for twenty years by the defendant; and also that during the same time the defendant and his predecessors in the title have continued to use uninterruptedly

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the way over the plaintiff's land. It is of course, apparent that the use of the way originally was adapted to the three small houses which were on the land, and was probably intended to be a way for the use of people to go to the well and for the children to play in the backyard of the houses, the land beyond the fifteen feet being devoted to gardens such as the German people ordinarily have. It is
 10 also apparent that the use which would now be made of the plaintiff's land by the occupants of a three story brick building of thirty odd feet front and one hundred feet deep with rooms for lodgers, and a public restaurant, would practically confiscate the plaintiff's property.

It is, therefore, of great importance to the plaintiff, to have this case carefully considered and finally disposed of.

20 The JUSTIFICATION OF A RIGHT OF WAY BY PRESCRIPTION WAS NOT SUSTAINED AND THE PLAINTIFF'S MOTION TO STRIKE OUT THAT DEFENCE OUGHT TO HAVE BEEN GRANTED.

In order to acquire a right of way by prescription, the use of the way must be adverse, exclusive and uninterrupted for twenty years in analogy with the Statute of Limitations.

30 Lehigh Valley R. R. Co. v. McFarlan, 14 Vr. 605.

Clement v. Bettle, 36 Vr. 675.

The question is as to the use made of the way over the plaintiff's land; when it commenced and how long it continued, and whether it was adverse within the meaning of the law. The first use of the land of which there is any proof in the case, was made in the early sixties, as appears from the

testimony of Charles Holzhauer, page 28. He testifies to the fact that the yard in the rear of Number 51 and the alleyway at the side of the house, were used in common by the three Louses. There is nothing in his testimony to show any adverse use by the owner of Number 53 Broome Street. There may have been denials of right and complaints and remonstrances, but there does not appear to have been any act done which in law would amount to a disturbance and be actionable as such, as required by the ruling in Lehigh Valley R. R. Co. vs. McFarlan. 10

The testimony of Knabe for the defendant, on page 33, is very unreliable, because he swears to conclusions and not facts; but assuming that he does make some proof of use of the alleyway, there is nothing in his testimony which shows uninterrupted adverse use. He had heard his stepfather say that people had the right to go out through the alleyway, and he had heard some disputes between Beck, who was then the owner of Numbers 53 and 55, and Traudt, his stepfather. The disputes seem to have related to the claims of Beck that people should not come over on his land. On page 38 Knabe does testify that there was a dispute about a fence which his father put up on the line where the old well stood, and Beck knocked it down, and he said that was after the well had been closed, which according to the evidence of Rosa Gill, page 40, line 10, must have been in 1876. So that from 1861, we will say, up to 1876, there was no adverse use of the plaintiff's land by the defendant or his predecessors in the title. 20 30

Assuming that Beck's act in 1876 of knocking down the fence was actionable and that he continued to use the way over the plaintiff's land, he did not continue that adverse use after that act for twenty years. 40

Beck sold his property in 1891 to Mendel and Mendel sold in 1893 to Fried; and Fried says that he did not build a fence between the plaintiff's land and his land (page 44, line 20) but he is contradicted as to the existence of the fence by the defendant, who says (p. 56, line 10 to 20) that there was a fence there put up by Mr. Bruce, an old colored man.

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The testimony of the defendant on page 54, line 25, also shows that Bruce put up the fence and that Bruce lived there at the time. Fried testifies on page 45, line 13, that Mrs. Bruce was living in Number 51 when he bought the property, and that "she was the mother of that driver from the station" meaning Divers Coleman, a witness for the plaintiff. Coleman testifies (pages 62 and 63) that his mother was Mrs. Bruce and that she lived in Number 51 Broome Street, and that she had previously lived in Number 55 (see page 64).

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It follows, therefore, that if Mr. Bruce put up the fence while he was living in one of the defendant's houses, he must have put it up before Fried purchased the property in 1893. The existence of the fence refutes any presumption of any adverse use of the plaintiff's land by the owners or occupants of Number 53 and 55 Broome Street after 1893.

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In addition to that evidence there is the testimony of Coleman, page 62, etc.; that there was a gate at the entrance to the alleyway on Broome Street, which was kept locked, and that during the time that his mother lived in the house Number 51, no one went through that alleyway except the occupants of that particular house. And of course the testimony of Fried and Armm corroborate Coleman as to the fact that his mother was there and lived in the house, and that she either was living

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in No. 51 in 1893, or in Number 55 and moved to Number 51.

According to the testimony of Mr. Lehlbach, the surveyor, the fence was still there when he surveyed the land in 1902, and it was still there when the plaintiff purchased this property. There may have been an occasional use of the plaintiff's land since 1876, but most emphatically there was no adverse use of it. And if the act of Beck in knocking down the fence erected by Traudt in 1876, or afterwards, was actionable, Beck did not follow up his adverse claim by continuing to use the alleyway adversely, nor have his successors in the title followed it up.

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There was some evidence that horses had been taken through the three foot alleyway, but it seems almost too ridiculous to discuss. The testimony of Carl Rand shows that the open space in the gateway is two feet, which is not large enough to permit a horse to go through.

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I, therefore, conclude that on the evidence in the case, the defendant did not establish a right by prescription to use the plaintiff's land.

The plea itself is bad in that it does not set up an adverse use, but proceeds on the theory of immemorial usage. And for that reason the defence sought to be maintained under that plea should have been stricken out.

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I think, therefore, that the court at the trial should have granted a motion to strike out the defence of justification founded on adverse use of the alleyway.

THE DEFENCE OF JUSTIFICATION UNDER A RIGHT OF WAY ACQUIRED BY GRANT WAS NOT SUSTAINED AND THE MOTION TO STRIKE OUT THAT DEFENCE OUGHT TO HAVE BEEN GRANTED.

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1. In the first place the defendant failed to show that the grant made by Beihler to Keebel was operative as against Holzhauser. The grant is contained in a deed made by Beihler, dated April 30th, 1851, which was not recorded until November 21st, 1851. In the meantime Beihler conveyed Number 51 Broome Street to Holzhauser by deed dated September 22nd, 1851 and recorded September 30th, 1851.

The learned justice who tried the cause considered that the evidence was sufficient to show that Holzhauser knew about the grant to Keebel when he purchased Number 51; but I respectfully contend that the evidence is not sufficient to show such notice. The burden would be on the defendant to prove that Holzhauser had actual notice, as he could not have had constructive notice, the deed of Keebel having been withheld from the record and not put on record until after Holzhauser obtained the deed from Beihler and put it on record.

The statute in force at the time these two conveyances were made, declared,—“that every deed or conveyance of, or for any lands, tenements or hereditaments to any purchaser of the same, shall be void and of no effect against a subsequent—bona fide purchaser—for a valuable consideration not having notice thereof, unless such deed or conveyance shall be acknowledged or approved and recorded—within fifteen days after the delivery of the same. Revised Statutes 1846, p. 643, par. 18.

The question is, did Holzhauser have notice? At that time Keebel was living and after his death Beihler on June 14th, 1859, conveyed Number 53 Broome Street, as administrator of Keebel's estate, without mentioning the alleyway; and this is significant as tending to show that Beihler did not at that time consider that Keebel had any right of

way. Apart from that suggestive documentary evidence there is nothing in the case except the testimony of Charles Holzhauer, son of Urban Holzhauer; and he says (p. 28) that his father owned the property and that he lived there in his childhood, and moved away in the early sixties, but he does not give his age, and he does not relate any fact which throws any light upon his father's knowledge of the existence of the deed to Keebel. Indeed he says (on page 29) that a family by the name of Keebel lived in the middle house, but he did not know whether Keebel owned the property or not. I do not perceive how it can be inferred from Mr. Holzhauer's testimony that his father knew of the existence of the deed to Keebel, or of the grant to Keebel when he purchased Number 51 Broome Street from Beihler. Therefore—the defendant failed to show a grant, and did not overcome the special traverse filed by the plaintiff to the defendant's plea of a grant. Consequently, the motion to strike out the defence should have been granted, and the direction of a verdict founded on the theory that there was a grant of the right of way, was erroneous.

2. In the second place the defence of justification under a grant was not sustained because the way that was granted was part of an entire way, and the defendant by his own act extinguished the right of way. The grant is contained originally in the deed of conveyance made by Beihler to Keebel, dated April 30th, 1851, and is also contained in a subsequent deed of conveyance made by Beihler to Beck, dated December 30th, 1856; but the language in both deeds is substantially the same so far as it is necessary to construe it. The language is as follows: "Also the said Joseph Beihler agrees that the said Keebel, his heirs and assigns, shall have the free use of a passageway 3 feet wide run-

ing from Broome Street 39 feet along the north end of said Joseph Beihler house, also the said Joseph Beihler agrees and reserves 15 feet in depth along the rear of the house he now occupies and the two houses adjoining on the south (as will appear by a map on the back of this indenture to be recorded herewith) to be used in common by himself, his heirs and assigns with Wendelen Keebel and Conrad Beihler, their heirs and assigns forever.

The map referred to is Exhibit P 3 attached to the printed case. The grant and the reservation are in one sentence and the intention of the grantor was not only to create a right of way over the land which he retained, but to reserve a right of way over the land which he was conveying. The reservation in the deed was binding upon Keebel. The rule to be followed in construing this language is well established and the intention of the grantor is to be adopted as it appears from the language used however informal it may be.

Coudert v. Sayre, 1 Dick. Ch. Rep. 386.

Haggerty v. Lee, 25 Vr. 580.

Pipe Line Co. v. D. L. & W. R. Co., 33 Vr. 254.

The location of the property as appears from the map, and the language of the reservation, and the grant taken together make it clear as I submit, that it was the intention of the grantor to establish an open passageway extending from Broome Street along the Northerly side of his house a depth of three feet to the yard and then across the rear of the houses a depth of fifteen feet for the common use of himself and the owners of the two adjoining houses; in other words, an entire way.

If my construction of the language of the deed is correct then in accepting that deed Keebel agreed

that the way should be entire for the common use of himself and Beihler. As has been stated, when Beihler, as the administrator of Keebel's estate, conveyed to Lang, he made no mention of the alleyway; but subsequently by deed dated August 8th, 1860, but not recorded until April 9th, 1867, Lang conveyed to Beck the Keebel property, Number 53 Broome Street, and the deed contains after the description, this language:—"Subject to the reservation and agreement for passageway and alley contained in the deed from Joseph Beihler and wife to Wendel Keebel"—consequently, when Beck acquired title to Number 53 Broome Street he did so subject to the right of Beihler and his grantees to use the three foot alleyway and the fifteen foot passageway as an entirety. 10

Now the defendant pleaded this right of way acquired by grant and particularly pleaded the several conveyances which contained the grant and necessarily, therefore, set up the reservation incorporated with the grant, and if my construction is correct, necessarily pleaded an entire right of way over the plaintiff's land and the defendant's land. 20

The plaintiff replied by special traverse denying the grant and setting up that the defendant had constructed and erected a permanent brick building upon that part of the way of fifteen feet in width extending Southerly from the land of the plaintiff and into the land of the defendant with intent to extinguish and abandon the right of way over the plaintiff's land. In order to overcome the effect of his act in constructing and erecting the brick building, the defendant replied that he had not erected the building with intent to extinguish the way, and that he and his predecessors in the title had used that part of the way which ex- 30

tended over his land adversely for more than twenty years prior to the construction and erection of the building and during the same time had used that part of the way which extended over the plaintiff's land uninterruptedly. The issue then was as to the adverse use by the defendant of that part of the way which extended over his land for
 10 twenty years prior to the time the building was constructed, which was alleged in the plaintiff's replication (p. 11) as July 1st, 1903. The theory of the defendant was that the adverse use of his land for twenty years would raise a presumption that the right of way over his land had been extinguished by release.

Horner v. Stillwell, 6 Vr. 307.

The defendant's theory also was that having
 20 extinguished the easement on his land by the adverse use, and having during the same time continued to use the way over the plaintiff's land, the construction and erection of the building had no effect upon the rights of the parties.

In directing the jury to find a verdict, the court stated that the claim of the plaintiff was that the whole easement was wiped out when Mr. Beck, being the owner of the two properties, refused to permit the people who lived in Number 51, any longer
 30 to come on Number 55 or Number 53 (see p. 78, line 35). This was not the theory of the plaintiff and the court certainly misunderstood the argument of the plaintiff's counsel. By mistake on the part of the printer, a memorandum made on the margin of the charge by the plaintiff's counsel, was incorporated in the charge and is noted in the printed case.

Two questions of fact arose in this connection:
 40 one, whether the defendant had established the

adverse use of that part of the way which extended over his land for twenty years prior to July 1st, 1903; and also, whether the defendant had established an uninterrupted use of the way over the plaintiff's land during the same period of time.

It will be remembered that in 1876 the well was probably closed and abandoned, and after that time Beck refused to let anybody come on his land, and tore down a fence that Traudt erected. This was probably an actionable act on the part of Beck, which would have justified Traudt in bringing an action against him for obstructing the way. But Beck did not continue to prevent the use of his land for twenty years. He disposed of his land in 1891 to Mendel, and Mendel sold to Fried in August, 1893.

I have gone over this testimony before in discussing the justification under the plea of right by prescription, and I reached the conclusion then that the evidence did not sustain the contention that there had been an adverse use. Neither does it sustain the contention that there was an adverse use of the defendant's part of the way for twenty years after 1876 for the same reasons given in the previous discussion. Neither does it sustain the contention that there was an adverse use for twenty years prior to July 1st, 1903; but on the contrary the evidence clearly shows that there was no act on the part of Fried in 1893, which constituted an adverse act, Fried denying that he put up the fence between the properties, and the defendant admitting that Bruce, the colored man, put it up. This fence of course, shut off the defendant's property but it was not erected by the defendant, or his predecessors in the title.

The defendant, therefore, failed to show an adverse use. The defendant, also in his pleadings

sets up that the way over his land had been abandoned (p. 13) for more than twenty years prior to the erection of the brick building. He also does not sustain that contention; it cannot be said when Beck refused to let the occupants of Number 51 go on his land, that they abandoned the right to go on the land. That was the situation of affairs until 1893 when the fence was put up by Bruce, so that there was no evidence of abandonment up to that time. The construction of the fence by Bruce, if it can be taken to be an act of the owner of Number 51 Broome Street, might lead to an inference that it was intended to abandon the use of the way on the defendant's land, but that situation did not continue for the necessary period of time.

To constitute an abandonment, the facts or circumstances must clearly indicate such an intention. Non-user is a fact in determining it, but though continued for twenty years is not conclusive evidence in itself of an abandonment. Its weight must always depend upon the intention to be drawn from its duration, character and accompanying circumstances.

Raritan Water Power Co. v. Veghte, 6 C. E. Gr. 463.

Mere non-user for any length of time of an easement created by express grant will not destroy or extinguish it. In order to extinguish it by non-user, there must be some conduct on the part of the owner of the servient tenement adverse to it and in defiance of the easement, and the non-user must be the result of it, and must continue for twenty years.

Dill v. Board of Education, 2 Dick. Ch. 421.

I think, therefore, that the evidence does not justify the conclusion that there was any intention to abandon the right to go on the defendant's land. Moreover the tenant of Number 51, if Bruce was then the tenant of Number 51, could not bind the owner of the property by any such act, unless it was brought to his notice and he ratified it, and there is no such evidence of any such facts. 10

It seems then that the defendant did not succeed in proving that at the time the brick building was erected, the entirety of the way had been extinguished in the manner claimed by him in his pleadings; and, therefore, it became a question as to the effect of the construction and erection of the brick building on the defendant's land.

The contention of the plaintiff was that the building necessarily extinguished that part of the way which extended over the defendant's land, and the way being an entirety as contained in the grant and reservation, it extinguished the entire right of way. It was on this basis that a motion was made to strike out the defence of justification under the grant. If one having an easement of a right of way erects a permanent obstruction such as a building in the way or any part of it, he thereby abandons his easement. 20

Jones on Easements, par. 855. 30

The author cites several cases and I particularly refer to the following:

Allan v. Gomme, 11 Ad. & El. 759.

Krehl v. Burrell, 7 Ch. D. 551.

Corning v. Gould, 16 Wend 531.

Lattimer v. Livermore, 72 N. Y. 174

Hayford v. Spokesfield, 100 Mass 491.

The point is that where the way is an entire thing the extinguishment of it in part, is an extinguishment of the whole. 40

In *Chew v. Cook*, 12 Stew. 396, Chancellor Runyon held, in a case as to the extinguishment of a way by building over a part of it, that it was a question of fact as to the location of the building, and the evidence being conflicting, he sent the case to the law courts to try the issue.

10 Again, it is quite plain that the use to which the way could be put and would probably be put by the occupants of this large brick building would be different in substance from the use which was intended by the grant and reservation, and which had been the use theretofore. While there were three small houses on the land the use of the alleyway would have been inconsiderable and was of little consequence, because each one of the houses had an outlet on the street and there was no occasion for going through the alleyway. The use to
20 which the defendant would now put the alleyway if he were permitted to do so, would be for carrying through there supplies for his restaurant and lodging house, and the going back and forth of his guests and tenants, and very probably, as an entrance to the back door or side door of a saloon. I think that the use would be so materially different in substance that it would put such an increase of the burden on the servient tenement as to extinguish the right of way.

30 The rule seems to be that where the dominant tenement is so altered as to change the nature of the easement, the easement is extinguished.

And it is also held that the owner of the dominant tenement cannot increase the burden upon the servient tenant.

Luttrell's case, 4 Co. Rep. 86; Eng. Rul. Cases.

Vol. 10 p. 294.

40 Wimbledon, et al. v. Dixon, Eng. Rul.

Cases.

Vol. 10, p. 164.

Tallon v. Hoboken, 31 Vr. 212.

I think it is quite clear that the use of the alleyway for the accommodation of the large brick building would not only be a substantial change of the use to which the way had been put heretofore, but would increase the burden on the plaintiff's property and change it to the injury of that property, and indeed, as I have said before, would practically confiscate his land. 10

THE DIRECTION OF A VERDICT IN FAVOR OF THE DEFENDANT WAS ERRONEOUS.

It is well settled that a jury should be controlled in its verdict by a peremptory instruction only where the testimony is of such a conclusive character as would compel the court in the exercise of a sound legal discretion to set aside a verdict, if one were returned in opposition to such testimony. 20

Crue v. Caldwell, 23 Vr. 215, and cases cited.

There have been other decisions since this, but they all confirm the rule as above stated.

I respectfully submit that the learned Justice who tried this case misconceived the issues raised by the pleadings in the case. I think that his charge so indicates, and it was probably the fault of counsel in not making the issues clear in his arguments. The court permitted both counsel to sum up and did not direct a verdict until after the jury had heard what counsel had to say. Suppose that the case had gone to the jury and the jury had found a verdict for the plaintiff, would it be clear that there was no evidence to support that verdict? Would not the jury have been justified in finding that the defendant, who had made no use of the 30 40

plaintiff's land whatever, or had even sought to do so, intended to abandon any rights that he had when he erected the large brick building; if that question had been left to the jury as one of fact?

10 Would not the jury have been justified in finding that there had been no adverse use of that part of the way which extended over the defendant's land, for a period of twenty years prior to the erection of the brick building?

I submit that the court erred in directing the verdict because there was evidence in the case from which the jury could have reasonably concluded that the facts sought to be proven by the plaintiff had been established, and that the defences set up had not been established.

20 In conclusion I contend that upon the evidence in this case, it would have been proper for the court to rule that the construction and erection of the large brick building on the part of the entire way which extended over the defendant's land operated in law to extinguish the easement on the plaintiff's land, and that the jury should have been instructed to so find, which would merely have left the amount of damages for the jury to ascertain.

30 The plaintiff in error is willing to waive any damages other than merely nominal damages, and will ask this court to reverse the judgment of the Supreme Court and to make order that judgment be entered for the plaintiff for nominal damages. It is desirable to end this litigation, as there is a suit pending in the Court of Chancery, which depends upon the result of this suit, and if the plaintiff in error is entitled to succeed, a final judgment directed by this court, would be more beneficial to all parties. Respectfully submitted,

FRANK E. BRADNER

of counsel with plaintiff in error.

INDEX.

	PAGE
Writ.....	1
Return to Writ.....	2
Pleas.....	3
Bill of Exceptions.....	17
Charge of Court.....	75
Assignment of Errors.....	82
Stipulation.....	84
Statement of Plaintiff's Title.....	85
Statement of Defendant's Title.....	87

TESTIMONY.

Herman D. Lehlbach,	direct.....	17
	cross.....	18
Max Rand,	direct.....	18
	cross.....	22
	redirect.....	25
	recross.....	26
	recalled, direct.....	69
Charles Holzhauser,	cross.....	71
	direct.....	28
	cross.....	29
Frederick Knabe,	redirect.....	31
	direct.....	33
	cross.....	37
Rosa Gill,	recalled.....	51
	direct.....	39
	cross.....	41
Isaac Fried,	redirect.....	42
	direct.....	43
	cross.....	44
	redirect.....	47

	PAGE
Ernest Traut,	direct..... 47
	cross..... 49
Samuel Armm,	direct..... 53
	cross..... 55
	redirect..... 57
Amelia Traut,	direct..... 57
	cross..... 59
	redirect..... 60
S. Louis Becher,	direct..... 60
Divers Coleman,	direct..... 62
	cross..... 64
Philip Sanders,	direct..... 65
	cross..... 67
David Levy,	direct..... 67
Carl Rand,	direct..... 68
	recalled, direct..... 72
	cross..... 72
David Armm,	direct..... 73

NEW JERSEY: SS:

The State of New Jersey to the
Chief Justice and other Justices
of our Supreme Court of Judi-
cature:

Greeting:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain action in our Supreme Court of judicature before you, between Max Rand, plaintiff, and Samuel Armm, defendant, in an action of tort, manifest error hath intervened to the great damage of the said Max Rand, as is stated, and we being willing that the error, if any there be, should in due manner be corrected, and just and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same, to our judges of our Court of Errors and Appeals in the last resort in all causes at Trenton, on the twenty-first day of June instant, together with this writ, that the record and proceedings aforesaid being inspected we may cause to be further done thereupon for correcting that error what of right and according to law ought to be done.

Witness, our Chancellor and President Judge of Errors and Appeals at Trenton aforesaid, the second day of June in the year Nineteen hundred and six.

S. D. Dickinson,
Clerk.

Frank E. Bradner,
Attorney.

The answer of the Chief Justice and the other Justices of the Supreme Court within named: The record and proceedings of the action whereof mention is within made, and all things touching the same, I certify to the court of Errors and Appeals in the last resort in all causes within specified, at the day and place within named, in a certain schedule to this writ annexed as I am within commanded.

William S. Gummere,
Chief Justice.

Pleas before the Justices of the
Supreme Court of the State of
New Jersey, of the thirty-first
day of August, Nineteen hun-
dred and five.

Witness,

William S. Gummerc, Esq., *Chief Justice.*

William Riker, Jr., *Clerk.*

Frank E. Bradner,

Attorney for Plaintiff.

Samuel W. Belden,

Attorney for Defendant.

ESSEX COUNTY: ss:

Samuel Armm, the defendant in this suit, was summoned to answer Max Rand, the plaintiff therein, in a plea of tort, and thereupon the plaintiff by Frank E. Bradner, his attorney, complains:

For that the said defendant heretofore, to wit, on the seventeenth day of June in the year Nineteen hundred and five, at Newark in the County of Essex aforesaid, with force and arms broke and entered into the close, lands and messuages of the said plaintiff bounded and described as follows:

All that certain tract or parcel of land and premises hereinafter particularly described. lying and being in the City of Newark in the County of Essex and State of New Jersey. Beginning at a point in the Westerly line of Broome Street distant thereon Southerly twenty-five feet from the intersection of the same with the Southerly line of Mercer Street, and from thence running (1) North sixty-seven degrees thirty minutes, West fifty-seven feet; thence (2) South thirty-two degrees thirty minutes, West nineteen feet nine inches;

thence (3) South sixty-seven degrees thirty minutes, East fifty-seven feet to the said Westerly line of Broome Street; thence (4) North twenty-two degrees thirty minutes, East nineteen feet nine inches to the place of beginning.

And then and there made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance for a long space of time, to wit, for the space of six days then next following; and then and there forced and broke open and to pieces a certain door and gate and lock and hinges of and belonging to the dwelling house of the said plaintiff situated upon said land, and of great value, to wit—of the value of Fifty dollars.

By means of which said several premises, he, the said plaintiff and his family were during all the time aforesaid not only greatly disturbed and annoyed in the peaceable possession of the said lands of the said plaintiff, but also he, the said plaintiff, was during all that time hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business. to wit—at Newark in the County of Essex aforesaid.

And other wrongs to the said plaintiff then and there did to the damage of the said plaintiff One thousand dollars.

And therefore, he brings his suit, etc.

And the said defendant by Saml. W. Belden, his attorney, comes and defends the wrong and injury when etc., and says that he is not guilty of the said supposed trespass above laid to his charge,

or any of either of them, or any part thereof, in manner and form as the said plaintiff hath above complained against him, and of this the said defendant puts himself upon the country, etc.

And for a further plea in this behalf by leave of the Court for this purpose first had and obtained, the said defendant says that the said plaintiff ought not further to have or maintain his aforesaid action against him, the said defendant, because he says that he, the said defendant, long before and at the several times when &c. was and still is seized in his demesne as of fee of and in a certain close contiguous and next adjoining in the said close which &c. and that he, the said defendant, and all those whose estate he now hath, and at the several times when &c., had of and in his, the said defendant's, close from time to time whereof the memory of man is not to the contrary, to wit: for the space of more than thirty years last preceding the issuance of process in this action, have had and used and have been accustomed to have and use and of right ought to have had and used and the said defendant at the times when etc. of right ought to have had and used and still of right ought to have and use a certain way for himself and themselves, and his and their families, servants, tenants and occupiers of his, the said defendant's close, to pass and re-pass on foot from a certain common highway in the City of Newark in the County of Essex, unto, into, through, over and along the said close of the said plaintiff in which &c., unto and into the said close of the said defendant and so from thence back again unto, into, through and over and along the said close of the said plaintiff in which &c., unto and into

the said common highway at all times of the year at his and their free will and pleasure as to the said close of the said defendant with the appurtenances belonging and appertaining. And the said defendant being so seized of his said close and also being in possession thereof and having occasion to use the said way did with his family, servants, tenants and occupiers of his, said defendant's, close, at the said several times when &c., pass and re-pass in, by, through and along the said way from the said highway into, through and along the said close of the said plaintiff in which &c. unto and into the said close now of said defendant and so from thence back again in, by, through and along the said way unto and into the said common highway using the said way there for the purpose and on the occasions aforesaid as he lawfully might for the cause aforesaid, and in so doing there necessarily and unavoidably removed obstructions in the said way, doing on those occasions no unnecessary damage to the said plaintiff, which were the same supposed trespasses whereof the said plaintiff hath above complained against him.

And this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him &c.

And for a further plea in this behalf by leave of the Court for that purpose first had and obtained, said defendant says that the said plaintiff ought not to have or maintain his aforesaid action against him because he says, that he, the

said defendant, long before and at the said several times when &c. was and from thence hitherto has been and still is seized in his demense as of fee of and in a certain close situate and being in the said City of Newark, which said close immediately adjoins the close of the said plaintiff; and the said defendant further says that long before any of the said several times when &c., one Joseph Beihler who was then seized in his own demesne as of fee, of the said close of the said plaintiff as well as of the said close now of the said defendant by two certain deeds made between the said Joseph Beihler as party of the first part and one Wendelon Keebel and one John Beck as parties of the second part respectively, the former of which bore date the seventeenth day of May, One thousand eight hundred and fifty-one, and the latter of which bore date the thirtieth day of December, One thousand eight hundred and fifty-six, did grant and convey to them, the said Wendelon Keebel and John Beck,, their respective heirs and assigns, parcels of the said close now of defendant, which said parcels constitute the entire close now of said defendant, together with a certain way three feet in width extending from Broome Street, a public highway of th said City of Newark, into, through, over and along the said close now of the said plaintiff thirty-nine feet along the Northerly end of the house of the said Joseph Beihler which was erected and standing on his close, now the close of the said plaintiff, and thence extending Southerly and at the rear of the said house of the said Joseph Beihler fifteen feet in width unto and into the said close now of the said defendant, and so back again from the said last mentioned close, into, through,

over and along the said close in which &c., unto and into the said public highway, to go, return, pass and re-pass on foot by themselves and their families, servants and tenants in and along the said last mentioned way every year and all times of the year at their free will and pleasure.

And the said defendant further says that the said Wendelon Keebel having departed this life intestate, the said Joseph Beihler was by the Surrogate of the said County of Essex appointed administrator of all and singular the goods, chattels and credits of the said Wendelon Keebel, and did by an order of the Orphan's Court of the said County of Essex made on the thirty-first day of August. One thousand eight hundred and fifty-eight, grant and convey the portion of the said close now of defendant together with the appurtenances and the said way and the right to use the same to one August Lang in fee simple by deed of conveyance bearing date the fourteenth day of June, One thousand eight hundred and fifty-nine; and the said August Lang by deed of conveyance made by him and bearing date the eight day of April, One thousand eight hundred and sixty, did grant and convey the last aforesaid portion of the said close together with the appurtenances and the said way in fee simple to the said John Beck; and the said John Beck by deed of conveyance bearing date the thirtieth day of December, One thousand eight hundred and ninety-one, did grant and convey the entire said close now of defendant with the appurtenances and said way to one Linna Mendel in fee simple; and the said Linna Mendel by deed of conveyance bearing date the first day

of August, One thousand eight hundred and ninety-three, her husband, Louis Mendel joining her therein, did grant and convey the said close now of defendant together with the appurtenances and the said way, to one Isaac Fried in fee simple; and the said Isaac Fried by deed of conveyance bearing date the sixth day of May, One thousand nine hundred and two, his wife, Flora Fried, joining him therein, did convey the said premises with the appurtenances and said way, to the said defendant in fee simple. By virtue of which said grants the said defendant before and at the several times when &c. was and still is entitled to such way as last aforesaid, and the said defendant being so seized and entitled to such way as last aforesaid, he, the said defendant, at the several times when etc., having occasion to use the said way did with his servants at the said several times when &c. go, pass and re-pass in, by, through and along the said way from the said highway, into, through, over and along the said close of the said plaintiff in which &c. unto and into the said close now of the said defendant and so from thence back again in, by, through and along the said way unto and into the said highway using the said way there, for the purpose and on the occasions aforesaid as he lawfully might for the cause aforesaid, and in so doing there necessarily and unavoidably removed obstructions in the said way, doing on those occasions no unnecessary damage to the said plaintiff, which were the same supposed trespasses whereof the said plaintiff hath above complained against him.

And this the said defendant is ready to verify,

wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him &c.

And the said plaintiff as to the said plea by the said defendant first above pleaded, wherof he puts himself upon the country does the like.

And the said plaintiff as to the said plea of the said defendant by him secondly above pleaded says that he by reason of anything by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him: Because he says that the defendant and those whose estate he now has in the said certain close contiguous to and adjoining the said close of the said plaintiff, in that plea mentioned, for the time being, for the space of more than thirty years next before the said several times when etc., or next before the commencement of this suit, without interruption, have not had or used, nor have been accustomed to have or use, nor ought the defendant at the said several times when etc., to have had or used, nor ought he still of right to have or use a way for himself and themselves, or his or their families, servants, tenants or occupiers of the said defendant's close to pass and re-pass on foot from a certain common highway in the City of Newark and County of Essex, unto, into, through, over or along the said close of the said plaintiff in which etc., unto or into the said close of the said defendant nor from thence back again unto, into, through, or over or along the said close of the said plaintiff in which etc., unto or into the said common highway

at all times of the year as to the said close of the said defendant with the appurtenances belonging and appertaining in manner, and form as the said defendant has above in his said second plea in that behalf alleged, and this he, the said plaintiff, prays may be inquired of by the country, etc.

And the said plaintiff as to the said plea of the said defendant by him thirdly above pleaded says: That he by reason of anything by the defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against him: Because he says that the said defendant before the said time when etc., to wit, on or about the first day of July, in the year Nineteen hundred and three, at Newark in the County of Essex aforesaid, constructed and erected a permanent brick building upon the said close of the said defendant which is contiguous to and adjoining the said close of the said plaintiff, and which said building completely covers the said close and completely covers over the said alleged way of fifteen feet in width, extending Southerly from the close of the said plaintiff unto and into the said close now of the said defendant, which said way is a part of the way mentioned in the said third plea of the said defendant: and constructed and erected said brick building with the intent to extinguish and abandon the said right of way mentioned and set forth in the said plea of the said defendant; without this, that long before any of the said several times when etc., Joseph Beihler did grant and convey unto Wendelon Keebel and John Beck a certain way three feet in width from Broome

Street, a public highway of the City of Newark, into, through or along the said close of the said plaintiff thirty-nine feet along the Northerly end of the house of the said Joseph Beihler, which was then erected and standing on his close, now the close of the said plaintiff, or thence extending Southerly and at the rear of the said house fifteen feet in width unto and into the said close now of the said defendant, or so back again from the said last mentioned close, into, through, over or along the said close in which etc., unto or into the said public highway to go, return, pass or repass on foot by themselves or their families, servants and tenants in or along said last mentioned way, every year or all times of the year at their free will or pleasure; or that the said defendant did by virtue of the said several grants mentioned and set forth in his said plea before and at the several times when etc., become or is still entitled to such way as last aforesaid, in manner and form as the said defendant has in his said last mentioned plea alleged, and this the said plaintiff is ready to verify.

Wherefore he prays judgment and his damages by him sustained, by reason of the said trespasses in the introductory part of that plea mentioned, to be adjudged to him, etc.

And the said defendant as to the said replication of the said plaintiff to the said second plea of the said defendant and which the said plaintiff has prayed may be inquired of by the country does the like.

And the said defendant as to the said replication of the said plaintiff to the said third plea of the said defendant says that the said plaintiff ought

not by reason of anything in that replication above alleged to have or maintain his aforesaid action against the said defendant in respect of the said trespasses in the introductory part of the said third plea and in the said declaration mentioned, because he says that he, the said defendant, did not before the time when &c., to wit, on or about the first day of July, in the year One thousand nine hundred and three, or at any other time at Newark in the County of Essex aforesaid, construct and erect a permanent brick building upon the close of the said defendant whereas and when averred in the said replication last above referred to or otherwise, with intent to extinguish and abandon the said right of way mentioned and set forth in the said third plea of the said defendant, and of this he puts himself upon the country.

And the said defendant as to the said replication of the said plaintiff to the said third plea of the said defendant further says that the said plaintiff ought not by reason of anything by him in that replication above alleged to have or maintain in his aforesaid action against the said defendant in respect of the said supposed trespasses in the introductory part of the said plea and in the said declaration mentioned because he says that for more than twenty years prior to the construction and erection of the said brick building in that said replication mentioned and set forth that part of the way mentioned extending Southerly from the close of the said plaintiff unto and into the said close now of the said defendant had not been used but had been abandoned by all persons theretofore claiming right to use the same, and for that period had been closed up and extinguished, but the said defendant

and all those whose estate he now has, at the same time and uninterruptedly during the same period have had and used the said way particularly mentioned and set out in the said third plea unto the said close now of the said defendant.

And this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him &c.

And the said defendant as to the said replication of the said plaintiff to the said third plea of the said defendant further says that the said plaintiff ought not by reason of anything by him in that replication above alleged to have or maintain his aforesaid action against the said defendant in respect of the said supposed trespasses in the introductory part of the said plea and in the said declaration mentioned because he says that for more than twenty years prior to the construction and erection of the said brick building in that said replication mentioned and set forth, the said defendant and those whose estate he now has and at the several times when etc., have had and enjoyed actual, exclusive, uninterrupted, hostile and adverse possession of that part of the way mentioned in that replication extending Southerly from the close of the said plaintiff unto and into the said close now of the said defendant, and at the same time and uninterruptedly during the same period have had and used the said way particularly mentioned and set out in the said third plea unto the said close now of the said defendant.

And this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him &c.

And the said plaintiff as to the said rejoinder of the said defendant first above pleaded whereof the said defendant puts himself upon the country, etc., does the like.

And the said plaintiff as to the said rejoinder of the said defendant secondly above pleaded says that he by reason of anything by the said defendant in that rejoinder alleged ought not to be barred from having his aforesaid action thereof against the said defendant, because he says that the said way particularly mentioned and set out in the said third plea, unto the said close of the said defendant, had not been for the period of twenty years prior to the construction and erection of the said brick building and uninterruptedly used by the said defendant and those whose estate he now has; and this the said plaintiff prays may be inquired of by the country.

And the said plaintiff as to the said rejoinder of the said defendant by the said defendant thirdly above pleaded, says that he by reason of anything by the said defendant in that rejoinder alleged ought not to be barred from having or maintaining his aforesaid action thereof against him, the said defendant, because he says that the said defendant and those whose estate he now has have not for more than twenty years prior to the construction and erection of the said brick building had and enjoyed actual, exclusive, uninterrupted, hostile and adverse possession of that part of the way mentioned in the replication of said plaintiff to the third plea of said defendant, extending Southerly from the close of the plaintiff unto and into the said close now of the said defendant; and have not at the same time and uninterruptedly during the

same period had and used the said way particularly mentioned and set out in the said third plea of the said defendant unto the said close now of the said defendant; and this the said plaintiff prays may be inquired of by the country, etc.

Afterwards, that is to say, on the twenty-fifth day of April, in the year of our Lord, One thousand nine hundred and six, at a Circuit Court held at Newark in and for the County of Essex before the Honorable William S. Gummere, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, according to the form of the statute in such case made and provided, come as well the within named Max Rand as the within named Samuel Armm, by their attorneys within named, and the jurors of the jury being summoned to try the said issue also come, who to try the truth of the matters within contained, being elected, tried and duly sworn, say upon their oath that the said Samuel Armm is not guilty of the trespasses above laid to his charge, or any of them, in manner and form as the said Max Rand hath thereof complained against him.

Therefore it is considered that the said Max Rand take nothing by his said writ and that the said Samuel Armm do go thereof without day &c. And it is further considered by the Court here that the said Samuel Armm do recover against the said Max Rand the sum of

for his costs and charges by him about his defense in this behalf laid out and expended by the Court now here adjudged to the said Samuel Armm and with his assent and according to the form of the statute in such case made and provided and that the said Samuel Armm have execution thereof &c.

NEW JERSEY SUPREME COURT.

MAX RAND	}	In Tort.
vs.		
SAMUEL ARMM.		

10

Bill of Exceptions.

Transcript of shorthand notes in testimony taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., April 21, 1906.

Before—Hon. WILLIAM S. GUMMERE, Chief Justice, and a jury.

FRANK E. BRADNER for the Plaintiff. 20
SAMUEL W. BELDON for the Defendant.

Mr. Bradner opened for the plaintiff.

HERMAN D. LEHLBACH, sworn for the plaintiff.

Direct-examination by Mr. Bradner:

Q. What is your occupation? A. Surveyor.

Q. In the City of Newark? A. Yes, sir.

Q. Did you ever make a survey of the property No. 51 Broome Street? A. I did. 30

Q. For whom? A. For Guild, Lum & Tamblyn, lawyers.

Q. I show you a paper which purports to be a diagram of that property, do you recognize it? A. I do.

Q. Who made it? A. I made it. I made that as the result of the survey.

Q. You made the actual survey yourself? A. I did. 40

Q. Do you recall, Mr. Lehlbach, whether there

were any fences on that property? A. There were fences.

Q. Was there a fence on the south side of the Rand lot? A. There was a fence in continuation of the south side of the Rand house.

Q. And how far did that fence extend? A. From the southwest corner of the house to the rear line of the lot.

10 Q. Do you recall whether there was any gate to the alleyway that appears on the diagram? A. I don't recall.

Cross-examination by Mr. Beldon :

Q. When did you make the survey? A. March 3, 1902.

Q. Is it your custom in making surveys, and maps therefrom, to note the fences and gates? A. Yes.

20 Q. What was the character of the fence to which you refer, on the south side of the lot you surveyed? A. My recollection is that it was a post and board fence.

Q. Did the boards run vertically or horizontally? A. Horizontally.

Said diagram offered in evidence and marked Exhibit P1.

30

MAX RAND, sworn for the plaintiff :

Direct-examination by Mr. Bradner :

Q. You are the plaintiff in this suit? A. Yes, sir.

Q. Where do you live? A. 51 Broome Street.

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

Q. Do you own the property? A. Yes, sir.

40 Q. From whom did you buy it? A. I bought from Susskind.

Q. What is that paper I show you? A. That is a bond.

Q. Well, look at it and read. A. Well, I can't read it.

Q. You don't know what it is? A. No, I can't read it; I can sign my name, that is all.

Mr. Beldon: What is it?

Mr. Bradner: It is a deed of conveyance from Susskind to Rand dated March 24, 1902, made by Louis Susskind, unmarried, to Max Rand, and describes the property mentioned in the declaration. I offer it in evidence. 10

Said deed marked Exhibit P2.

Q. You got a deed from Mr. Susskind, didn't you? A. Yes, sir.

Q. And put it on record? A. Yes, sir.

Q. Did you say what time you got the property? When did you buy it? A. When I bought the property? 20

Q. Yes. A. It was in March, I can't remember the day exactly.

Q. What year? A. Four years ago, 1902.

Q. Did you move in the house right away? A. Well, I fixed it up, and after a couple of weeks I moved in.

Q. Who was living there when you bought the place? A. Mr. Sanders. 30

Q. Is he a white man or colored man? A. It is a white man.

Q. How long did he live there after you bought the place? A. I think he moved away two months, six weeks, or eight weeks, I can't remember.

Q. And then you moved in? A. After, I moved in.

Q. And you have lived there ever since? A. Yes, sir. 40

Q. Now, did you have any difficulty with Mr. Armm, the defendant in this suit, some time last June? A. Yes.

Q. Do you remember the date? A. Yes, sir.

Q. What date? A. It was the 17th of June.

Q. Do you remember what day of the week it was? A. It was Saturday.

10 Q. What happened then? A. Mr. Armm came into my yard with a crowd of people and some workmen, and took up tools and materials, and he said, "You can do in this yard what you want, this yard belongs to me, the chicken coop belongs to Mr. Rand"; and I told him, "Mr. Armm, you are mistaken; if you have got any right in this lot you go and prove it by Court of law." And he answered to me, "I don't need the law, I got the law in my hand." And he picked up a stick, a piece of wood, the workingman, and hits over my hand; and after this he go to the door with a hatchet, or hammer, I can't say what it was, I saw him take it up from a
20 workingman's hand, and he knocked the door to pieces, and knock out in the street.

Q. What door? A. The alley door; and he break it up in pieces, and throw it out in the middle of the street, and he says—

Q. One minute. Where did he come from? A. He built his house, and makes a door to pass out through my yard; he says he got a right to do it, and I says I don't know he got a right to do it, and
30 I don't let anybody in my yard.

Q. During the time you lived there has the gate been on your property, on the alleyway? A. Yes, sir; it was this way, I bought this way, and have four years ago.

Q. What was on this alleyway, a door, or gate, or anything? A. Sure, it was a door.

Q. Well, was there any way of fastening it when you bought the place? A. Well, if I bought the
40 place it was of course I go in and look before I bought it, and I make it open before I go in, and after the man what lives there keep it closed for himself and his family.

Q. Up to the time this 17th of June, that Mr. Rand came in there, who had used that gate and alleyway to go in and out there? A. Nobody; I use it and my family.

Q. Anybody else? A. No, sir.

Q. Have you put the gate back? A. Yes; the Vice Chancellor gave me the order through my counsel.

10

Objected to.

Q. Never mind; you put it back? A. Yes, sir; I do it.

Q. What did it cost you to restore the gate? A. \$4.50.

Q. What else did Armm do there that day? A. Well, the time he break the door he make noise, and he says, "The alley was free from everybody entrance, all the crowd, people can come in, that is my alley, my yard." Of course I don't want strange people go in my place, and one of his sons came and punch me right on my breast.

20

Q. Was he there then, Mr. Armm? A. Yes, the son and father, and all Broome Street, everybody come in, all the crowd, a hundred people the same time.

Mr. Beldon: I would like to ask one thing. I understood this was to be tried on the question of technical assault, as it is tried for the basis of a suit now instituted in the Court of Chancery; and it occurs to me that if my friend is going to put in the matter of aggravated assault, he is going to lose the purpose for which he brings the case, and I would like him to state whether it is a question of aggravated assault or technical assault.

30

40

Mr. Bradner: We do not claim damages for personal assault.

Mr. Beldon: Then I think, if that is true, it should be stricken from the testimony.

Q. On the south side of your lot what is there?

A. To-day?

Q. Yes. A. A brick building.

Q. How big a building? A. Well, it is about three-story high.

10 Q. And how deep is it? A. One hundred feet deep.

Q. And what front? A. The front is 32 feet and some inches, 6 or 8 inches.

Q. How deep was that whole lot? A. 57 feet.

Q. And immediately back of your house what is there? A. The back is empty land.

Q. For how many feet? A. 33 feet.

20 Q. You have no buildings back there at all? A. No, sir.

Q. Isn't there a little woodshed there? A. Yes, sir; I got a little woodshed.

Q. Is there a space there of as much as 15 feet clear in the rear of your house all the way across the lot?

Objected to.

A. Yes, sir; that is clear.

30 Cross-examination by Mr. Beldon:

Q. You bought this property from Mr. Susskind?

A. Yes, sir.

Q. Do you know who owned it prior to him? A. Mr. Traut.

Q. Susskind was acting as your agent in an attempt to buy it from Mr. Traut, is that correct?

Objected to as not cross-examination.

40 The Court: What difference does that make?

Mr. Beldon: I want to show, on cross-examination of this witness, that Mr. Susskind

simply took it as his agent, and that he afterwards acquired it from the agent; that prior to that time he and Susskind and Traut visited the owner of the property now owned by Armm, the defendant in the case, and endeavored to buy from him the right of way over this land, to extinguish it, that is, over his own land, or the land which he now occupies; and that— 10

The Court: That is enough, proceed.

A. Yes, sir; he was my agent.

Q. And he afterwards took title to it himself from Mr. Traut? A. Yes, sir.

Q. And then you took title from Susskind? A. Yes, sir.

Q. Now, during the time that you were trying to buy from Mr. Traut, you were informed that there was a right of way across the property that you were about to purchase? A. No, sir; he didn't say anything about the right of way, Mr. Traut. 20

Q. You didn't know there was any right of way across the property you were about to purchase?

A. No, sir.

Q. Do you know Isaac Freid? A. Yes, sir.

Q. Isaac Freid was then the owner of the premises now owned by Armm, is that true? A. Yes, sir. 30

Q. This defendant? A. Yes, sir.

Q. Didn't you and Susskind and Traut go to Isaac Freid and endeavor to buy from him the right of way which he then had across the premises which you purchased? A. My counsel, Guild, Lum & Tamblyn, sent for him; they searched for the property, and they sent for Traut, and Mr. Traut came down to Guild, Lum & Tamblyn, and he said Mr. Traut told him he could sell the property to Mr. Rand free and clear, "You have something about a right of way," he said, "I don't 40

know nothing about a right of way, I sell him free and clear, and I give him a way free and clear"; and he asked counsel to give him advice how to give me the grant free and clear, and the counsel give him the advice to go to Isaac Freid and settle with him, "Give him how much you want, how much you can settle with him, that is not
 10 Rand's business, you have to give him a way free and clear," and Mr. Traut say, "All right, Mr. Rand, will you go with me?" I said, "Yes, sir, why not, I go with you," and I went with him; and the same time we come to Isaac Freid and talk about this deed, the right of way, and Mr. Traut offer him the price to make it clear for me; and a day or two later I heard Mr. Susskind bought the property from Freid, before the time to settle, behind my back.

20 Q. Susskind was with you, was he not, when you went to Freid? A. Yes, sir; Susskind was with me.

Q. And what price had Mr. Traut asked you for the property? \$1,500, had he not? A. \$1,400.

Q. And Mr. Freid asked how much for the right of way? A. \$400.

30 Q. And that was taken off of the price because it wasn't conveyed, wasn't it? A. I don't care how much Mr. Traut gave him, he had to convey free and clear.

Q. I understand, but when Mr. Traut sold the property he took off the price which Mr. Freid asked for the right of way? A. I didn't buy from him, I bought from Susskind.

Q. How much did you pay for your entire property? A. \$125 my deed called for, yes.

40 Q. And is that all you paid? A. I bought two mortgages.

Q. How much did they amount to? A. Well, the mortgages amount up \$1,100, I think, something, \$1,120.

Q. You paid about \$1,200 for the property, did you? A. I bought the mortgages, and afterwards I gave Susskind for the deed \$125.

Q. I say the consideration you paid for your property was \$1,200? A. About the amount.

Q. And you had previously agreed to pay Traut \$1,400 for it, is that it? A. Yes, sir.

Q. If you were to get it clear from Mr. Traut you would pay \$1,400 for it, is that so? A. Yes, I agree, \$1,400. 10

Q. Now, you have spoken of this brick building of Mr. Armm's, and you say that there is a door opposite the part of your land, at the rear of your house, that is correct, is it? A. Yes, sir.

Q. That door opens on Mr. Armm's own land, doesn't it? His house there stands back from the line, doesn't it? A. I am not surveyor, I don't know. 20

Q. Well, do you know A. I don't know.

Redirect-examination:

Q. Mr. Rand, as I understand it, then, Mr. Traut did not keep his agreement with you to sell you the property? A. Well, he gave me an agreement.

Q. Did he keep his agreement, or did he break it?

A. No, he didn't keep the agreement.

Q. How did you know that he was not going to keep his agreement and give you a deed? A. Well, 30

how I know it? I was by Isaac Freid after two or three days, it was in the papers that Mr. Susskind settle the house, 51 Broome Street. My son read the papers, and read the deed, and Mr.

came in and say, "What is the trouble, you bought the house, and Mr. Susskind got the record, is that true?" and I went to Guild & Lum and asked him can be such a swindle, and Mr. Lum answer me, "Everything can be, go to the record and find out." Well, I can't read; my son go and 40

read it, and it is true, and he bought from behind my back.

Q. And then you went to Susskind and bought of him? A. Yes, sir.

Recross-examination:

10 Q. You went down to see your lawyer after you found Susskind had bought it? A. Yes, sir.

Q. And they told you if he was your agent he could be compelled to turn it over to you? A. If he doesn't want it, he doesn't do it; Susskind bought it himself; good business.

Q. And then you bought from him? A. From him.

Q. After you had bought this property, Mr. Armm bought property next door, didn't he? A. Yes, sir.

20 Q. Didn't you after that time go to him and ask him to sell to you the right of way across your premises? A. No, sir.

Q. Didn't you make an agreement with him in the presence of Julius Aboilise to buy that right of way for \$300, and extinguish it? A. I went to Springfield Avenue, and Mr. Armm called me into Mr. Aboilise, in his store, and Mr. Aboilise tell me this way: "Mr. Rand, would you buy the right of way what the deed says?" I tell him this way: 30 "My place has been fixed up, and I moved in, I don't know it if any right here, I thought from my counsel if he got a special deed I buy it, if he not got a special deed what for I give money? If he got a right of way, I give him \$200." And Mr. Aboilise say, "I can give you my word there is a right of way," and I say, "Show me special deed," and he says, "Take my advice and give him 40 \$300," and I say, "I will, Mr. Aboilise, I take your word, you are an honest man"; and I tell him to give \$300, and I want to give him right away a deposit of \$25, and he refused to take a deposit.

Mr. Aboilise tell him, "Mr. Armm, you haven't a right to take a deposit, you have only got an agreement." And I was satisfied, I went away. And just the same time I have to go to New York; in a day, or two days later, Mr. Aboilise say, "I gave him \$300, he back out and want \$500"; two days later he want \$800, and he raise the price to \$1,000, and I am a poor man and can't give \$1,000.

Q. And there it stopped? A. There it stopped. And I went to my counsel and tell him I settle right away; he says, "Yes, Mr. Rand, you give him \$300, and if he start to build, you got a right of way across his land, and you get twice as much," and that is the reason I offer the price; everybody wants to make a business in this country.

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Mr. Bradner: We rest. It is admitted that the grantor was in possession.

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Mr. Beldon: If Mr. Bradner will state the chain of title by date of record I am content.

The Court: Mr. Bradner has now proved title to the *locus in quo* in the plaintiff, and possession under it.

Mr. Bradner: I have an abstract of title, and I can state our title as it appears on this.

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(See Statement of Title at end of Book.)

Mr. Beldon: Had not you better state that with your deeds there is no mention of a right of way until the deed from Susskind to Rand?

Mr. Bradner: I think that is true.

The Court: When Bechler conveyed the property that the plaintiff now holds, he did

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not add to it any express grant of a way over the other lot.

Mr. Bradner: No.

Plaintiff rests.

Mr. Beldon opened for the defendant.

10 CHARLES HOLZHAUER, sworn for the defendant:

Direct-examination by Mr. Beldon:

Q. Where do you live, Mr. Holzhauser? A. 732 High Street.

Q. That is in the City of Newark? A. Yes, sir.

Q. And you have lived in Newark for how long? A. All my life, nearly.

20 Q. You know the property now occupied by Max Rand? A. I don't know it by name, but I know the property you refer to.

Q. You know the property referred to, next to the corner of Mercer, on the westerly side of Broome? A. Yes, sir; I don't know the owner.

Q. And you know the properties adjoining? A. Yes, sir.

30 Q. Did you know Urban Holzhauser in his lifetime? A. He was my father.

Q. You remember that your father, Urban Holzhauser owned the property that is now said to be owned by Mr. Rand? A. Yes, sir.

Q. Did you live there? A. Yes, sir.

Q. When did you live there? A. Oh, I spent my childhood there.

Q. And you know when you moved away? A. I left there in the early 'Sixties.

40 Q. That is, you left this property in the early 'Sixties? A. Yes, sir.

Q. Did you move before your father sold? A. Yes, sir.

Q. You knew the premises adjoining on the south? A. Yes, sir.

Q. Do you remember the name of the owner of any of them at the time you were there? A. The last one was Beck.

Q. Do you remember that a man by the name of Beck owned one of them while you were there? A. Yes, sir; the middle one I am not sure of, there was a family by the name of Keeble lived there, but whether they were the owners or not, I don't know. 10

Q. During the time you lived in the premises now owned by Mr. Rand, what use, if any, did the people who lived in the two adjoining premises make of your yard and the alleyway at the side of your house?

A. It was used in common by the three houses.

Q. For what purpose, Mr. Holzhauer? A. I don't know for any particular purpose; they went in and out; we went in and out. 20

Q. That is what I mean; there was an alleyway at the northerly side of your house that went to the street? A. Yes, sir.

Q. And if you wanted to come in the back of your house you would come in through the alleyway and along your yard to your house? A. Yes, sir.

Q. And these people adjoining on the south, entering the premises did the same thing; is that right? A. Yes, sir. I don't think the last house ever made much use of it, but the two others did. 30

Q. And was that so during all the time that you knew the premises? A. Yes, sir.

Cross-examination by Mr. Bradner:

Q. You were a child, then, were you not, Mr. Holzhauer? A. Yes, sir.

Q. When you speak of the people of the three houses going in and out there, do you mean the children using it? A. All hands. I don't think the last house ever made much use of the alleyway; 40

I think the only use they made of it was going to a well back of the middle house.

Q. The other two houses had front entrances on the street? A. Yes, sir.

Q. There was no necessity for going through the alleyway to get to the well, was there? A. No, sir.

10 Q. It would be more convenient to go off their back stoops, wouldn't it? A. They wouldn't go through the alleyway to go to the well; they couldn't; that would be out of the way.

20 Q. Doesn't your memory relate particularly to what you and the other children did there, going in and out, and through this back yard? A. Why, we were always instructed by our parents to make as little difficulty back of the other two houses as possible; to keep away from there; and when we wanted to get water from the well, why, to go and get it and avoid any difficulty.

Q. Not to make too much noise out there? A. No; it seemed to be always more or less of a dispute as to the rights of one and the other, and we were instructed to simply attend to our business; go and get the water, and pay no attention to nobody.

30 Q. Wasn't the yard open all the way through in the rear of the three houses; open yard there? A. I don't quite understand what you mean by "open yard?"

Q. Immediately back of the houses? A. Back of the three houses there was a space; as nearly as I can recollect, I should say it was 12 or 15 feet, running back of the three houses.

Q. Across the entire lot? A. Yes, sir; the houses were built together, like one house.

40 Q. Was there a fence on the north side of your lot? A. At the alley, do you mean?

Q. No; along the alleyway, and continuing down the length of the lot? A. Yes, sir.

Q. Was there a fence on the south side of the land on the Beck property? A. The extreme south; yes, sir.

Q. And between those fences there was an open yard of 12 or 15 feet wide? A. Yes, sir.

Q. Now, beyond that yard were there not some gardens? A. Yes, sir; each house had its own garden.

Q. And between the open place and the gardens there was a fence, was there not? A. Yes, sir. 10

Q. Do you recall whether any other persons than the occupants of those houses used the alleyway? A. Oh, at times, yes, sir; it was a source of disturbance; I know we would gladly have closed the alley, if we could, a number of times.

Q. Didn't you have a gate on the alley, then? A. Yes, sir.

Q. A lock on it? A. No. 20

Redirect-examination :

Q. These houses, the house in which you lived, and the two houses adjoining on the south, were built in a row? A. Yes, sir.

Q. And the two houses on the south each covered the front of its entire lot, did it not? A. Yes, sir.

Q. There was no alleyway out the side of either of those houses? A. No, sir. 30

Q. Your father and family went over to the well to get water? A. Yes, sir.

Q. And other than that you were instructed to keep away, I understand? A. Yes, sir—well, we were instructed not to make any trouble with the neighbors; we wanted to live in peace, and the other two were constantly quarrelling, and we were instructed to keep away from there, and give no cause for offence, and I don't think we ever had any. 40

Q. But you did exercise the right to take water from the well? A. Yes, sir.

By the Court:

Q. Where was the well? A. Immediately in the rear of the centre house.

Q. And upon the lot belonging to the owner of the second house? A. Upon this open 15 feet.

Q. Was this open 12 or 15 feet you speak of the alleyway? A. No, sir.

10 By Mr. Bradner:

Q. (Showing witness paper.) Suppose you look at that and see if that represents the construction?

A. Yes, sir; that gives a very good idea of it. The well was located, I should judge, back of the centre of this middle house, nearer the garden, right about there, I should judge, from my recollection, and that was supposed to be kept in repair by the three
20 houses, supplying buckets and chains, and one thing and another.

By the Court:

Q. Was the alleyway marked by any boundaries on the ground? A. No, sir.

Q. No fences? A. Well, our house was on one side, and the fence the other.

Q. That is on the side alley; how about the alley at the rear of the lots? A. The alley at the rear of
30 the lot was fenced with a division between that 15 feet and the garden; each one's garden was private.

Q. Was there any fence on the other side of the alleyway? A. I don't quite get what you mean?

Mr. Bradner: Next to the house; the houses were on the other side.

The Court: Oh, ran right alongside the rear of the house?

40 Witness: Yes, sir.

Mr. Bradner: This 15 feet across was just an open yard?

Witness: Yes, sir.

FREDERICK KNABE, sworn for the defendant:

Direct-examination by Mr. Beldon:

Q. Where do you live? A. 150 Howard Street, Newark.

Q. How long have you lived here? A. Very near all my life.

Q. And that means how long; how old are you? 10
A. I will be fifty-four next birthday.

Q. Did you know William Traut? A. Yes, sir.

Q. In his lifetime? A. Yes, sir.

Q. What relation was he to you? A. Stepfather.

Q. Did you live with him? A. Yes, sir.

Q. Where? A. 91 Mercer.

Q. Do you know the premises now owned by Max Rand? A. Yes, sir.

Q. And the premises also owned by Samuel 20
Armm? A. Yes, sir.

Q. Where is the place that you lived with reference to these premises? A. We lived 87 Mercer Street when I was a child, and then after that lived in 91 Mercer Street.

Q. I say how near is that to these premises? A. Right next door.

Q. William Traut, your stepfather of whom you spoke, owned the Rand premises at one time, did he 30
not? A. 51 Broome Street?

Q. Can you say when you began living there on Mercer Street adjoining these premises? A. Oh, back in the 'Sixties.

Q. Was it before or after your stepfather bought the Rand premises? A. I think it was before.

Q. And how long did you live there in either one of these two premises? A. I lived there—I am sure I lived there in 1860. 40

Q. Now, then, how long after that? A. Until I was twenty-one or twenty-two; then I got married; then I moved away from there.

Q. Well, how long were you away? A. Oh, about three years—four years.

Q. Did you come back? A. Yes, sir.

Q. Where did you live when you came back? A. I came back and lived with the folks.

Q. How long did you live there? A. Well, going on four or five years; I went to Connecticut.

10 Q. How long were you there? A. About a year.

Q. When you came back where did you live then? A. Came back to the folks.

Q. How long did you live there then; until your father died? A. No, sir.

Q. Well, how long? A. Came back and lived there about eighteen months or so, and then got married again.

Q. Well, how long were you away? A. Well, I was only away a little while.

20 Q. Did you come back to live at the same place? A. No, sir.

Q. When did you come back to live at the same place? A. What; after I got married the second time? A. That is nineteen years ago.

Q. Yes. A. I never went back there.

Q. Now, then, when was it you went away the last time? A. That is nineteen years ago.

30 Q. What say? A. Pretty near nineteen years ago.

Q. Where did you live when you got married the second time? A. Lived in Broome Street.

Q. Where in Broome Street? A. Three or four doors below 51.

40 Q. Now, during the time you lived in Mercer Street and your father owned those premises, your step-father, can you tell me what use, if any, the people who lived in the two houses adjoining on the south, made of the premises which your father owned? A. Well, they had the right of way going into that there alleyway, as far as I could understand; carried in their manure to the garden.

Mr. Bradner: Just state what you saw?

Witness: I saw them carting manure in the garden.

Q. Did you see them taking— A. Carting in kindling wood.

Q. Now, during what period of the time you lived there did you see these people, owning and living in these premises, use that right of way? A. Well, they had the right of way all the time, I believe. 10

Q. Well, did you see them using it all the time? A. Well, nobody ever stopped anybody that I know of.

Q. Now, back of the middle one of the houses there was a wall, wasn't there? A. Yes, sir.

Q. During the time that your stepfather owned the premises, what right, if you know, did the people who lived in his house exercise in the premises below? A. They had no right there at all, only just go to the well and get their water. 20

Q. Is that what they did? A. That is all I ever saw.

Q. Did you ever hear your father say what right he had, or his tenants had, in the premises adjoining on the south? A. I did not.

Q. You say you never heard your stepfather say anything about what right he had in the premises? A. Well, he— 30

Objected to.

The Court: No.

Q. Did you ever hear your father say what rights, if any, the people to the south had in the premises which he owned? A. Go out through that alleyway.

Q. During the time that your stepfather owned the Rand premises, who owned the premises adjoining on the south? A. Mr. Beck. 40

Q. Did you know him? A. Yes, sir.

Q. What, if anything, do you know that he did with regard to keeping people off his premises? A. He wouldn't allow anybody on it.

Q. Even on this 16 feet? A. Well, just to get a pail of water, and that is all.

10 Q. What would he do if they came for anything else? A. Well, if he couldn't get anything else he would take a stick or club and knock you off.

Q. Whom do you know that he ever prevented from going there? A. Well, he prevented me.

Q. What? A. Myself.

Q. Did he ever prevent your father from going there? A. He wouldn't allow my father to go near that well, only when the bucket fell into it, when the bucket dropped off the chain, Beck owned two houses, he had to pull it up twice and my father had to pull it up the third time.

20 Q. Then during the time that your stepfather owned the premises, who exercised the right to go to the well there over your father's premises? A. Only the people in 51; my father owned the house, and he couldn't get a drink of water out of the well.

Q. Now, was the well closed up? A. Yes, sir; after a cat dropped into it.

30 Q. And after the well was closed up, what, if anything, did your father do to get water to that house? A. Why, he had to put in the city water.

Q. After that time, what right if any, did your father, or his tenants in 51, exercise in the adjoining premises? A. None whatever.

Q. How were they prevented from doing it, if at all? A. Well, I can remember a servant girl working there who was on his side one time, and he took a stick and drove her off.

Q. Who is that? A. Beck.

40 Q. Did he prevent anybody else going there? A. He didn't want anybody there.

Q. Did he ever prevent you from going there? A. Yes, sir.

Q. Did he ever prevent your father from going there? A. Yes, sir.

Q. Do you know whether he ever prevented any of the occupants of the house going there excepting this servant girl? A. Nobody else, no, sir.

Q. After the well was closed up, did the people in the Beck house continue to use the way out to the street over your father's premises? A. Yes, sir.

Q. As long as you knew it? A. Yes, sir.

10

Cross-examination by Mr. Bradner:

Q. Mr. Knabe, whenever you tried to go over on Beck's land, you had a dispute with them, did you? A. Well, I didn't hardly try to go over there.

Q. Well, you did try once or twice? A. I did try; yes, but he chased me off.

Q. And you saw him chase the servant girl off? A. Yes, sir.

20

Q. More than once? A. Only once.

Q. Was that after the well had been closed? A. Yes, sir.

Q. And was it after the well had been closed that he chased you off? A. He didn't have to chase me off after the well was closed?

Q. When was it he chased you off? A. Well, I was too big a boy for him to chase me off after the well was closed.

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Q. Well, what was the servant girl doing over there after the well was closed? A. She was washing.

Q. Washing clothes? A. Yes, sir.

Q. Did she go to the well to get water? A. The well was closed.

Q. Where was she washing clothes? A. In the yard.

Q. Back of your house? A. Back of my father's property.

40

Q. And she went over on that land to hang

them up, didn't she? A. No, she had her tubs over a little too far for him, and he ran her off.

Q. Didn't you hear a dispute between them at that time? A. No, sir.

Q. Didn't you hear her claim she had a right to have her tubs there? A. No, sir.

Q. Didn't you claim you had a right to go there?
10 A. Who, me?

Q. Yes, when he chased you off? A. No, sir; I hadn't a right to go there.

Q. When people came through the alleyway did you hear any disputes betwen them and your father? A. No, sir.

Q. Did you hear disputes between your father and Beck about the land? A. Yes, sir.

Q. What did you hear them dispute about? A.
20 About my father putting up a fence where the old well stood; my father was a carpenter and put a fence up there, and Beck knocked it down.

Q. Where was the well? A. In back of 53.

Q. That was the centre house? A. The centre house.

Q. Where did your father try to put the fence?
A. On his line.

Q. So as to shut off the other two houses? A. He tried to do it, but he couldn't.

Q. That was before the well was closed, wasn't it?
30 A. No, sir.

Q. That was after the well— A. Afterwards.

Q. When was that, what year? A. Oh, exactly, I couldn't tell you; I think it was about twenty years ago.

Q. More than that, wasn't it? A. No, I couldn't swear that it was more than that; I think about twenty years ago.

Q. Was Mr. Traut dead then?
40 A. No, sir.

Q. You mean Mr. Traut? You mean your step-father? A. No, sir; he ain't dead twenty years yet.

Q. You mean Mr. Traut when you speak of your father? A. Yes, sir.

Q. At that time was there a gate on the entrance to this alleyway? A. Yes, sir.

Q. And a lock on it? A. Never.

Q. There never was any lock on it? A. No, couldn't lock it.

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ROSA GILL, sworn for the defendant:

Direct-examination by Mr. Beldon:

Q. Where do you live? A. No. 7 Sayre Street.

Q. City of Newark? A. Yes, sir.

Q. How long have you lived in Newark? A. I lived, I guess, nearly over forty years.

Q. Do you know the property where Mr. Max Rand lives now? A. Yes, sir.

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Q. And the property where Mr. Samuel Armm lives? A. No, sir.

Q. You know both of them; did you ever live in the Rand property? A. I live over thirteen years in 51.

Q. Well, that is where Mr. Rand lives? A. I don't know.

The Court: Well, she lived in No. 51.

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Witness: I live in No. 51, by Mr. Traut; Mr. Traut was my landlord.

Q. When did you move there, do you remember? When did you begin to live there? A. 1876, I think it was.

Q. And lived there for how long, did you say? A. Thirteen or fourteen years.

Q. Now, during the time that you lived there, do you know who owned the two houses at the south of it, that is, next door? A. Yes, sir.

40

Q. Who? A. Mr. Beck.

Q. During the time that you lived there as ten-

ant of Mr. Traut, what use did you make in the premises at the south that was owned by Mr. Beck? What did you go over there for, if anything? A. No a person go there, he wouldn't let us.

Q. Didn't you go there to get water from the well? A. Yes, sir, a couple of months.

10 Q. And what happened then? A. Well, so I told the landlord we couldn't drink the water, the water was no good any more, so he fixed us the hydrant water so we could get water.

Q. You told the landlord you couldn't use that water, and so he put in hydrant water in the house? A. Yes, sir.

Q. After the hydrant water was put in, did you use the well? A. No.

20 Q. Did you go over on Mr. Beck's premises after that? A. No.

Q. Why not? A. He wouldn't let us.

Q. Now, what use of your yard and alleyway there did the people who lived next door to you, in Mr. Beck's house, make; did they go through there? A. Well, he say he got two feet on the alleyway and I got only one foot, so he got a right to go through the alleyway.

Q. Well, did he go through? A. Certainly.

30 Q. During all the time you lived there? A. He went all the time through.

Q. And the people that lived in his house, too? A. All the people.

Q. You heard the testimony of Mr. Knabe, didn't you? A. Yes.

Q. You heard what he said about the servant girl being put off by Mr. Beck, didn't you? A. My servant girl.

40 Q. I was going to ask you whether that was your servant girl that was put off? A. I wasn't home, and—

Q. Well, then, never mind; I can't ask you if you were not home.

Cross-examination by Mr. Bradner:

Q. You say you used the well for about two months after you moved in No. 51? A. Well, I don't know how long we used the well. I pull a bucket of water up and find cats in and then—

Q. You stopped using the well because the water was bad, was that the reason? A. The water was no good, was no water more in, was all dried up. 10

Q. And after that where did you get the water that you wanted to use? A. In our kitchen, we got the hydrant water.

Q. Had it put in from the city, from the pipe in the street?

The Court: Well, it was a hydrant in the kitchen.

Q. Well, you say that Mr. Beck wouldn't let you go over on his land? A. No. 20

Q. Did you try to go on there? A. What right I had there?

Q. Did you try to go on his land? A. When we come over a little bit, he scold.

Q. But you tried to go over there, didn't you? A. I got nothing to do there.

Q. Didn't you hang your clothes there sometimes? A. Oh, no, I got my pulley line from our top windows, on the top one was by Mr. Traut's, he got a shop there; we use our pulley lines, not on the other yard, we daresn't touch the other yard; my servant girl was wash clothes and I wasn't home— 30

Q. Never mind; don't tell what occurred to your servant girl when you were not home. The only reason you didn't go over on that land was because Mr. Beck wouldn't yet you? A. No.

Q. He wouldn't let you go over there? A. We got nothing to do there; he wouldn't allow me to go there. 40

Q. Wouldn't let you even step on it? A. What right I had there, no.

Q. Who lived in the house with you? A. Only me.

Q. Only you, all alone? A. All alone.

Q. Was there any fence back in the yard after the well was closed up? A. There was no water in the well; the water was dirty; I wouldn't say what comes in.

Q. Do you know whether the well was ever closed up? A. There was no water in the well, no more.

Q. Don't you know that the Board of Health of the City of Newark closed the well? A. I don't know.

Q. Was there any fence put up there between those houses while you were there? A. No, no fence; the fence was in the garden.

Q. Between the yard and the garden there was a fence, wasn't there? A. It was behind, in the rear.

Q. In the rear of the property there was a fence? A. Not in the yard where Mr. Beck goes through.

Redirect-examination:

Q. You say you stopped using the well; do you know whether the well was actually filled up? A. How is that?

Q. I say you stopped using the well, but do you know whether the well was filled up? A. I guess he filled it up; I don't know who filled it up, you know.

Q. Do you know whether it was filled up? A. I don't know who done it.

Q. But it was filled up, was it? A. The well was filled up.

ISAAC FREID, sworn for the defendant:

Direct-examination by Mr. Beldon:

Q. Where do you live, Mr. Freid? A. 21 Richmond Street.

Q. In the City of Newark? A. Yes, sir.

Q. How long have you lived in Newark? A. 1882.

Q. Do you know the premises where Max Rand now owns and lives? A. I do. 10

Q. And the premises where Mr. Armm, Samuel Armm, now owns and lives? A. I do.

Q. You sold Mr. Armm the property that he owns, didn't you? A. Yes, 53 and 55.

Q. 53 and 55 Broome Street? A. Yes.

Q. You bought it in what year, do you remember? A. I owned it maybe about five or six years; I don't recollect exactly how long. 20

Q. From whom did you buy? A. Mendel.

Q. Now, during the time that you owned the premises what buildings were there on the premises? A. There were two little houses exactly like Mr. Rand's, and in the rear was a stable over the entire width of 53 and 55, in the extreme rear.

Q. The two houses in front were the old houses, were they not? A. 53 and 55 exactly alike, like 51.

Q. Now, during the time that you owned the property what rights, if any, did your tenants exercise in the lot 51, and the passageway out? A. To take the horses in and out through the alley. 30

Q. You rented the stables in the rear to people, did you? A. Yes.

Q. Was there any other way for them to get out? A. No, except the alley.

Q. I say any other way than the alley? A. Just the alley with the horses. 40

Q. During what portion of the time that you owned the property was that kept up? A. A good many years.

Q. During the time that you owned the property the houses in front were taken down, were they not?

A. Yes, I had them taken down.

Q. What time was that, do you know? A. About two or three years before I sold the lot.

Q. You didn't build while you were there; while you owned it you didn't build on it afterwards? A. No, sir.

10 Q. During the time you owned those premises where Mr. Armm now owns what use, if any, did the people living in 51 make of your property? A. None that I know of.

Q. Did any of them make any claim to you that they had any right to use it? A. Never.

20 Q. Did you ever build a fence, or have built a fence, separating your property, or any portion of your property from Mr. Rand? A. No, it was open; I never built nothing there.

Q. Before you sold the property to Mr. Armm were you visited by Mr. Rand and Mr. Susskind and Mr. Traut? A. Yes, sir.

30 Q. With reference to this property? A. They came to me, they wanted to buy the privilege that 53 and 55 had to go through 51, and they asked me the price; I said \$500; Mr. Rand was satisfied on the price, but when he came to buying he said I should take a mortgage on 51, and including for the privilege the \$500, I should take a mortgage for \$1,500, and I thought that was a little bit too much of a mortgage to take on 51, and so I refused.

Q. And did you ever convey that, or release that right of way to him? A. No, sir.

Q. Or to anybody else? A. That right of way went to who bought the lot 53 and 55, Mr. Armm, he bought that right from me, according to the deed.

40 Cross-examination by Mr. Bradner:

Q. You bought from Mendel in 1893, didn't you?

A. I suppose so; I don't recollect exactly what year.

Q. At the time you bought those two little houses was there a stable on the land in the rear of them?

A. Yes, sir; which Mr. Mendel used for his horses.

Q. There was a stable there? A. Yes, sir; on the extreme rear.

Q. At that time was there a fence between the Mendel property and the Traut property? A. No, sir.

Q. Mr. Traut was living then, wasn't he? A. He was living in Mercer Street; I know him. 10

Q. You knew him? A. Sure.

Q. Who was living in the Traut house then? A. I think two tenants, just the same as by me.

Q. Wasn't there a colored woman living there then? A. Oh, yes, yes, the mother of that driver from the station.

Q. Who was living in 53 when you bought the property? A. I don't recollect. 20

Q. Colored people? A. I don't recollect; I don't think so, there was colored people when I bought it; white people.

Q. Who was living in 55? A. don't recollect; some tenants.

Q. At that time was there a fence on the south side of the Mendel property next to Armm's place at 57? A. Yes, sir; there was also a stable in the rear of 57. 30

Q. Mr. Armm had a restaurant at 57, then, didn't he? A. I don't know if he lived there when I bought it; I don't remember.

Q. But there was a stable in the rear of 57? A. Yes, sir.

Q. And you are sure there was a stable on 53 and 55? A. There was on Mr. I don't remember his name, he died since; he was living there in that house; that is right; Mr. Armm wasn't living there. 40

Q. You are sure there was a stable in the rear of 53 and 55 on that land? A. Oh, yes, I rented that land.

Q. Was there any way of getting out from that stable to Mercer Street? A. No, sir; the stable took up all the lot.

Q. Did you ever see a horse go through this alleyway? A. Sure.

Q. Through that gate? A. Sure; couldn't get out any other way; no way out.

10 Q. While Mr. Traut was living? A. While Mr. Traut was living.

Q. After his death did you see any horses go through that? A. I had the stable pulled down; I don't recollect whether that was before Mr. Traut died or afterwards, because I had property in 58 and 60 that I owned there, I had business there to go and collect, and I know about the horses going in and out.

20 Q. How many years do you think you owned that property before you pulled that stable down? A. Maybe three or four years.

Q. And Mr. Traut was living when you pulled it down? A. don't know about that.

Q. How many times did you see any horses go through that alleyway? A. Several years.

Q. You saw horses go through that three-foot alleyway? A. Yes, sir.

30 Q. The two small houses were taken down? A. Had been taken down.

Q. When did you take those down? A. I don't remember; several years ago.

Q. Was Mr. Traut living then? A. I don't know.

Q. When you took those down was there a fence up up across the front of the lot? A. No, sir.

Q. It was all open there? A. All open.

Q. Out to the street? A. Oh, the front?

40 Q. Yes. A. On the lot an Italian had a garden, and he put a fence in front so he could cart his material, building material, on 53 and 55; I gave him that privilege for nothing.

Q. Don't you know he put a fence up on the north side of 53, between 53 and 51? A. I don't know.

Q. Don't you know there was a fence there when he sold to Armm? A. I don't know.

Q. You didn't go and look? A. No, sir; no business there.

Q. Do you remember the name of that Italian? A. Evongalisco. 10

Q. Do you know where he lives now? A. He used to live right in the rear of me facing Mercer Street; he owned that property, two brothers, Louis Evongalisco and another one.

Redirect-examination:

Q. Were those stables on the back of 53 and 55 old stables when you went in there, or new? A. Those stables were there when I bought the property from Mendel; Mendel kept his horses. 20

Q. You knew the property when Mendel lived there, did you? A. Yes, sir.

Q. And you know that he kept his horses there? A. Yes, sir; he kept his horses and he rented out some stables to other people.

Q. Do you know whether their horses went in and out that alleyway? A. That is the only way they could get out; there was no other way. 30

ERNEST TRAUT, sworn for the defendant:

Direct-examination by Mr. Beldon:

Q. Where do you live, Mr. Traut? A. 79 Commerce Street.

Q. You are the son of William Traut who has been mentioned here this morning? A. Yes, sir.

Q. How long have you lived in Newark? A. Oh, fifty years off and on, I suppose. 40

Q. Your father used to own these premises now owned by Mr. Rand and Mr. Armm, didn't he? A. No, not Armm, Rand.

Q. That is true; and when he died he left his property to you in his Will? A. Yes.

Q. When did your father die? A. In '94, April.

10 Q. Were you familiar with the property that he left you before his death? A. Well, slightly.

Q. Had you lived in the neighborhood? A. I had for a time.

Q. What time? A. Well, before 1862, and then, I think, about three years after 1865.

Q. And that was all? A. That is all.

Q. Do you know anything about the alleyway, or the passageway in back? A. I heard tell of it.

Q. When? A. Oh, I suppose it must have been the time I was—between 1865 and 1868.

20 Q. How did you hear tell of it? A. I don't know, I think I heard my father speak of it.

Q. What did your father say about it? A. Well, the way I understood it, my father was going to build there one time, and he wasn't allowed; that is how I got it.

Q. Going to build on his own property, then? A. No, he was going to build over onto this alley.

30 Q. That is the alley across? A. No, the alley going out to the street.

Q. Did you ever hear your father say what rights, if any, he had in the property adjoining? A. He had none there, I guess.

Q. What? A. He had none there.

Q. When you came to sell this property to Mr. Rand what was the price agreed upon between you? A. \$1,500.

40 Q. And did you go with him to Mr. Freid? A. Yes, sir.

Q. To see about disposing of the right of way across? A. Yes, sir.

Q. And what was it Mr. Freid asked you for it?
A. He wanted \$500 for the privilege, to buy this privilege.

Q. And what agreement or understanding was made with regard to it? A. Well, I should have this \$500 off the sale, I take it, to give to Mr. Freid, and he settle it and give him a clear title.

Q. And you sold finally to Susskind, did you? 10
A. Yes, I sold to Susskind; well, he was his agent, anyhow.

Q. And how much did you get out of it? A. I got \$1,000.

Q. You got \$1,000 and left the alley part for them to settle, was that it? A. Yes, that is it.

Cross-examination by Mr. Bradner:

Q. Mr. Traut, how much did you say you agreed with Rand to sell the property for? A. \$1,500. 20

Q. That was your agreement, was it? A. Yes, sir.

Q. (Showing witness paper.) Is that your signature? A. I guess it is.

Q. Look that paper over, Mr. Traut. A. I have seen that so far.

Q. Can you say now it was \$1,500? A. Well, I might have made a mistake, but I think it was \$1,500.

Q. Isn't that the agreement that you made with Mr. Rand? A. Yes, it seems so. 30

Q. Doesn't that say \$1,400? A. Well, let it go at \$1,400, but I think it was \$1,500.

Q. Didn't you make the agreement to convey this property to Mr. Rand free and clear? A. Yes, sir.

Q. Did you ever carry out that agreement? A. I think I did.

Q. Did you ever convey the property to Mr. Rand? A. Oh, no, not to Mr.—well, I did to his agent. 40

Q. Never mind; you never conveyed it to him?
A. I did to his agent.

Q. You say that this man was his agent? A. Yes, sir.

Q. Didn't you agree to pay a commission to Mr. Susskind for selling this property for you? A. I did, and he was his agent also; he worked the thing all himself.

10 Q. Now, you have given some evidence about this alleyway. Did you go down to the office of Guild, Lum & Tamblin when Mr. Rand was negotiating to buy this property from you? A. I think so.

Q. Do you remember being there in the office when Mr. Collier, a member of that firm, asked you about this alleyway? A. Well, I was asked questions, but I don't know what I was asked.

20 Q. Didn't you say to Mr. Collier, in the presence of Mr. Rand, and Mr. Rand's son, that you didn't know anything at all about the alleyway? A. Well, I didn't know, only what I heard.

Q. You don't know anything about it? A. No, only what I heard.

Q. You never had been there to see the alleyway, or how it was used? A. Oh, I know that partly, how it was used, but I never seen any document to that effect, never heard tell of it.

30 Q. Then you admit, do you, that you told Mr. Collier that you didn't know anything about this alleyway? A. We went to Mr. Freid to find out about that.

Q. Did you tell Mr. Collier at that time that you didn't know anything about the alleyway? A. I don't know what I said.

Q. Your father died in 1894, didn't he? A. Yes, sir.

Q. And you owned the property then; you acquired title by his will? A. Yes.

40 Q. Did you put a tenant in there? A. There was tenants in it, yes.

Q. Was Mrs. Coleman, the colored woman, your tenant? A. I don't remember any such name.

Q. Was Mr. Sanders your tenant? A. You mean, I suppose, Mrs. Bruce.

Q. The colored woman? A. The colored woman.

Q. Was she your tenant? A. Yes, sir.

Q. While you owned the property you visited it, didn't you, sometimes, to collect your rent? A. I did.

Q. Did you ever see any horses go through that alleyway? A. I never see a horse there, not at that time, or any time. 10 10

Q. When your father died was there any stable in the rear of those houses? A. Not to this property.

Q. On the rear of 53 or 55? A. I don't know.

Q. Did you ever see any stable there? A. No, sir; never looked.

Q. Did you ever see any there? A. No, sir.

Recess. Recess. 20 10

Mr. Beldon: I find, upon recalling the testimony, that there is a matter of uncertainty which I left in the testimony of Mr. Knabe; I would like permission to recall him.

The Court: You may.

FREDERICK KNABE, recalled for the defendant: 30 10

Direct-examination by Mr. Beldon:

Q. Mr. Knabe, when were you first married? A. Oh, '73 or '74, I ain't certain.

Q. And at that time I think you said that you moved out of your stepfather's house; did you remain in the neighborhood, and if so, where? A. About five or six doors away from the property that is in dispute. 40 10

Q. Now, you stated also that you went to Con-

necticut, when was it that you went to Connecticut and how long were you there? A. I was away from Newark about three years.

Q. When was that? A. That was in 1878, until 1881.

Q. Then, as I understand you, you came back to your stepfather's house? A. Yes, sir.

10 Q. And went away from that next when you were married the second time? A. I was married the second time about eighteen or nineteen years ago.

Q. Yes, and you moved out of your stepfather's house then, and where did you move then? A. Broome Street.

Q. How near to the premises in question? A. About five or six floors.

20 Q. Then, excepting the time that you were in Connecticut, you have been familiar with the premises in question? A. Yes, sir.

Mr. Beldon: There is a matter also that I didn't know this witness knew.

The Court: You may ask him.

Q. Did you know of any stables on the rear of the premises 53 and 55? A. Yes, sir.

Q. During your ownership of the premises 53 and 55 were they there? A. Louis Mendel's.

30 Q. And afterwards Isaac Freid's? A. I don't know whether the stables were there when Isaac Freid owned it, but I know it was when Louis Mendel owned it.

Q. Were horses kept in them? A. Yes, sir.

Q. Was there any way for the horses to be taken out than across 51 and out through the alley? A. No, sir.

No cross-examination.

SAMUEL ARMM, sworn for the defendant:

Direct-examination by Mr. Beldon:

Q. Mr. Armm, you are the defendant in this case? A. Yes, sir.

Q. How long have you lived in Newark? A. Nineteen years.

Q. You are the present owner of the properties 53 and 55 Broome Street, are you? A. Yes, sir. 10

Q. And you know, Mr. Rand, the owner of 51? A. Yes, sir; I know him very well.

Q. How long have you been familiar with that property? A. Which, Mr. Rand's?

Q. Well, with all the three properties? A. Well, I am familiar since I bought it.

Q. Did you know anything about the property before you bought it? A. Well, I know it; I know it since I am in Broome Street. 20

Q. How long is that? A. Since nineteen years.

Q. Prior to the time that you bought the property did you know anything about an alleyway running into the side of 51 and across to 53 and 55? A. Yes, sir.

Q. How did you know of that alleyway? A. I know it because I used to pass, used to live—53 and 55 Broome used to live colored people, and Polish people, and I used to go through the alley because the front doors was closed, and I used to go through the alley to call them, to give them work, because they used to help me out, washing dishes and everything. 30

Q. Do you know whether or not they used that alley, did you ever see them use it? A. Yes, sir.

Q. Now, when was that? A. Since I am in the neighborhood first, nineteen years, always used to be; always they used to use that alley; 53 and 55 Broome was condemned from the city. 40

Q. What do you mean, was condemned? A.

There was several fires in one week, and then the fire Department made a complaint of it.

Q. You mean when the buildings were torn down? A. Yes, sir; was compelled to tear down those buildings.

Q. You say until that time? A. Until that time was six or seven years ago.

10 Q. Now, since you have owned the premises 53 and 55, and prior to the time of this dispute, that is, before the time of this dispute, did you use the alley at all? A. I used to pass sometimes.

Q. Going where? A. I used to go around there and back in the alley, since I started to dig the foundation there, started to build.

Q. Do you remember any particular occasions on which you went through? A. Well, I know, was because I paid for it.

20 Q. No, no, you don't understand me. Do you remember any times you went through, any special occasion? A. No, I can't tell you exactly; I know I passed with the surveyor.

Q. At any other time? A. My children used to pass always there.

30 Q. While 53 and 55 were vacant, what use did you have for the alley? A. At that time I didn't have any use at all, because went to work, and Mr. Bruce used to live there, the colored man, and he took some boards from those old houses and made a fence there, children should not make a noise there in the right of way, and he made a fence, and until I started to build that fence Mr. Rand himself took it away; when he fixed his house the fence was no more there; he took it apart himself.

Q. Yes, but until the time you built you had no occasion to use the alley particularly? A. No.

40 Q. Until you took the surveyor? A. Yes, sir.

Q. And anybody else through, did you say? A. Mine children used to pass always.

Q. Now, upon the day about which Mr. Rand has testified, you attempted to go through that alley, did you? A. Yes, sir.

Mr. Beldon: Now, if the Court please, I understand that the aggravation part of the assault is not insisted upon.

Q. You attempted to cross through for the purpose of going out through the alley? A. Yes, sir. 10

Cross-examination by Mr. Bradner:

Q. You went in there that day with some of your workmen, didn't you? A. Well, the builders; there was that time the surveyors, on a Saturday afternoon—no, before dinner.

Q. Wasn't that building all up there then? A. no, sir.

Q. Was it enclosed? A. No, all open yet; was working in it. 20

Q. Was the roof on? A. Yes, sir; the roof is the first thing to put on.

Q. The side walls were all up? A. Side walls all up; no doors in yet.

Q. And you went over on Rand's ground there? A. Yes, sir; I went on my premises.

Q. Did you break the gate down? A. Yes, sir; I done. 30

Q. And before that time you had never used the alley except to go around there and see those colored people? A. Sir?

Q. You had never used the alley before that, except to go through and go around and see those colored people at the back door? A. When?

Q. Didn't you say— A. Yes, I said that, not colored people, I used to use that alley to go to Polish people to hire them to work. 40

Q. Why didn't you go to the front door? A. It was closed.

Q. And you went around through this alleyway?

A. Yes, sir; everybody used to pass there.

Q. You own No. 57 also, don't you? A. No, sir; I was a tenant there about ten years in 57 Broome.

Q. Is there a fence on the line between 57 and 55? A. Sure.

Q. Been there all the time you were there? A. All the time was a fence.

10 Q. When you bought this 53 and 55 there was a fence on the line between 53 and 51, wasn't there?

A. There was no fence, only was a little bit of fence, common boards which I took off that house.

Q. There was a fence there, wasn't there? A. It was put up by Mr. Bruce.

Q. There was a fence there? A. From Mr. Bruce; just Mr. Bruce put it up, an old colored man.

20 Q. How long had that been there before you bought it? A. What; that fence?

Q. Yes. A. I won't say how long; about two years before I bought it.

Q. When did you buy from Mr. Freid? A. The same year when Mr. Rand bought of Traut; about a month later.

30 Q. What else was on the land besides the two small houses when you bought it? A. Was empty, idle ground, when Evongalisco had charge of that ground.

Q. He had mason's materials on there? A. Had a garden; everything there.

Q. Always been a garden in the back part? A. The back part always been a garden; yes.

Q. Always been a garden? A. Mr. Freid bought it; Mr. Freid took the stables away from there, and took those houses away after that; after the stables he took those houses away.

40 Q. How long did Louis Mendel own the property? A. I can't tell you.

Redirect-examination :

Q. Were there any buildings at all on 53 and 55 when you bought it? A. No, sir.

Q. The small houses had been removed? A. Had been removed from the Fire Department.

Mr. Beldon: I offer certified copies of the deeds in our chain of title, and the original deed from Mr. Freid to Mr. Armm.

10

Defendant rests.

AMELIA TRAUT, sworn for the plaintiff in rebuttal:

Direct-examination by Mr. Bradner:

Q. You are a daughter of Mr. Traut? A. Yes, sir. 20

Q. Do you know the property 51 Broome Street? A. Yes, sir.

Q. How long have you been familiar with that property? A. About fifty or fifty-one years; that is the front part, not the back part.

Q. The front part? A. Well, I saw the houses standing there.

Q. Were you ever in the back yard? A. Yes, sir. 30

Q. Do you remember when your father bought the property? A. Yes, sir; in 1867.

Q. There were three houses there, weren't there, when he bought it? A. Yes, sir.

Q. When he bought 51? A. Yes, sir.

Q. Was there an alleyway on the north side of 51 at that time? A. Yes, sir.

Q. Do you know whether there was a gate there? A. Yes, sir. 40

Q. What was there immediately behind the three houses? A. Well, a yard; we called it a yard.

Q. During the time that your father owned that property how was that yard used? A. How was it used?

Q. Yes. A. Well, people went through to go in the gardens; the gardens were by themselves; they went through to go in the gardens and go to the well; the children played in there.

10 Q. Well, do you know whether the people of 53 and 55 used the yard on your side, and your father's house, and whether the people in that house used the yard on the other side during the time he owned it? A. Well, the children used to go through; I don't know as the big people used it; but, as I understood, they had the right, but I never saw any papers; I understood they had the right to run around.

20 Q. Did you ever hear any dispute about the right to go through there between any of the parties? A. No, sir; I never heard it.

Q. Your father died in 1894? A. Yes, sir.

Q. Were you frequently at the property? A. Well, I was home there; at the time my father died I was in 77 Mercer Street.

Q. Did your father live in this house? A. He lived 91 Mercer Street.

30 Q. Did he ever live in 51 Broome Street? A. No, sir.

Q. From 91 Mercer Street could you see this property? A. Yes, sir; it was around the corner.

Q. It was right in the rear of 91 Mercer Street?

A. Yes, sir; right around the corner.

Q. Do you remember whether there were any stables back of this property? A. Not of 51, but, as they speak about it, 53 and 55, there were.

40 Q. You do remember it? A. I did afterwards; yes, sir; not at first.

Q. Didn't you make an affidavit in this case in the Court of Chancery? A. What?

Q. Didn't you make an affidavit in this matter of Rand and Armm in the Court of Chancery? A. When?

Q. Last July? A. In the Court?

Q. Yes. A. No, sir; never.

Q. At my office? A. Yes; at your office I did.

Q. At that time you didn't say anything about the stables, did you? A. I don't think I did, for I had forgotten all about it until I heard it mentioned to-day, then I remembered it. 10

Q. Hadn't you heard it mentioned before to-day, here in the court room? A. No, sir.

Q. Hadn't anybody said anything to you about it? A. No, sir; but I knew it was there, for I remember from our window they had horses there, but I had forgotten that.

Q. How did the horses go in and out there? A. I don't know that; I never noticed; I see them have the horses in the back yard. 20

Q. You never saw any horses go through this back yard, did you? A. No, sir; I wouldn't notice that, only I saw them beat the horses.

Q. Where were these stables; where the gardens used to be? A. Well, where 51 and 53 garden used to be.

Q. 53 and 55, you mean? A. 53 and 55; because the garden 51, father took for his place, 91 Mercer Street. 30

Q. Do you know whether there were any clothes posts or clothes lines across this yard; all the way across? A. I don't remember.

Q. This Mr. Knabe, a witness, is your stepbrother, isn't he? A. Yes, sir.

Cross-examination by Mr. Beldon:

Q. Miss Traut, in the affidavit which you made in Mr. Bradner's office, for use in the Court of Chancery, did you say this, "As far as I know the alleyway was not used for any other purpose than as a 40

means of going to and coming from the well?" A.
I think I did; I say it again.

Redirect-examination:

10 Q. That is, so long as you knew that alley was
never used for any other purpose than to go in and
out of that well? A. Not that; I—Well, children
ran around, and, as far as I know, big people were
allowed, but they didn't because they had their own
entrance to go in.

Q. They could go in and out their front door? A.
They could, but Mr. Rand's house they had the
alleyway.

S. LOUIS BECHER, sworn for the plaintiff in
rebuttal:

20 Direct-examination by Mr. Bradner:

Q. What is your occupation, Mr. Becher? A.
Tailor.

Q. Where do you live? A. 597-795 Bergen
Street.

Q. How long have you lived in Newark? A.
Since 1886, October.

30 Q. Do you know the property 51 Broome Street?
A. Yes, sir.

Q. Did you ever live there? A. Yes, sir.

Q. When? A. Well, I think it was between 1867
and 1868.

Q. How long did you live there? A. Well, about
a couple of years, I think, about, maybe a little over
two years.

Q. Who was your landlord? A. Mr. Traut.

40 Q. William Traut. At that time was there an
alleyway on the north side of 51 Broome Street?
A. Yes, sir.

Q. A gate there? A. Yes, sir.

Q. Do you recall whether there was a lock on it?

A. I don't remember a lock; I remember just an ordinary gate like, you know; not a lock with a key, I mean.

Q. Was it a gate or a door? A. A gate—well, what was the difference between a gate and a door? It was a door and a gate; a door you could go in and lock it, close it; but there was no lock on, a key, so far as I know.

Q. Well, what I mean is was it a solid door, or a gate made of separate pieces; open spaces? A. It was a gate like they generally got them on the side of a house. 10

Q. Now, immediately in the rear of the three houses what was there? A. In the rear of the three houses there was a space about—I think, about 12 or 15 feet wide before you come on the garden fence.

Q. Beyond that what was there? A. On where? 20

Q. Beyond the yard? A. There was nothing; not—only a well, between the second and third house.

Q. I mean beyond this 15 foot space, what was there, building, or garden or what? A. You mean in the yard?

Q. Yes, back; further back? A. Oh, in the garden, over the fence, you mean?

Q. Yes. A. There wasn't anything; not in my time; there was nothing else; not as I remember. 30

Q. Didn't the people each have a garden there? A. Oh, yes; a garden; yes, a garden.

Q. Was there, in your time, any stable on the premises? A. I never heard anything like that before.

Q. What use, while you were there, Mr. Becher, was made of this alleyway by the occupants of the different houses? A. This alleyway, I heard of it, as much as I remember, and I know they were talking they have a way to go over there, if they want to, but to my knowledge I haven't took notice of anybody going through there, because them neigh- 40

bors wasn't good friends, and they stayed by themselves, and as long as we lived there we stayed by ourselves; we only had the right to go on the well; otherwise we had nothing to do on the other side; but we had the right to go on the well to get our water that time.

10 Q. While you were there do you know whether your neighbors in the other two houses went through this little alleyway alongside your house?

A. Well, I couldn't say, sir; I never remember anybody go through; they might, but I don't remember; I always saw them go through the front.

20 Q. Did you ever hear any disputes about the right of going through there? A. No. I heard when I moved in that Mr. Brown and Mr. Beck were bad neighbors, and I went on the well once, and the old gentleman came out and say, "That bucket is broke." I didn't want to have any argument with them, and I went inside. They always found fault, you know; something was wrong, you know, and they had it fixed. I don't know who fixed it; I never paid no attention to it.

Q. Do you recall whether there were any clothes posts or clothes lines in the yard? A. I don't; no, sir; I couldn't remember; I couldn't hardly say.

30

No Cross-examination.

DIVERS COLEMAN, sworn for the plaintiff in rebuttal:

Direct-examination by Mr. Bradner:

Q. What is your occupation, Mr. Coleman? A. Police officer.

Q. In the City of Newark? A. City of Newark.

40 Q. Stationed at what precinct? A. Third.

Q. Do you know the property 51 Broome Street?
A. Yes, sir.

Q. How long have you known that property? A. Oh, for a number of years, twenty odd years.

Q. Your mother used to live there? A. Yes, sir.

Q. What is her name? A. Mrs. Bruce.

Q. She married a second time? A. Yes, sir.

Q. Do you remember when she used to live there?

A. I don't remember exactly; I couldn't remember exactly when she lived there.

Q. Do you know who her landlord was? A. No, I don't remember that either; I never paid the rent. 10

Q. Did you ever hear the name? A. I am not positive about the name; I think they rented of Traut; I am not positive of that.

Q. How long did your mother live at 51 Broome Street? A. Well, as near as I can recollect four or five years; something like that.

Q. Did you go to see her while she was there?

A. Every day; two or three times a day. 20

Q. Do you know whether there was an alleyway then on the north side? A. Yes, sir.

Q. A gate? A. There was a door to that alleyway.

Q. How was that fastened? A. Locked, and they had a key.

Q. How do you know it was locked? A. I know they had it locked, because we always had to go in the house and get a key; I had to take wood for her. 30

Q. Who had the key? A. My mother had a key, and the lady upstairs had a key, two keys.

Q. And when you went there with wood you had to go upstairs to get the key? A. Go and get the key because they kept it locked.

Q. Do you know whether anybody else went in there besides those who had the key? A. No, sir; not while she was there; nobody went there but my mother and the lady upstairs. 40

Q. What was there in back then? A. Had a

yard; there was a house, and then back ten or twelve feet there was a fence, and a garden back of that.

Q. And then next there were two other houses?

A. Yes; my mother lived first in 55, then moved in 51.

Q. Did you go there while she lived in 55? A. Every day, never missed a day, two or three times a day.

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Q. While she lived in 55 do you know anything about using this alleyway to go and see her? A. No, sir; I never used that alley; there was a hall through; I never used that alley; had no occasion to use the alley.

Q. While she lived in 55 did you ever go out in the back yard? A. I did; we had a nice yard there.

20

Q. Do you know anything about anybody going through that alleyway and out that alley, while your mother lived in 55? A. No, sir; she had no occasion to, there was a hall through 55.

Q. The same way in 53, wasn't there? A. I think so.

Q. Was there a well there then? A. No, we didn't use the well, we had hydrant water.

Q. While she lived there were there any stables on the land? A. No, sir; she had a garden back there, no stable there.

30

Cross-examination by Mr. Beldon:

Q. How long ago was it that your mother lived there? A. That I don't remember exactly; as near as I can remember I should judge fifteen or sixteen years, possibly a little longer; maybe not quite so long, something in that neighborhood.

Q. You are quite sure of that, are you? A. Why, I say I don't remember exactly when she did live there.

40

Q. Isn't it a fact she moved out only a few years ago? A. Oh, she moved out a few years ago.

Q. How long ago did your mother move out of 51? A. Five or six years ago, something like that.

Q. How long after she first moved there was it that you put this lock on the gate? A. I never put the lock on the gate; the lock was on the gate when she moved there.

Q. You made an affidavit for use in the Court of Chancery, didn't you for use in this case? A. I made an affidavit for some use, I don't know what. 10

Q. In that you referred to a well that used to be— A. There was a well there, but it wasn't used, not when she lived there.

Q. Do you know anything about how long the well had been closed up? A. No, sir; I don't.

PHILIP SANDERS, sworn for the plaintiff in rebuttal: 20

Direct-examination by Mr. Bradner:

Q. You live in Newark, Mr. Sanders? A. Yes, sir.

Q. Do you know the property at 51 Broome Street? A. Yes, sir.

Q. Did you ever live there? A. Yes, I lived there once.

Q. Were you living there when Mr. Rand bought it? A. Yes, sir. 30

Q. How long had you been living there? A. I was living there about thirteen months.

Q. Who was the tenant just before you, do you know? A. I guess a colored fellow; I am not sure; I went to Mr. Traut and I took the house from him.

Q. You got it from Mr. Traut? A. Yes, sir.

Q. Mr. Ernest Traut? A. Yes, sir.

Q. When you went there was there a door on this alleyway? A. Where? 40

Q. A door or gate at the alleyway? A. There was a gate; yes, sir.

Q. Was there any way of fastening the gate? A. Nobody fastened that gate.

Q. Was there any way of fastening that gate? A. Fastening?

Q. Yes, do you know what I mean? A. Yes, you mean the gate held shut.

10 Q. Yes. A. Yes, I find there was a place to keep him shut in my time.

Q. Well, how did you keep the gate shut? A. There was a lock, you know, a catch on.

Q. A catch? A. Yes.

Q. Was there any key? A. No—yes, there was a key, too, I remember there was a key, too that is right.

Q. During the time that you lived there who used the alleyway besides— A. Nobody used that.

20 Q. Your own family used it? A. My own family did; yes, sir.

Q. Nobody else? A. Nobody else; we kept the way—

Q. What did you have there immediately back of your house—right next to your house? A. Next to the house corner was a saloon.

Q. No, no, right behind your house did you have a garden, or yard, or not? A. There was a garden in the yard.

30 Q. Between your house and the next house, No. 53, what was there? A. There was an empty lot one side, and the other side was a saloon.

Q. Well, was there any way of getting through from your yard to the yard in 53? A. No, sir; there was a fence about 5½ feet high, and there was a garden there; I don't know who make that garden.

Q. Do you know when that fence was put up? A. I find the fence there.

40 Q. When you went there? A. Yes, sir; I find the fence there.

Q. Do you know whether anybody went through

from 53 to 55? A. Never so long as I was living there, I never saw anybody go through there.

Q. What was there on the rear of the lots 53 and 55 while you lived there? A. In that place where I was living?

Q. No, the next house. A. There was a garden there.

Q. Any stable there? A. I didn't see a stable there; I didn't see a mark of a stable there; it was a nice garden there. 10

Cross-examination by Mr. Beldon :

Q. In the lots next to you on the south there were no buildings at all, were there? A. One side was on the corner a saloon, on the other side was nothing.

Q. Which side was the saloon on? A. Towards Mercer Street. 20

Q. On the other side, I mean, away from Mercer Street, there were no buildings at all? A. No buildings at all.

DAVID LEVY, sworn for the plaintiff in rebuttal:

Direct-examination by Mr. Bradner :

Q. What is your business, Mr. Levy? A. Special officer. 30

Q. Of the Police Department of the City of Newark? A. Yes, sir.

Q. Do you know the property at 51 Broome Street? A. I know it by sight.

Q. How long have you known that property? A. Well, since I am here in Newark.

Q. How long has that been? A. About twelve years. 40

Q. Have you been stationed in that part of the City? A. Some times.

Q. Well, do you know whether there is an alleyway on the north side of that house? A. Well, I have always seen an alleyway there.

Q. What called your attention to it? A. Well, nothing, only because I pass there mostly every day; I live around the neighborhood.

Q. Do you know whether there was any gate there? A. I have always seen a door there, no gate at all.

Q. A door? A. A door.

Q. Have you ever seen anybody going in and out of that alleyway? A. No, sir; never noticed.

Q. You never noticed anybody? A. No.

No Cross-examination.

20 CARL RAND, sworn for the plaintiff in rebuttal:

Direct-examination by Mr. Bradner:

Q. You are a son of Max Rand? A. Yes, sir.

Q. When your father bought the property what fences were on the ground? A. There was a fence on the southerly line of our house in the yard 5 1-2 feet high.

30 Q. Have you lived there ever since your father moved in? A. Yes, sir.

Q. Was that fence afterwards taken down? A. It was taken down when Mr. Armm started to build.

Q. Who took it down? A. His workmen.

Q. When you took possession of the property was there any way of fastening this door or gate, at the entrance of the alleyway? A. Yes, sir; there was a lock, and we had a key, and we closed it.

40 Q. Did you lock it? A. Yes, sir.

Q. During the time that you have lived there who have used that alleyway? A. No one except our family.

Q. When was the fence taken down on the south-
erly side of your lot? A. When Mr. Armm started
to build.

Q. When was that? A. About two and a half
years ago.

Q. Before this occasion of the 17th of June who
had used, or attempted to use, that alleyway, out-
side of your own family? A. Nobody. 10

Q. How wide is the open space in this doorway,
Mr. Rand? A. The open space?

Q. Yes. A. At the door it is about two feet.

Q. Are there jambs on each side? A. Yes, sir.

Q. And the open space is about two feet? A.
Two feet; yes, sir.

Q. Were you present at a conversation in Mr.
Collier's office? A. Yes, sir.

Q. When Mr. Traut was there? A. Yes, sir. 20

Q. When something was said about the alleyway
up there? A. Yes, sir.

Q. On that occasion what did Mr. Traut say
about the alleyway? A. He said he didn't know
anything about an alleyway, didn't know anything
about it, it was free and clear.

Q. Who else was there at that time? A. Father
was there and Mr. Susskind.

No cross-examination.

30

MAX RAND, recalled for plaintiff in rebuttal:

Direct-examination by Mr. Bradner:

Mr. Bradner: I think Mr. Rand testified
this morning that this big building had been
put up over the alleyway; I am not quite
sure.

Mr. Beldon: You do not need to ask him, 40
we admit it.

The Court: Over so much of the 15-foot
strip as is in the rear of 53 and 55.

Mr. Bradner: That is admitted.

Mr. Beldon: Excepting a distance of 2 feet, but at that point the building is back about 2 feet from the line.

Q. Mr. Rand, when you bought the place and went there was there a fence on the south side of the lot? A. Yes, sir.

10 Q. Do you know who put it up? A. No, sir.

Q. Who took it down? A. Mr. Armm's working people.

Q. You didn't take it down? A. No, sir.

Q. Since you have been living on the premises, Mr. Rand, who has used the alleyway on the north side of your house? A. Nobody, only I and my family, that is all.

Q. Has the gate been fastened in any way? A. All the time since I am in this house.

20 Q. How do you fasten it? A. With a lock, I got a key.

Q. Were you present at a conversation between Mr. Collier, of the firm of Guild, Lum & Tamplyn, and Ernest Traut? A. Sure I was.

Q. When you were negotiating to buy this property? A. I was with Guild, Lum & Tamplyn the same time I bought the house; I gave them the searching.

30 Q. You had an agreement with Mr. Traut, didn't you, to buy the property? A. Yes, sir; I have an agreement.

Q. To be free and clear? A. Yes, sir.

Q. Now, at this time of this conversation did you hear anything said about the alleyway there? A. No, sir; nothing about it.

Q. Didn't you hear Mr. Collier ask Mr. Traut about this alleyway? A. Before the settlement, the day before, he send for Mr. Traut, and ask him, "You sell the place to Mr. Rand free and clear, I see a deed on the alleyway; you know something

40

about the alleyway?" He said, "I don't know nothing about it; I know my father left to me a Will, and I got the place free and clear, and I sell it free and clear."

Cross-examination by Mr. Beldon:

Q. This was the day before you settled for the property with Mr. Susskind, wasn't it, the conversation in Guild, Lum & Tamblyn's office? A. 10
 Why, Mr. Susskind, I was with Ernest Traut; Guild, Lum & Tamblyn send for Ernest Traut, send a letter to me and a letter to Ernest Traut; we have to come to his office before the settlement; and Mr. Guild & Lum tell Mr. Traut, "You sell the place to Mr. Rand"; he said, "Yes, sir." "You give him and agreement free and clear?" He said, "Yes, sir." They said, "You know something about the alley, something about the deed?" He said, "I 20
 know nothing about it." They said, "Did you search the place?" He said, "Never." They said, "What for?" He said, "My father give to me by Will free and clear, and I know nothing about the privilege, nothing about the alley."

Q. This was a day or two before you got your deed? A. No, no, I don't get a deed, a memorandum, an agreement.

Q. It was some time before you got your deed, then, was it, quite a while? A. Yes, I don't buy 30
 from him.

Q. Was it before or after you and he and Susskind went to see Freid? A. It was before.

Q. Since you have been living there have you ever seen Mr. Armm's son go through your property with a surveyor, coming from the alleyway? A. No, sir. 40

CARL RAND, recalled for the plaintiff in rebuttal:

Direct-examination by Mr. Bradner:

Q. Mr. Rand, did you examine the record of the deed of Joseph Bechler to Wendel Keeple? A. Yes, sir.

10 Q. And did you make a copy of the map annexed to the record? A. Yes, sir.

Q. And a copy also of the clause in the deed relating to the passageway? A. Yes, sir.

Q. (Showing witness a paper.) What is that paper? A. That is a copy of the map on the back of the deed.

Q. And what is the writing below? A. That is the language used in the deed.

20 Q. How much of the land marked "Keeple" is covered by the present building of Mr. Armm? A. All this except two feet here (indicating).

Q. All of what? A. All of this land.

Q. The whole land all the way through from Broome Street to the end of the lot? A. Yes, sir; except two feet.

Q. Mark on there in pencil where the door is in his building. A. (Witness marks on map.)

30 Q. Now, Mr. Rand, the door then in his building is on his own land? A. Yes, sir.

Q. The door does not open out on your fifteen feet? A. No, sir.

Mr. Bradner: I offer that paper in evidence.

Marked Exhibit P3.

Cross-examination by Mr. Beldon:

40 Q. You say you made this from what? A. From the deed, from the record.

Q. Where? A. In the Register's office.

Q. What deed? A. From Bechler to Keeple.

Q. Down here you copied what, do you say? A. That is the language used in the deed.

Q. In the Keeple deed? A. Yes, sir.

Q. Up here I see you have "Right of way 1851?"
A. I put that in myself.

Q. How did you make this copy? A. Made it myself with ink.

Q. By measurement or laying one paper over the other? A. By measurement, as near as I could. 10

Q. I don't suppose you are a regular draftsman?
A. Not regular; no, sir.

Said paper marked Exhibit P3.

Plaintiff rests.

DAVID ARMM, sworn for the defendant in rebuttal:

20

Direct-examination by Mr. Beldon:

Q. Where do you live? A. 53-55 Broome.

Q. You are the son of the defendant? A. I am.

Q. Since Mr. Rand has owned the property 55, have you ever gone through the alleyway and passageway to your property? A. I have.

Q. With whom? A. With surveyors.

Q. Did Mr. Rand see you? A. He did.

Q. Where was he? A. In the yard. 30

Q. Through which you went? A. Yes, sir.

Q. Did he say anything to you? A. Not at all.

Q. Was the gate locked when you went through?
A. No, sir.

Q. Did you ever go through on any other occasion? A. Perhaps once.

Q. Was he there then? A. I believe he was looking out of the window, if I am not mistaken.

Q. Do you know whether he saw you? A. He did. 40

Q. Did he say anything to you? A. Nothing.

No cross-examination.

Plaintiff rests.

Testimony closed.

10 Mr. Bradner: I think I am justified in asking the Court to limit this defense either to a right under the grant, or to a right by adverse use, if they want to go to the jury on that. I think they ought to stand on either one leg or the other, for this reason: If they ignore the grant altogether and claim that they have used this alleyway adversely and inconsistently with the grant, that would be a question of fact, perhaps, to go to the jury. I don't know of any evidence in the case that would be inconsistent with the grant, except the use by the horses, that is all, and I will ask your Honor to strike out the defense, justifying under an adverse use of this alleyway.

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The Court: I will decline to do so.

Plaintiff's counsel prays exception to the ruling of the Court, and the same is allowed and signed and sealed accordingly.

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WM. J. GUMMERE, [SEAL.],
C. J.

The Court: Tell me what was the name of the plaintiff's grantor?

Mr. Bradner: Susskind.

The Court: And who was his grantor?

Mr. Bradner: Ernest Traudt. I ask your Honor to strike out the defense claiming right of way, and justifying under a right of way acquired by the grant originally from Joseph Bechler.

40

The Court: I refuse your motion.

Plaintiff's counsel prays exception to the ruling of the Court, and the same is allowed, and signed and sealed accordingly.

WM. J. GUMMERE, [SEAL.],
C. J.

Counsel summed up.

Adjourned for the day.

10

NEW JERSEY SUPREME COURT.

MAX RAND	}	Tort.
vs.		
SAMUEL ARMM.		

20

Newark, N. J., April 26, 1906.

Continued pursuant to adjournment.

Appearances as before.

The Court charged the jury as follows:

GUMMERE, C. J.

Gentlemen of the Jury: The consideration 30
which I have been able to give this case since the
hour of adjournment yesterday afternoon has led
me to the conclusion that there is no controverted
fact in the case, the settlement of which by you
would determine to any extent the rights of the
parties to this litigation. The situation, as the
proofs have developed it, is this: In 1851 a man
named Joseph Bechler, or Beihler, was the owner
of Nos. 51, 53 and 55 Broome Street, in Newark, 40
adjoining lots; those lots were, each of them, 100
feet deep. Beihler, being the owner, conveyed the
middle lot, No. 53, to a man named Wendell Keeple

by proper deed of conveyance. In that deed he inserted this provision: "The said Joseph Beihler agrees that the said Keeple, his heirs and assigns shall have the free use of a passageway three feet wide, running from Broome Street 39 feet along the north end of the said Joseph Beihler's house." Evidently, from that clause in the deed, and from the proofs in the case, Joseph Beihler was occupying one of the three houses, and that was the house alongside of which this alley ran. The proofs show that that was No. 51. So you will see that, by the deed made by Joseph Biehler to Wendell Keeple, Beihler agreed that Keeple and his heirs and assigns should have the use of the alley running by his residence. The deed goes on to say also, "The said Joseph Beihler agrees and reserves 15 feet in depth along the rear of the house he now occupies, and the two houses adjoining on the south," that is the houses on Nos. 53 and 55, "to be used in common by himself, his heirs and assigns, with Wendell Keeple and Conrad Beihler, their heirs and assigns forever." The legal effect of that provision in that deed by Beihler to Keeple was this: he granted to Keeple a right to use the alleyway for the purpose of passing backward and forward from No. 55, the rear of No. 55, to the public street; he also granted to Keeple the right of using a strip 15 feet wide in the rear of his, Beihler's residence, for the purpose of enabling Keeple to get from No. 53 to the rear of the three-foot alley, which was on the north side of Beihler's residence. Whether that provision with relation to the 15-foot strip granted anything more or not, is not material in this case; it at least granted to Keeple the right to pass across the rear of No. 51 to get to the three-foot alley, and so go on out to the street. You will see, too, that this deed reserves to Beihler, the man who made it, the right to use fifteen feet of the lot which he conveyed to Keeple, that is, No. 53. The scheme was to re-

serve a strip fifteen feet wide running across the whole of these three lots, just in the rear of the houses, for the use of Keeple and himself, and another man, whose interest does not appear. Now, so far as he granted to Keeple the right to use this, he was charging the property which he occupied, No. 51, where he lived, and No. 55, the rear property. He was granting to Keeple something more than the ownership of lot No. 53; he was granting him a use in the property which he still occupied, and, in the grant of No. 53, he was keeping out something for himself. That is, he said by this deed, "Keeple, I grant you a right to pass over this fifteen-foot strip on my home lot No. 51, and also on No. 55, and I reserve to myself the right to pass across a fifteen-foot strip on your lot No. 53. "Now, the purpose for which Mr. Beihler reserved to himself the right to pass backward and forward across that strip on No. 53 does not appear in the deed; but we have it from the proofs that there was a well, either on that lot No. 53 or perhaps on lot No. 55, which was used in common by the occupants of all three of these lots, and it may be that it was for the purpose of preserving the benefit of that well to the different owners of the lots that this provision was put in. The provision which I have read was put in the deed, not only for the benefit of Mr. Keeple, and for the benefit of Mr. Beihler, but for those who should come after them in the ownership of the property. In other words, it was put in for the benefit of the property, and the man who bought the property bought it with that benefit attached to it.

Shortly after the grant to Keeple Beihler conveyed his home lot, No. 51, the lot where the alley was, to Mr. Holzhauser; and he made that conveyance before the deed which he made to Keeple had been put on record; and, unless Holzhauser knew of

the conveyance to Keeple, and knew what was in it, he was taking lot No. 1 free from this servitude, as we lawyers call it. But I think the evidence shows that he knew about it, notwithstanding the deed was not on record, because his son testifies that while he was a boy living there with his father, those who owned lot No. 53 used the alleyway, and that his father's family used the fifteen-foot strip for the purpose of going backwards and forwards to the well. Now, Mr. Beihler having charged No. 51 with that servitude in favor of No. 53—that is, having granted to the owner of No. 53 an easement—a way across the back of lot No. 51, and so on through the alleyway, that easement descended to the different purchasers as they bought No. 53, unless something was done between 1851 and the time of bringing this suit to wipe it out. About six years, or five years, after Mr. Keeple bought No. 53, Mr. Beihler sold No. 55 to a man named Beck, and some years after Beck purchased No. 55 he purchased No. 53 from a gentleman whom in the meantime had acquired it; and, as the owner of those two properties, you see, he became entitled, as an appurtenance to these two properties, to the easement across lot No. 15, across that fifteen-foot strip, and down through the alley; that is, the right to pass backward and forward from his own property, across lot No. 51 and through the side alley out to the street, and back again, when he wanted to.

Now, the claim on the part of the plaintiff, who, ~~not so in pleadings or argument~~, is the present owner of lot No. 51, is that that whole easement was wiped out, when Mr. Beck, as the testimony shows, being the owner of these two properties, refused to permit the people who lived in No. 51 any longer to come on No. 55, or No. 53. You will remember from the testimony that, after the well ran dry, or after the cat fell in the well, perhaps, that well

was closed; so far as it had been used for a water
 supply it was abandoned; the aqueduct water was
 put in the buildings, in No. 51 at least, and the well
 finally filled up; and after that Mr. Beck said to the
 people living in No. 51, "You can't come on my
 property any more"; his idea apparently being that
 the right to go on No. 51 and No. 53, which had
 been reserved in this deed to Keeple, was limited
 to the purpose of getting water, and when the abil- 10
 ity to get water was terminated, the right to go
 backwards and forwards was terminated; and on
 that theory, he said to the occupants of No. 51,
 "Keep off my lot hereafter." But although he
 said that, and enforced what he said by acts, when
 it was necessary, he did not abandon his right to
 pass over No. 51. He continued to exercise that
 right, although he refused to recognize the right of
 the occupants of No. 51 to come on his land. So 20
 there was no abandonment by Mr. Beck of his right
 to use this way; and his conduct in refusing to
 recognize the right of the occupant of No. 51 to
 come on his land, does not operate to extinguish the
 easement which, as owner of No. 53, he had in lot
 51. He, as I say, continued to use that way; the
 amount of the user is immaterial; he used it, appar-
 ently, when he desired; when the members of his
 family, or the occupants of his property, desired, 30
 they used it. Now, it is said that some years ago
 a colored woman, Mrs. Bruce, I think her name was,
 who was living in No. 51, assumed the right to
 stop the user of that way by occupants of No. 53;
 that the alleyway on the side of No. 51 opened into
 the street; that there was a door there, and that she
 kept that door locked, and kept the key, so it could
 not be used by anybody except herself or those
 whom she permitted to use it. Well, without stop- 40
 ping to consider whether she had any right to do
 that, or whether that conduct could be effective as
 against the owner of No. 53, it seems to me that the

proof is immaterial in determining the rights of the parties, for this reason: This right of way, or right of passage, was created by deed, and it continues to exist, as a matter of law, until it is terminated either by the acts of the parties, or by the act of one of the parties. I have already said that Mr. Beck did nothing to terminate it; so far as the case shows, nobody who holds title from Mr. Beck has done anything to terminate it. The only way the owner of No. 51 could terminate it against the will of the owner of No. 53, was by doing something which was in defiance of the right of the owner of No. 53 to enjoy the way; doing something, for instance, such as this colored woman did, putting up a barrier which prevented its use. And that condition of affairs must continue for fully twenty years, in order to wipe out the right of way; and the evidence in this case is, as I recall the testimony of the colored policeman, that his mother had only lived on this block, I think in No. 53, for a while, or No. 55, and afterwards in No. 51 for a period beginning some sixteen years ago; he did not know just how long, perhaps a little longer—perhaps a little shorter; that she originally lived in No. 53 or No. 55, and afterwards moved into No. 51, but he did not know when she moved into No. 51. In order to show that there was an extinguishment of this easement, the burden rested upon the plaintiff to show that there had been such an interruption, such a defiance of the rights of the owner of the easement as I have mentioned, and that that continued for twenty years; that for twenty years the owner of No. 53 had been deprived, by the act of the owner of No. 51, or those representing him from enjoying this easement, and that has not been shown. The case presents a pure question of law on the admitted facts; and on those facts I charge you that the defendant Armm, who is the owner of Nos. 53 and 55, holds that property with

the right to use this way over No. 51; and that, so far as the proofs go, nothing has occurred to determine that right, since it was originally created by Mr. Beihler in 1851. That being so, the result is that Mr. Armm was justified, when the plaintiff barred that gate against him, which prevented him from going through the alley, in using such force to remove the barrier as the occasion required, and he consequently is entitled to your verdict. Gentlemen of the jury, you may render a verdict in favor of the defendant, without leaving your seats.

10

Plaintiff's counsel prays exception to the charge of the Court directing a verdict in favor of the defendant, and the same is allowed, and signed and sealed accordingly.

WM. S. GUMMERE, [SEAL.]

C. J.

20

Mr. Bradner: I request the Court to instruct the jury that the act of Mr. Armm in erecting upon lots Nos. 53 and 55 a building which entirely covered both lots, operated to extinguish the right of way over lot No. 51, which was appurtenant to lot No. 53.

The Court declined to instruct the jury as requested.

Plaintiff's counsel prays exception to the refusal of the Court to instruct the jury as requested, and the same is allowed, and signed and sealed accordingly.

30

WM. S. GUMMERE, [SEAL.]

C. J.

The Court: On the contrary I instruct the jury that the erection of that building by Mr. Armm did not extinguish the easement.

Plaintiff's counsel prays exception to this instruction of the Court, and the same is allowed, and signed and sealed accordingly.

40

WM. S. GUMMERE, [SEAL.]

C. J.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	<p>MAX RAND, Plaintiff-in-Error,</p> <p>vs.</p> <p>SAMUEL ARMM, Defendant-in-Error.</p>	<p>In Error to Su- preme Court.</p> <p>Assignment of Errors.</p>
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20 Afterwards, that is to say, on the twenty-first day of July in the year nineteen hundred and six, in the Court of Errors and Appeals in the last resort in all causes comes the said Max Rand by Frank E. Bradner, his attorney, and says that in the record and proceedings aforesaid and also in the matters recited and contained in said bill of exceptions, and also in the giving of the verdict and judgment aforesaid there is manifest error in this, to wit—

1. Because the Court refused the motion of the plaintiff to strike out the defense justifying under an adverse use of the alleyway.
- 30 2. Because the Court refused to strike out the defense claiming right of way and justifying under a right of way acquired by grant originally from Joseph Bechler.
3. Because the Court directed a verdict in favor of the defendant below.
- 40 4. Because the Court refused to charge the jury as requested by the plaintiff, that the act of the defendant in erecting upon lots Numbers 53 and 55 a building which entirely covered both lots operat~~ed~~

to extinguish the right of way over lot Number 51 which was appurtenant to lot Number 53.

5. Because the Court instructed the jury that the erection of the building by the defendant did not extinguish the easement.

6. Because the pleadings filed by the defendant are insufficient in law to maintain any justification for the trespasses alleged in the declaration, and the plaintiff in error is entitled to judgment upon the pleadings in the cause. 10

Wherefore, and for other errors appearing in the record and proceedings aforesaid the said Max Rand prays that the judgment may be reversed, annulled and for nothing holden and that he may be restored to all things he has lost on account of said judgment, and that the said Samuel Armm, the defendant in error, may rejoin to the said errors, etc. 20

FRANK E. BRADNER,
Attorney for and of Counsel
with Plaintiff-in-Error.
(Joinder in Error.)

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Stipulation.NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	MAX RAND, Plaintiff-in-Error, vs. SAMUEL ARMM, Defendant-in-Error.	}	In Tort.
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20 It is hereby stipulated and agreed that the statements of plaintiff's title and of defendant's title annexed hereto, may be printed in the printed case to be used on the writ of error in the above stated cause, instead of printing the several deeds of conveyance and other instruments of title, which were used in evidence at the trial of said cause.

Dated October 16th, 1906.

FRANK E. BRADNER,
 Attorney for Plaintiff-in-Error.

30 SAMUEL W. BELDON,
 Attorney of Defendant-in-Error.

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Statement of Plaintiff's Title.

NEW JERSEY SUPREME COURT.

MAX RAND

vs.

SAMUEL ARMM.

In Tort.

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The title of the plaintiff is derived from Joseph Beihler, the former owner of the premises of both the plaintiff and defendant by the following conveyances:

1. Warranty deed made by Joseph Beihler and wife to Urban Holzhauer, dated September 22, 1851, acknowledged the same day and recorded September 30th, 1851 in Book T7 of Deeds, page 36. This deed conveyed premises fronting on Broome Street and immediately adjoining on the north the premises of the defendant and described as follows: BEGINNING on the Westerly line of Broome Street 25 Feet Southerly from the corner formed by the S. line of Mercer Street with said line of Broome St.; thence (1) running N. $67\frac{1}{2}$ Deg. W. 100 ft.; thence (2) S. $22\frac{1}{2}$ deg.; W. 17 ft. 4 in.; thence (3) S. $67\frac{1}{2}$ deg.; E. 100 ft. to Broome St.; thence (4) N. $22\frac{1}{2}$ deg. E. 17 ft. 4 in. to the place of beginning. 20
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2. Warranty deed made by Urban Holzhauer, no wife mentioned, to Christian Ziller, dated January 5th, 1867, acknowledged same day, recorded same day in book H13 of Deeds, page 101, and conveys the same premises. 40
3. Warranty deed made by Christian Ziller and wife to William Traudt, dated June 26th, 1867,

acknowledged same day and recorded July 1st, 1867, in Book L13 of Deeds, page 386, and conveys the same premises.

4. The last Will and Testament of William Traudt, who died May 4th, 1894, and the Will was admitted to probate May 16th, 1894. The testator devises to his son Ernest Traudt, the house and lot
 10 known as No. 51 Broome Street, Newark, New Jersey, said lot of land being 17 ft. 4 in. front on Broome Street and about 57 feet in depth.

The plaintiff's property is known as No. 51 Broome Street.

5. A bargain and sale deed made by Ernest Traudt, widower, to Louis Susskind, dated March 7th, 1902, acknowledged same day, and recorded
 20 same day in Book F35 of Deeds on page 56, and recites a consideration of Fifteen hundred dollars, and conveys the premises above described, and recites the same as being the same premises devised to the grantor by the last Will and Testament of William Traudt.

6. Bargain and sale deed made by Louis Susskind unmarried, to Max Rand, dated March 24th, 1902, acknowledged same day and recorded same
 30 day in Book B35 of Deeds on page 551 &c., and recites a consideration of One hundred and twenty-five dollars; and conveys the premises described in the declaration in the above stated cause, and then recites as follows:

“The foregoing description was prepared from an actual survey made by Lehlbach Brothers in March, 1902.” The conveyance then contains a clause as follows: “Together with the right to use that portion of the premises conveyed to Wendel and Kee-
 40 bel by deed dated April 30th, 1851, and recorded in Book U7 of Deeds on pages 304 etc., and to John Beck by deed dated Dec. 30th, 1856, and recorded in Book B10 pages 111 etc., reserved in said deeds.”

Statement of Defendant's Title.

NEW JERSEY SUPREME COURT.

MAX RAND

vs.

SAMUEL ARMM.

In Tort.

10

The title of the defendant is derived from Joseph Beihler, the former owner of the premises of both the plaintiff and the defendant, by the following conveyances:

1. Warranty deed made by Joseph Beihler and wife to Wendelen Keebel, dated April 30, 1851, recorded in Essex County Clerk's Office November 21, 1851 in Book U7 of Deeds, pages 304 to 306. 20

This deed conveys premises fronting on Broome Street and immediately adjoining on the south, premises of plaintiff, described as follows:

Beginning on the westerly side of Broome Street 44 feet 4 inches from the corner formed by the southerly line of Mercer Street with said line of Broome Street, thence (1) running N. $67\frac{1}{2}$ degrees W. 39 feet; thence (2) N. $22\frac{1}{2}$ degrees E. 2 feet; thence (3) N. $67\frac{1}{2}$ degrees W. 61 feet; thence (4) S. $22\frac{1}{2}$ degrees W. 17 feet 4 inches; thence (5) S. $67\frac{1}{2}$ degrees E. 61 feet; thence (6) S. $22\frac{1}{2}$ degrees W. 1 foot; thence (7) S. $67\frac{1}{2}$ degrees E. 39 feet to Broome Street; thence (8) N. $22\frac{1}{2}$ degrees E. 17 feet 4 inches to the place of Beginning. 30

The deed then continues, "Also the said Joseph Beihler agrees that the said Keebel, his heirs and assigns, shall have the free use of a passageway 3 feet wide running from Broome Street 39 feet along the north end of said Joseph Beihler house, also the 40

said Joseph Beihler agrees and reserves 15 feet in depth along the rear of the house he now occupies and the two houses adjoining on the south (as will appear by a map on the back of this indenture to be recorded herewith) to be used in common by himself, his heirs and assigns, with Wendelen Keebel and Conrad Beihler, their heirs and assigns forever.

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2. Administrator's deed made by Joseph Beihler, administrator of Wendelen Keebel, deceased, to August Lang, dated June 14, 1859, recorded in the Register's Office of the County of Essex February 14, 1860 in Book A11 of deeds pages 16 and 17.

This deed conveys without covenant and without mention of the alley or passageway of premises conveyed in Exhibit D5.

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3. Warranty Deed made by August Lang to John Beck, dated August 8, 1860, recorded in said Register's Office April 9, 1867 in Book K13 of Deeds, pages 53 to 55.

This deed conveys the same premises described in Exhibits D5 and D4 and continues after the description as follows: "Subject to the reservations and agreement for passageway and alley contained in the deed from Joseph Beihler and wife to Wendelen Keebel, recorded in Book U7 of Deeds for Essex, page 304 and omitted in the deed to the party of the first part."

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4. Warranty Deed made by Joseph Beihler and wife to John Beck, dated December 30, 1856, recorded in said Essex County Clerk's Office January 5, 1857 in Book B10 of Deeds, pages 311 to 313.

This deed conveys premises immediately adjoining on the south, the premises described in Exhibits D4, D5 and D6, described as follows:

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Beginning on the westerly side of Broome Street 60 feet 8 inches from the corner formed by the south-

erly line of Mercer Street with said line of Broome Street; thence (1) running N. $67\frac{1}{2}$ degrees W. 39 feet; thence (2) N. $22\frac{1}{2}$ degrees E. 1 foot; thence (3) N. $67\frac{1}{2}$ degrees W. 61 feet; thence (4) S. $22\frac{1}{2}$ degrees W. 17 feet 4 inches; thence (5) S. $67\frac{1}{2}$ degrees E. 100 feet to Broome Street; thence (6) N. $22\frac{1}{2}$ degrees E. 16 feet 4 inches to the place of beginning.

The deed then continues, "Also the said Joseph Beihler agrees that the said John Beck, his heirs and assigns, shall have the free use of a passageway 3 feet wide running from Broome Street 39 feet along the north end of said Joseph Beihler's house, also the said Joseph Beihler agrees and reserves 15 feet in depth along the rear of the house he now occupies and the two houses adjoining of the south (as will appear by a map below of this indenture to be recorded herewith) to be used in common by himself, his heirs and assigns, with Wendelen Keebel and John Beck, their heirs and assigns forever."

5. Warranty Deed made by John Beck to Linna Mendel, dated December 30, 1891, recorded in said Register's Office December 30, 1891 in Book M36 of Deeds, pages 521 and 522.

This deed conveys by a single description the premises described in Exhibits D4, D5 and D6 and the premises described in D3.

After the description the deed continues, "Together with the free use of the passageway or alley 3 feet wide running from Broome Street 39 feet along the northerly line of the house on the premises now belonging to John Traut; thence southerly along the rear of said house 15 feet in width about 16 feet to the northerly line of the premises above described."

6. Warranty Deed made by Linna Mendel and husband to Isaac Fried, dated August 1, 1893, re-

corded in said Register's Office August 2, 1893 in Book X27 of Deeds, pages 73 and 74.

This deed conveys the same premises described in Exhibit D2 and contains the same language with regard to the passageway or alley.

7. Warranty Deed made by Isaac Fried and wife to Samuel Armm, dated May 6, 1902, recorded in
10 said Register's Office May 6, 1902 in Book E35 of Deeds, pages 528 and 529.

This deed conveys the premises described in Exhibit D1 and contains the same language with regard to the passageway or alley.

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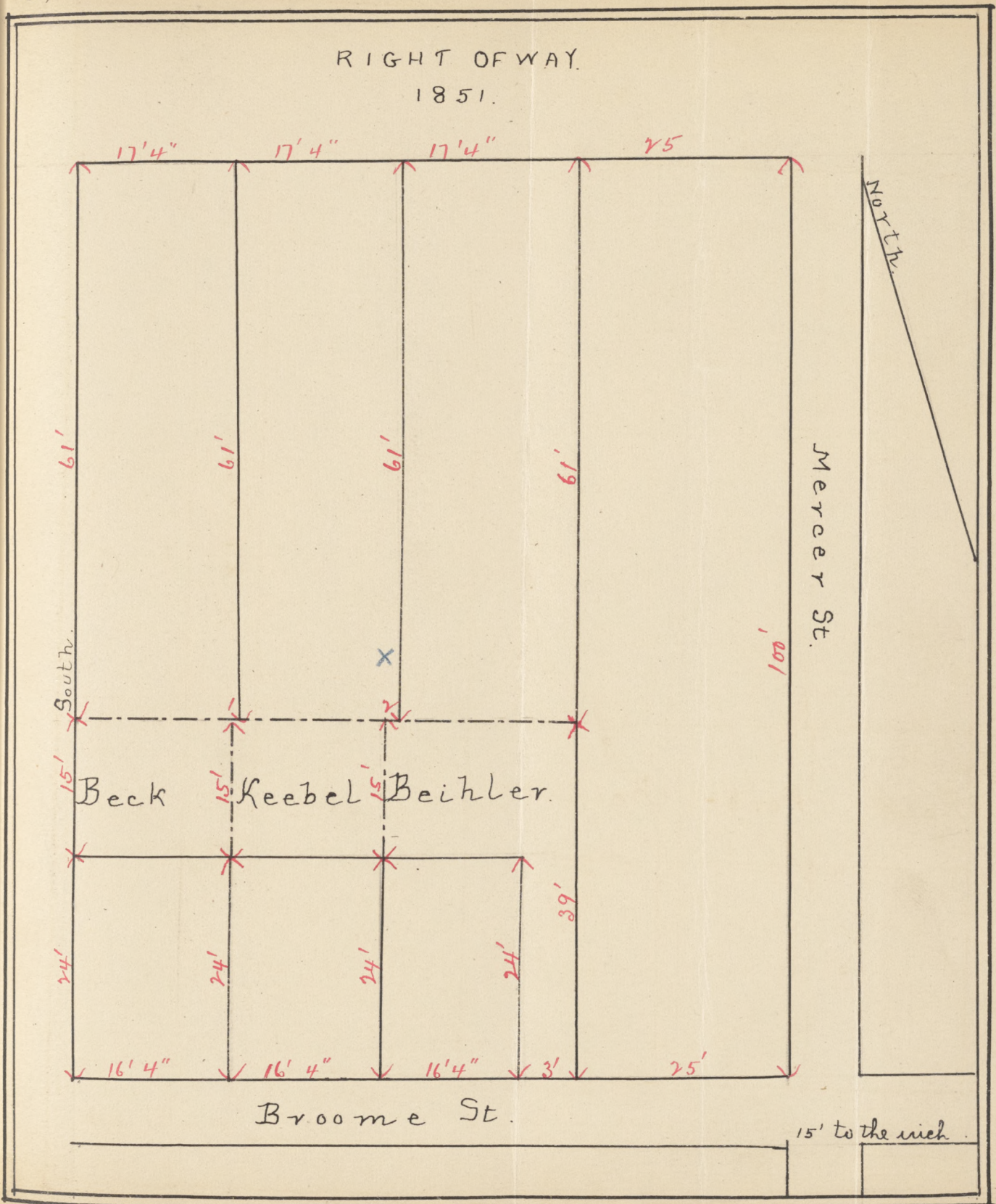
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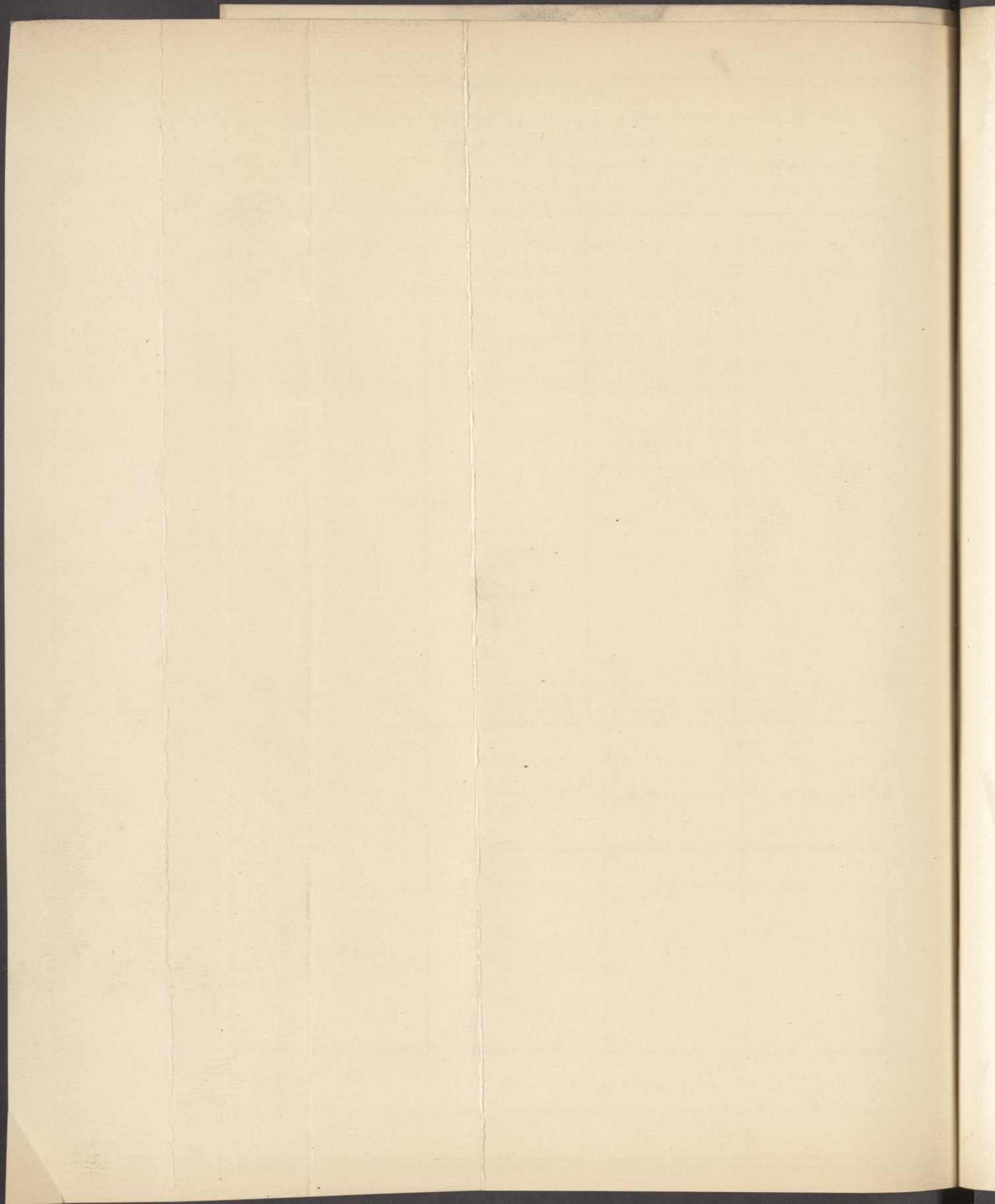
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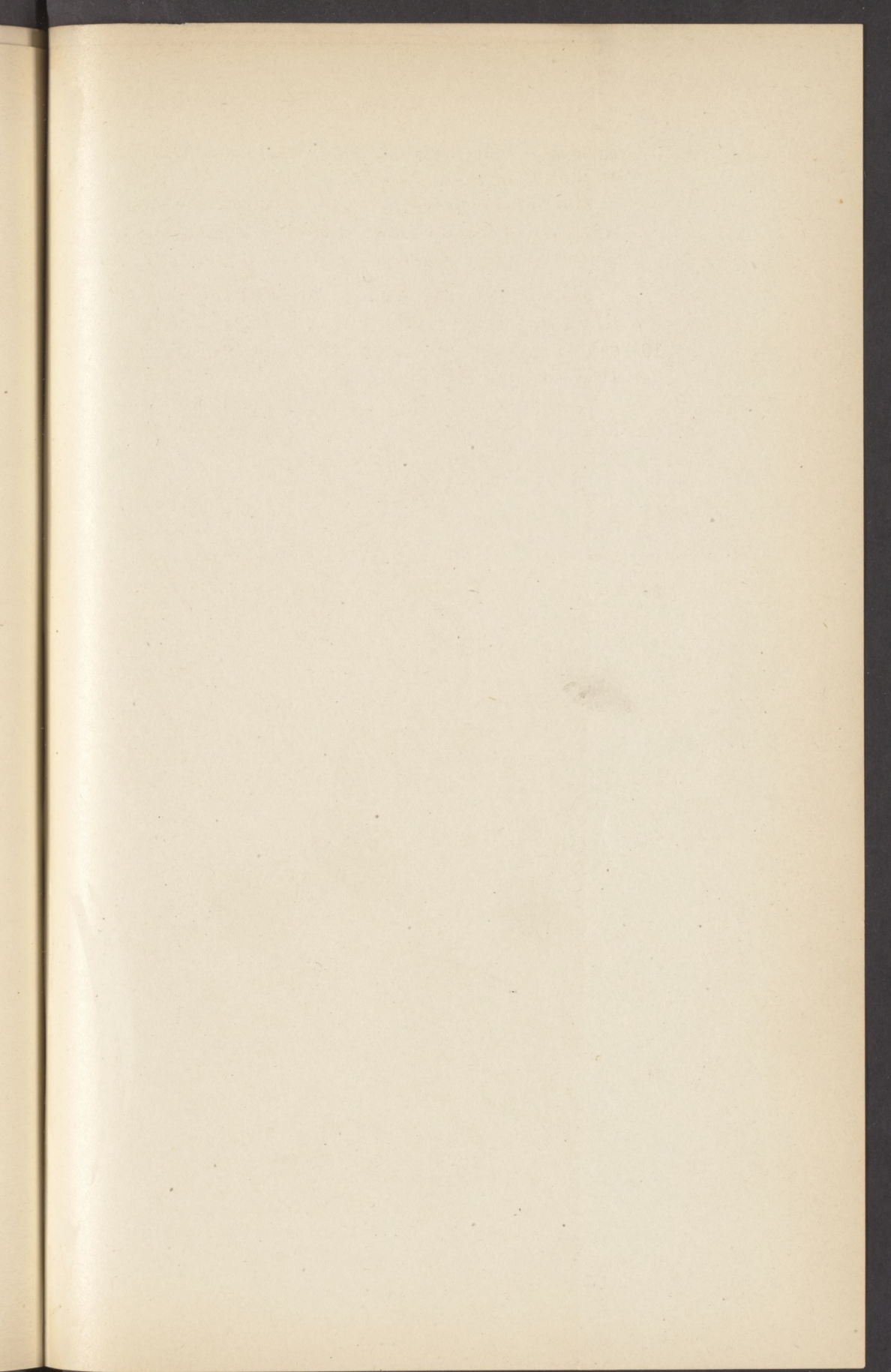
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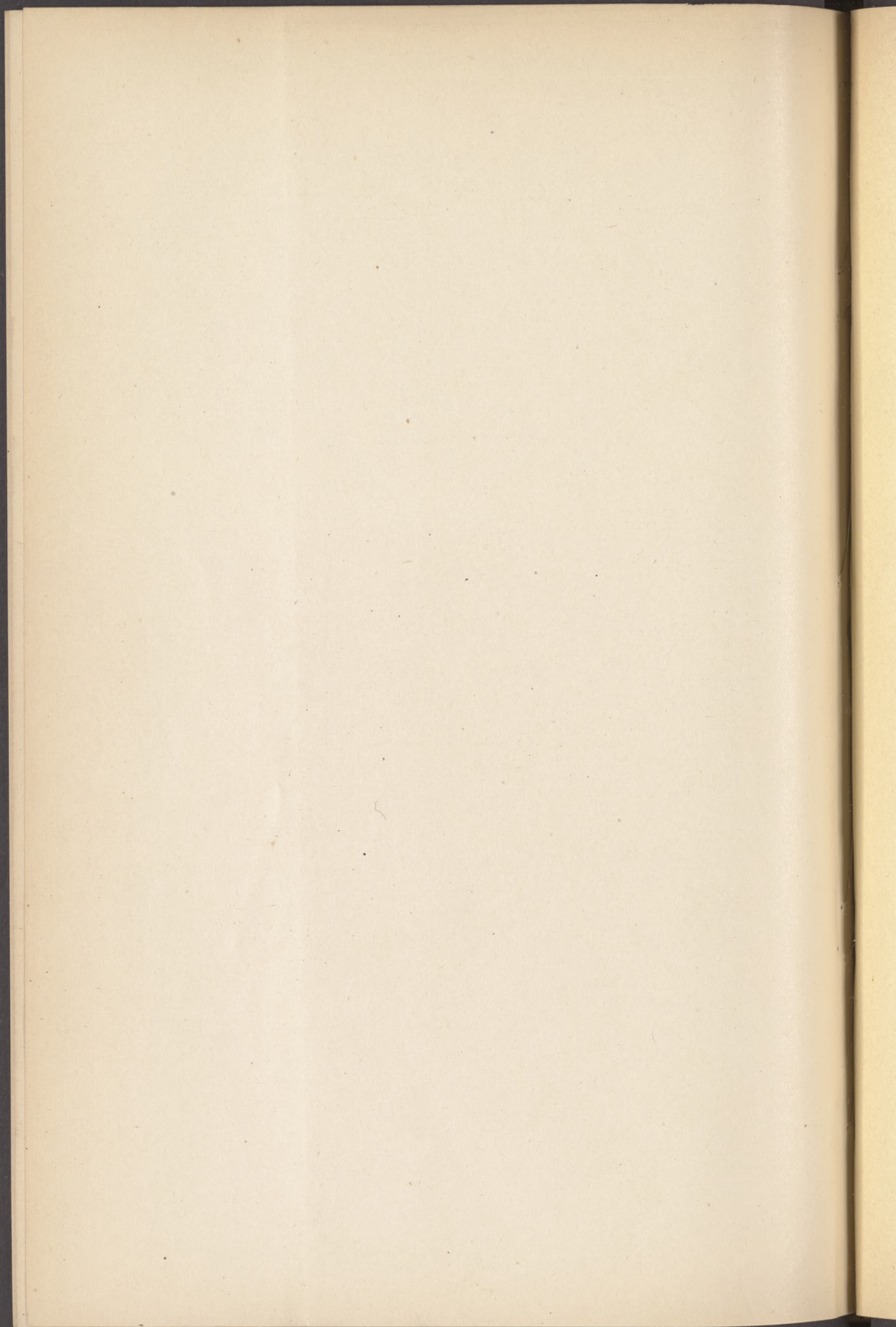
RIGHT OF WAY.

1851.









Madison County Court Book

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