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*Notice of Appeal.***NOTICE OF APPEAL**

Filed March 12, 1918.

10

NEW JERSEY SUPREME COURT.

 PIETRO IMBENINATO,
*Respondent,**vs.*

MAX MENDEL,

Appellant.

*Notice
of Appeal.*

20

*To Anthony R. Finelli, Esq.,
Attorney of Respondent.*

SIR: Take notice that the defendant appeals to
the Court of Errors and Appeals from the whole
of the judgment entered in this cause.

CHARLES HOOD,
Attorney for Appellant.

30

Dated March 8th, 1918.

40

Grounds of Appeal.

3. Because the Court erred in denying the defendant's motion for a direction of the verdict in favor of the defendant at the close of defendant's case.

4. Because the verdict was contrary to the weight of the evidence. 10

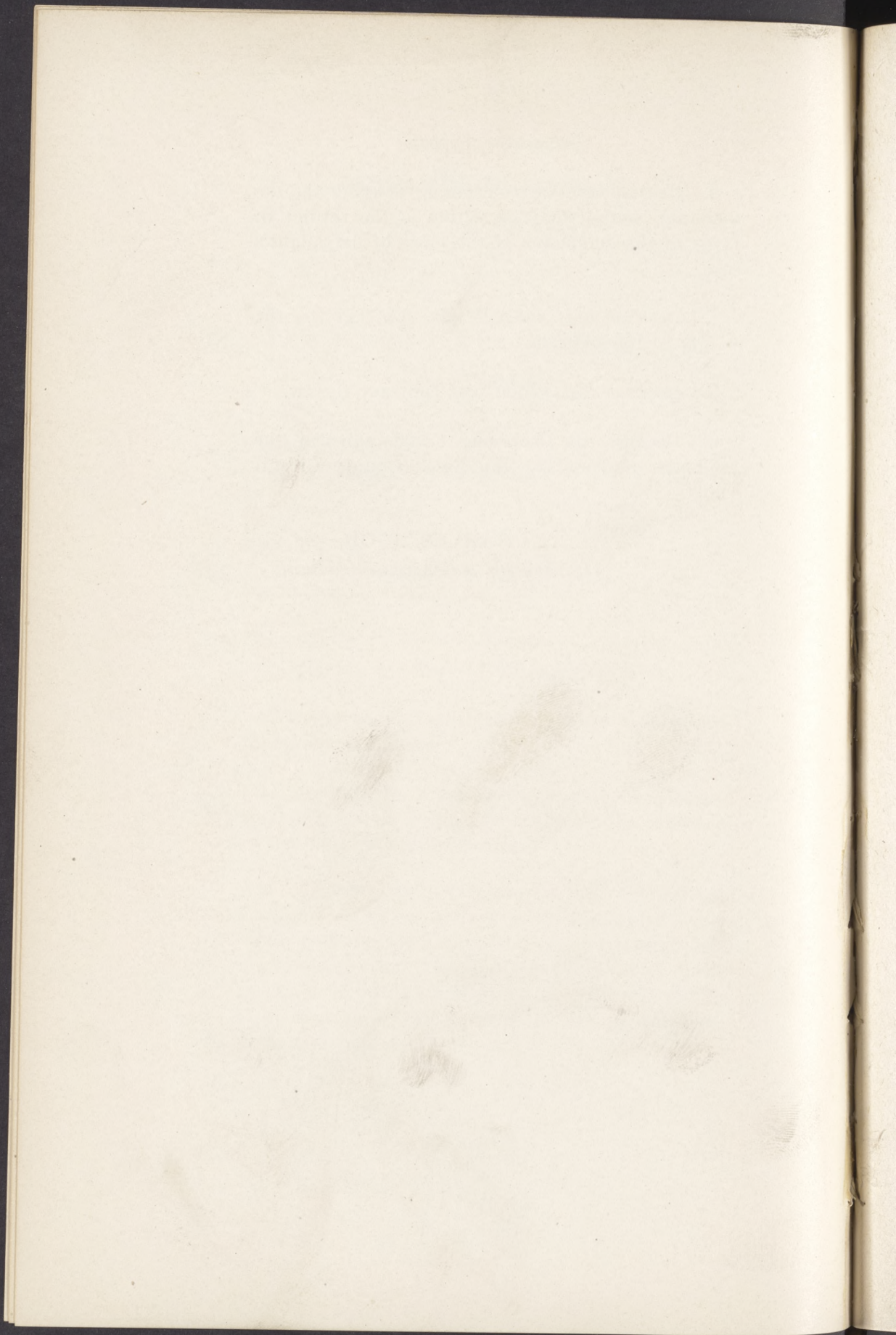
5. Because the verdict was contrary to law.

6. Because the Supreme Court affirmed the judgment rendered by the Essex County Circuit Court.

CHARLES HOOD,
Attorney for Defendant-Appellant. 20

30

40



JUDGMENT RECORD.

Essex County Circuit Court.

PIETRO IMBENINATO,
Plaintiff,
vs.
MAX MENDEL,
Defendant.

On Appeal.
Judgment Record.

10

Max Mendl, the defendant in this cause, was summoned to answer unto Pietro Imbeninato in an Action at Law. In Ejectment, upon the following complaint: 20

Plaintiff, who resides at No. 47 Lock street, in the City of Newark, County of Essex and State of New Jersey, demands of the defendant herein the possession of all that certain tract of land, with the appurtenances, situated in the City of Newark, in said County and State, and described as follows: 30

Beginning on the westerly side of Lock street 100 feet south 28 degrees west from its intersection with the southerly line of Inness street, which streets are particularly designated on a map of the property called Inness place in the City of Newark, made by Francis W. Brimley, surveyor, said beginning point being also distant southerly about 40

Answer.

80 feet from the present southerly line of Central avenue; thence running (1) along Lock street south 28 degrees west 18 feet in width; thence (2) extending from Lock street by lines parallel with Inness street north 62 degrees 40 minutes west 100 feet in depth, carrying the said width of 18 feet along the whole of said depth and being the north-
 10 erly portion of lot No. 95 on the aforesaid map.

And also the sum of \$1,000 for *mesne* profits and damages.

And the plaintiff says that his right to the possession of the same accrued on February 21, 1907, and that the defendant wrongfully deprives him of the possession thereof, to his damage, \$1,000.

20 ANTHONY R. FINELLI,

Attorney for Plaintiff.

ANSWER.

30 Filed September 18, 1916.

The defendant answered as follows:

The defendant, residing at No. 53 Osborne terrace, Newark, N. J., says:

He denies the truth of the matters contained in the complaint.

40 CHARLES HOOD,

Attorney for Defendant.

*Notice.***NOTICE.**

Filed February 19, 1917.

To Anthony R. Finelli, Attorney for Plaintiff.

10

SIR: Please take notice that on Saturday, the 17th day of February inst., at ten o'clock in the forenoon, at the Court House in the City of Newark, before the Honorable Frederic Adams, a Judge of the above stated Court, I shall apply for an Order requiring the said plaintiff to deliver to the defendant a Bill of Particulars showing the definite point of beginning of the premises described in the complaint, and in particular the distance in feet and inches from the southerly line of Inness street to the southerly line of Central avenue, so that the said defendant may ascertain what part of said premises, if any, he is in possession of and what part thereof said plaintiff seeks to recover.

20

CHARLES HOOD,

Attorney of Defendant.

30

Dated February 14, 1917.

40

Order.

ORDER.

Filed February 19, 1917.

10 The defendant having served upon the plaintiff notice of a Motion for an Order in the above entitled cause, requiring the said plaintiff to deliver to the defendant a more definite description of the premises described in the complaint, so that the defendant may ascertain what part of the said premises, if any, he is in possession of and the argument of counsel for the respective parties having been heard.

20 It is on this 17th day of February, 1917, on motion of Charles Hood, attorney of the defendant, ordered that the plaintiff amend his complaint filed herein by making the beginning point of the premises described therein definite.

And it is further ordered that five dollars costs be allowed to the defendant, with leave to the defendant to file an amended answer within ten days after the filing of the amendment to the complaint.

30 And it is further ordered that the plaintiff have until the twenty-eighth day of February inst., inclusive, to file his amendment to the complaint.

Let this order be entered.

WILLARD W. CUTLER,

Circuit Court Judge

*Amended Complaint.***AMENDED COMPLAINT.**

Filed February 21st, 1917.

By order of the Court the plaintiff filed an amended complaint, as follows:

The plaintiff, who resides at No. 47 Lock street, in the City of Newark, in the County of Essex and State of New Jersey, demands of the defendant herein the possession of all that certain tract of land, with the appurtenances, situated in the City of Newark, in said County, and described as follows:

Beginning on the westerly side of Lock street one hundred feet south twenty-eight degrees west from its intersection with the southerly line of Inness street, which streets are particularly designated on a map of the property called Inness place, in the City of Newark, made by Francis W. Brimley, surveyor, and filed in the office of the Register of Deeds for Essex County; thence running (1) along Lock street south twenty-eight degrees west eighteen feet in width; thence (2) extending from Lock street by lines parallel with Inness street north sixty-two degrees forty minutes west one hundred feet in depth, carrying said width of eighteen feet along the whole of said depth. And also the sum of \$1,000 for *mesne* profits and damages.

And the plaintiff says that his right to the possession of the same accrued on the twenty-first day of February, 1907, and that the defendant wrongfully deprived him of the possession thereof, to his damage one thousand dollars.

ANTHONY R. FINELLI,

Attorney for Plaintiff. 40

Rule.

RULE.

Filed March 3, 1917.

Application having been made for leave to file a Disclaimer on the part of the defendant, and the Court having heard argument thereon, it is on this 3rd day of March, A. D. 1916,

10 Ordered that the further hearing of said application be and the same is hereby continued until March 10th inst., at ten o'clock in the forenoon, at the Court House at Newark, and

Further ordered that the time of the defendant to file his answer in said cause be and is hereby extended to March 10th inst.

WILLARD W. CUTLER,
Circuit Court Judge.

20 Form is satisfactory.

ANTHONY R. FINELLI,
Attorney for Plaintiff.

RULE.

Filed March 10, 1917.

30 The application of the defendant for leave to file his disclaimer in the above entitled cause is denied without costs against the defendant, and the defendant's time to file his Amended Answer is hereby extended to and including the twelfth day of March inst.

It is further ordered that a copy of such amended answer be served on plaintiff's attorney within one day after the filing thereof.

Dated March 10, 1917.

WILLARD W. CUTLER,
Circuit Court Judge.

40 On motion of Charles Hood, attorney for Defendant.

*Amended Answer.***AMENDED ANSWER.**

Filed March 12, 1917.

By leave of Court the defendant filed an Amended Answer as follows:

10

Leave to file an Amended Answer having been allowed to the defendant in the above entitled action, by order of this Court made on March 10th, 1917, the said defendant hereby amends his Answer heretofore filed herein to read as follows:

1. Defendant has no knowledge or information sufficient to form a belief thereof as to whether the plaintiff's right to possession of premises described in the Amended Complaint filed herein accrued on the 21st day of February, 1907, or at any other time.

20

2. Defendant denies that he, said defendant, wrongfully deprived the said plaintiff of the possession of said premises.

3. The said defendant was not at the commencement of this action, nor has he since been in possession of the premises described in the Amended Complaint, or any part thereof.

30

4. The said defendant has not at any time before the commencement of the said action, nor has he ever since, claimed title to the premises described in the Amended Complaint, or any part thereof.

CHARLES HOOD,

Attorney for Defendant.

40

JUDGMENT.

This action was tried before Judge Nelson Y. Dungan with a jury, in the presence of counsel for the respective parties, at the Essex County Circuit Court, on March 21, 22 and 23, 1917.

10 The cause having been heard and submitted to the jury, they returned their verdict in favor of the plaintiff for the sum of six cents damages and for possession of the premises described as follows:

Situate in the City of Newark, in said County and State, and described as follows:

20 Beginning on the westerly side of Lock street 100 feet south 28 degrees west from its intersection with the southerly line of Inness street, which streets are particularly designated on a map of the property called Inness place, in the City of Newark, made by Francis W. Brimley, surveyor, said beginning point being also distant southerly about 80 feet from the present southerly line of Central avenue; thence running (1) along Lock street south 28 degrees west 18 feet in width; thence (2) extending from Lock street by lines parallel with Inness street north 62 degrees 40 minutes west 100 feet in depth, carrying the said width of 18 feet along the whole of said depth and being the northerly portion of lot No. 95 on the aforesaid map, and the sum of seventy-one dollars and forty-nine cents costs of suit.

30 Whereupon it is adjudged that the plaintiff do recover against the defendant, the possession of the premises aforesaid with the appurtenances, together with six cents (\$0.06) damages aforesaid, together with costs, which are taxed at the sum of seventy-one dollars and forty-nine cents (\$71.49), making in the whole the sum of seventy-one dollars and fifty-five cents (\$71.55).

40 Judgment entered March 23, 1917.

WILLIAM S. GUMMERE,
Judge.

Certificate.

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

10

I, Joseph McDonough, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the records and proceedings and judgment record in the case of Pietro Imbeninato vs. Max Mendl, and the same is taken from and compared with the original records on file and as the same now remains on the files of said office. 20

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this first day of June, A. D. 1917.

JOSEPH McDONOUGH, 30
Clerk.

40

Opening.

Essex County Circuit Court.

10

PIETRO IMBENINATO	}	<i>Action at Law.</i>
<i>vs.</i>		
MAX MENDEL.		

20

Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., Wednesday, March 21, 1917.

Before Hon. Nelson Y. Dungan, Judge, and a jury.

Anthony R. Finelli for plaintiff.

Charles Hood for defendant.

A jury is called and sworn.

Adjourned to Thursday, March 22, 1917, at ten
30 o'clock A. M.

SECOND DAY.

Thursday, March 22, 1917.

Met pursuant to adjournment.

Counsel as before stated present.

Mr. Finelli opened for the plaintiff.

40 (Mr. Finelli shows sketch to the jury.)

Opening.

Mr. Hood: I object to showing any sketch to the jury unless it has been offered in evidence, any sketch on the opening.

The Court: You must not do that.

Mr. Hood opened for the defendant.

10

Mr. Finelli: I offer in evidence deed from Abraham Patowsky to the plaintiff recorded February 28, 1907.

Mr. Hood: I want to object to this deed going in evidence unless it is to prove that the plaintiff is the owner of the premises described in his amended complaint. I am willing to admit on the record that he is the owner of the property described in his amended complaint and I am willing to admit that he secured his title to the deed.

20

The Court: What do you say to that?

Mr. Finelli: I believe it is in evidence that he is the owner of the premises and I think it ought to go in evidence.

30

Mr. Hood: My objection is that there is a variance, as your Honor will note. For that reason I am perfectly willing to admit that they own the property and that they acquired it by deed. That was the reason that the Court insisted upon an amendment of the complaint.

The Court: It will be admitted.

40

Oscar De Camp, direct.

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

Exception noted as ground of appeal.

Marked Ex. P1.

OSCAR DE CAMP sworn in behalf of plaintiff.
Direct examination by Mr. Finelli.

10

Q. Where are you employed? A. Essex County Register's office.

Q. In what capacity? A. Chief Clerk.

Q. Have you got charge of the filed maps? A. I have charge of the office and any part of it, yes.

Q. Have you a map known as Innes place on file in your office? A. Yes, sir.

20

Q. Have you the map here in court? A. Yes, sir; map No. 68, known as Innes place.

Q. Where was that map filed? Has it there a date? A. Filed the 22d of January, 1836.

Q. You have here the original map? A. Yes, sir; I have the original and also a compared copy that was made because the old map got in such a condition that the register had to have it recopied; but it was certified to as being correct by the register.

30

Q. When was the copy made? A. I don't think it is dated. It says (reading): "I hereby certify that this map is a true copy of the original map filed in this office, Thomas P. Allworth, Register." It was made some time during Mr. Allworth's term. His term ended a little over a year ago.

Mr. Finelli: I offer in evidence the original map.

Marked Ex. P2.

40

John B. Acoccella, direct.

Anthony R. Finelli, direct.

Mr. Finelli: I also offer the other one.

The Court: They will both be received.

Copy of map marked Ex. P3.

The Court: Suppose you designate on the record what it is.

Mr. Finelli: Map of the property known as 10
Innes place, in the Town of Newark, N. J.,
surveyed and laid out into lots in June, 1835,
by F. W. Brinley, the surveyed scale 70 feet to
the inch.

Q. The number is? A. 68.

JOHN B. ACOCELLA, sworn in behalf of plain-
tiff.

Mr. Finelli: Now, your Honor, with the 20
consent of the other side I desire to offer in
evidence abstract of title to the premises.

Mr. Hood: No, we have asked for it and it
has never been served upon us.

The Court: You say you do not consent
to it?

Mr. Finelli: Up to yesterday I understood 30
that it was consented to. Then I will with-
draw the witness. I made the abstract my-
self and I desire to be sworn.

ANTHONY R. FINELLI, sworn in behalf of
plaintiff.

Examination:

I am the attorney for the plaintiff, and as attor-
ney of this court have been practicing for eleven 40

Anthony R. Finelli, direct.

years. I have made a comparison of the abstract which I now have in my hands with the official books in the office of the Register of Deeds. I did not make the original abstract, but I did compare every deed herein contained with the books down-
10 stairs, and I therefore adopt this paper as a complete abstract of the title to the premises 47 Lock street, which I find to be in Pietra Imbeninato, the plaintiff, tracing the title all the way back up to November 5, 1835, from John W. Inness and Clara Innes, his wife.

Mr. Hood: At this point I think I can object to counsel reading from this abstract, or any
20 future attempt to read from it. He says he has compared this paper, which I take it is in handwriting, with official records; but has not searched the title, or does not set forth that there is a chain of title which we could go through and see how this title is derived. He simply says that he has compared these papers in his hands with the official books in the register's office, and from that he is testifying.

30 By the Court:

Q. Nothing has been stated as to the contents of the paper at the present time, Mr. Finelli?

A. I have examined book F 4 of Deeds for Essex county, page 195, and have made an abstract of that deed. Mr. Hood's assistant was with me at the time. May I state what that shows?

40 The Court: Is there any objection to that?

Anthony R. Finelli, direct.

Mr. Hood: No objection to that deed; that we have seen.

Witness: That is a grant from John W. Innes and Clarissa to Johnson G. Baldwin, premises in the Township of Newark, beginning on the westerly line of the street called Lock street at a distance of 100 feet south and 28 degrees west from its intersection with the southerly line of a street called Innes street, which streets are particularly designated on a map of the property called Innes place, in the Town of Newark, made by Francis W. Brinley, Surveyor; thence through said beginning and running along Lock street, south 28 degrees west 40 feet in width and extending from Lock street by lines parallel with Innes street, north 62 degrees, 40 minutes, west 100 feet in depth, carrying the said width of 40 feet along the whole of the said depth, and being designated on the aforesaid map as lot No. 95. It further recites, bounded northerly by lot 94, sold to William Ricket, easterly by Lock street, southerly by lot No. 96, sold to said Ricket, and westerly by lot 101, sold to Stephen N. Munson.

Q. (By Mr. Hood.) What is the date of that?
A. November 5, 1835.

Q. (By the Court.) Recorded where? A. F. 4, 195. I came to the following page in the same book.

Q. (By Mr. Hood.) Where was that? A. Book F. 4, being page 196, which was a conveyance from

Anthony R. Finelli, direct.

Johnson G. Baldwin to James Silvey, same description as above. It is a warranty deed.

Q. (By the Court.) What is the date of that?

A. April 9, 1836. I also looked at another book, E. 4, page 500.

10 Q. (By Mr. Hood.) We didn't see that. A. That is a conveyance from James Silvey.

Mr. Hood: Well, now, we want to object to that, your Honor. There are other deeds that we saw and there are other records that we went through; anything we didn't, of course we object to. We cannot have counsel testify as to the title in view of our demand for the particulars.

20 Mr. Finelli: Your Honor, there was no demand for a bill of particulars on us. Please do not get the impression that I have not furnished them with the bill of particulars.

Mr. Hood: He said that he had not made a search.

The Court: You do not object because a certified copy of the record is not produced? Does your objection go as far as that?

30 Mr. Hood: Yes, it goes as far as that.

The Court: Of course, the Court will be obliged to sustain the objection on that ground.

Mr. Finelli: We are not obliged to bring the official books up here. The abstracts of title are admissible in the course of the examination. I examined it and I adopt it.

The Court: The objection will be sustained.

40 An exception to this ruling is noted by the plaintiff as ground of appeal.

John B. Acocella, direct.

Witness: There was a further conveyance from James Hanahan, September 5, 1861.

Mr. Hood: We object to that on the same ground. We have not had anything shown to us except these two which we have admitted; nothing after 1836.

10

The Court: The objection will be sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Mr. Finelli: I believe, further, that the evidence is admissible in view of the state of the pleadings. There is no challenge made in the pleadings, to our chain of title, therefore the issue is not here as a primary issue; this matter comes here collaterally, and the question of the paper title is not made, and I think that the Court ought to receive this proof as it is believed by the plaintiff.

20

The Court: An exception will be noted.

An exception to this ruling is noted by the plaintiff as ground of appeal.

JOHN B. ACOCELLA recalled in behalf of plaintiff.

30

Direct examination by Mr. Finelli.

Q. Where is your office? A. In the Union building, Newark.

Q. What is your profession? A. Civil engineer and surveyor.

Q. There is exhibited here a map of the southwest corner of Central avenue and Lock street, and vicinity. Who prepared that map? A. I did.

40

John B. Acoccella, direct.

Q. How long have you been a surveyor? A. About seven years.

Q. Did you make a map from an actual survey of the property? A. Yes, sir.

Q. When did you make your actual survey? A. I went up there more than once. The last time I
10 was up there was on the 15th of January of this year.

Q. When were you there the first time? A. Last August of last year.

Q. At whose request? A. Mr. Imbeninato's request.

Q. Is that map true to the actual locations? A. Yes, sir.

Q. Is it made to a scale? A. It is.

20 Q. What is the scale? A. Four feet to the inch.

Q. And does it show the lots as mapped out on the Innes place property? A. It does.

Q. What lots does it show? A. Lots 92, 93, 94 and 95.

Q. Does it show the premises 47 Lock street? A. It does.

Q. Is it so marked? A. This (indicating) is 47.

Q. Does it show the premises 45 Lock street? A.
30 Yes.

Q. How is it marked? A. It is on lot No. 94; it is right adjoining this property here (indicating).

Q. What is the yellow square wherein No. 47 is marked? A. Yellow shows frame buildings situated on the lot.

Q. What are the dimensions of that building? A. The building measures 18 feet, front and rear.

40 Q. And how deep is it? A. The whole of it, the

John B. Acoccella, direct.

scale of it (after measuring) about 24 feet.

Q. What is shown in red there? A. The brick garage or automobile building is shown in red.

Q. And that is over on the property No. 45 Lock street? A. That is the one on 45 Lock street, yes.

Q. And what are the other yellow marks? Present position of shed. What is that? A. This is a shed on lot No. 47; that is the temporary location of it. 10

Q. What is the other yellow square? A. This is another shed on the same lot, and a water-closet.

Q. You have certain things marked fences. What are they? A. These are old fences that are there now.

Q. Is there an old fence now between 47 and 49 Lock street? A. Yes, sir. 20

Q. Is there an old fence between 49 and 51 Lock street? A. Yes, sir; there is.

Q. How far back do these lots run? A. 100 feet.

Q. Is there a fence in the rear of the lots? A. Yes.

Q. Is that line of Innes street—does that exist today? What do you find up there to be the actual location? A. Central avenue is there now. 30

Q. The scale is 1 inch to 4 feet? A. Yes.

Mr. Finelli: I offer the map.

Mr. Hood: We desire to cross-examine before it is admitted.

By Mr. Hood:

Q. You were surveyor for how long? A. About seven years. 40

John B. Acoccella, direct.

Q. Where were you trained? Here in Newark?
A. I was.

Q. You received all your training here in Newark? A. Yes.

Q. You made this map? A. I did.

10 Q. Where is the south line of Central avenue on your map? Have you indicated it? A. I have.

Q. Where? A. This heavy black line.

Q. And is that line of Innes street shown as the line originally existed there? A. Yes.

Q. You got that from the Innes map? A. Yes.

Q. What is the distance from the south line of Innes street to the south line of Central avenue?

A. It is practically 20 feet.

Q. Have you indicated that? A. I have not.

20 Q. Why not? A. Because I don't know its exact distance.

Q. You say it is exactly 20 feet? A. I don't say exactly.

Q. Practically? A. Yes.

Q. Now, Lock street, you fixed the line of Lock street did you? A. I did not.

Q. You have it shown there on your map? A. That Lock street is as it is shown on the map of Innes place.

30 Q. Is Lock street, as you have shown it there on your map, the same westerly line of Lock street as you show it on the map—is it the same as the westerly line of Lock street, as shown on the Innes street? A. I don't know.

Q. There is not any surveyor knows that, is there? A. No.

40 Q. But you have made your angle from the westerly line of Lock street, as you fixed it, through

John B. Acoccella, direct.

the angle of Lock street and Central avenue, haven't you? A. I did not.

Q. You have got a line there showing the westerly line of Lock street. Where did you get it from? A. The angle at the property line here as defined by the occupations.

Q. Nobody asked you about occupations. You don't know anything about occupations? A. You asked me how I got the angle. 10

The Court: You asked him and he is telling you how he got the line. Proceed and tell.

Witness: From the occupations of the premises along the block which were located with reference to the old Innes street.

20

Q. How did you fix Innes street? A. From the lines of occupations of the buildings.

Q. Didn't you fix Innes street from Innes map? A. I did.

Q. Didn't you fix it from the monuments which show Innes street? A. No monuments there.

Q. There are no monuments for Innes street? A. No, sir.

Q. Didn't you fix it from the city records? A. There is no city record referring to Innes street; no monuments. 30

Q. Aren't the monuments fixing Innes street 30 feet south of the northerly line of the next street—the northerly line of Central avenue, I mean? A. There is no city record referring to Innes street and no monuments.

Q. Aren't there monuments on Central avenue, 30 feet south of the northerly line of Central ave- 40

John B. Acoccella, direct.

nue, which is the old line of Innes street? A. Monuments which fix Central avenue?

Q. Aren't there monuments which are 30 feet south of the northerly line of Central avenue? A. Yes, sir.

10 Q. Isn't the northerly line of Central avenue and the northerly line of Innes street coincident? A. They are supposed to be.

Q. (By the Court.) Supposed to be what? A. Supposed to be coincident with the southerly line of Innes street, parallel with the southerly line of Innes street, which leads me to conclude that it is the old——

20 Mr. Hood: I move that that be stricken out.

The Court: The entire question and answer may be stricken out.

Q. (By Mr. Finelli.) These monuments on Central avenue are at intervals of about two blocks apart? A. Yes, sir.

Q. About 30 feet south of the northerly line of Central avenue? A. Yes.

30 Q. In making your measurements did you measure from these monuments? A. I did not.

Q. What did you measure from? A. From the old occupations on the block.

Q. What do you mean by that? A. By that I mean the houses and buildings along the whole block, and the fences as they existed for years.

Q. The old buildings and old fences? A. Yes.

40 Q. You prefer that as a base from which to take your measurements rather than by monuments on public streets? A. Public monuments?

John B. Acoccella, direct.

Q. I say, you prefer that as a basis of your measurements, meaning by that, rather than by monuments which are fixed on public streets? A. Public monuments on the public streets were put there after the buildings were built.

Mr. Hood: I don't think the question and answer are responsive and I ask that it be stricken out. 10

The Court: It will be stricken out.

Q. (Question read.) A. In this particular case I do.

Q. In this particular case there is not any fence between 47 and 45? A. There is not.

Q. You made your last visit there in January of this year? A. Yes. 20

Q. When was your preceding visit? A. Last August.

Q. Was there any fence along there then? A. No fence.

Q. This is your survey? A. Yes, sir.

Q. You made it? A. I did.

Q. You marked on this survey, "Formerly fence"? A. Yes. 30

Q. You didn't see it? A. No.

Q. You got that from some information, from somebody? A. No, sir.

Q. It wasn't of your own observation? A. I put, "Formerly fence" there for the reason that the sewer laid later on proved that there was one and I just showed it.

Q. You put "Formerly fence" along this line as being the exact position of the fence? A. Yes. 40

John B. Acoccella, direct.

Q. Did you put this fence along here, this line, as being the exact position of that fence? A. Yes.

Q. These are very old houses? A. Yes.

Q. Old frame houses? A. Yes.

Q. They are just in the perfect line that you have indicated on your map, perfect squares, you might say? A. Yes, sir.

Q. That is the fact? A. Yes, sir.

Mr. Hood: Now, we object to the map going in evidence. In the first place, he says he has not fixed that line of Lock street—he does not explain that westerly line; he says that he did not make measurements from public monuments on the public streets but that he made them from locations which he has ascertained, and took these locations in preference to the public monuments. He has indicated things that existed on that map which he admits did not come under his notice or observation, and I think that he has not indicated on that map the northerly line of Central avenue, or has not indicated the distance between the southerly line of Innes street and the southerly line of Central avenue. It does not seem to be a survey which is based on established fixed monuments, which control, but rather based upon conclusions or information which he has gathered up. I am of the opinion, and I think it is proper to say, that a survey which controls must be a survey which is made from established recognized beginning points, such as monuments which are fixed and de-

John B. Acoccella, direct.

fined, and I think that it should not be put in evidence.

The Court: The map may be admitted for what it purports to show. The witness says that these lines are known from the apparent lines of occupation of the lots. I assume that the line marked "Formerly fence," which, of course, would not be on that map at all means that that line is just 18 feet northerly from the line marked "Old fence." 10

Q. (By the Court.) Is that correct? A. Yes.

Q. These lines are straight lines from 47 Lock street, the line to the north of 47 Lock street—these are straight parallel lines, are they? A. Yes.

The Court: Then the jury will understand that this map is not made with reference to any monuments, but is made with reference to the apparent lines of occupation of lots 47 and 48 Lock street. 20

Q. Is that correct? A. Yes, sir.

The Court: So far as it shows that the map will be admitted. 30
Marked Ex. P4.

By Mr. Finelli.

Q. Were you furnished with a description when you first went on the premises to make your official survey? A. I was.

Q. What description did you have? A. The description contained in the deed. 40

John B. Acoccella, direct.

Q. P1? A. Yes.

Q. Was the garage up the first time you were there? A. It was.

Q. And I understood you to say that this fence was not? A. No.

10 Q. What is the distance between the westerly or rear part of the frame house and the easterly or front part of the garage? A. That measures about 35 feet.

Q. How does the grade of the earth compare with the level of Lock street? A. This yard here is from 8 to 9 feet higher than the level of the property adjoining.

20 Q. What did you find on lot 45 immediately adjoining 47, on the north, a driveway? A. Yes, there is a driveway here (indicating).

Q. And is that driveway on a level with the front, with the street? A. Yes, with the street.

Q. How wide is that driveway? A. It is about 10 feet.

Q. What is the condition of the earth immediately in the rear of the premises 47? A. Well, this bank, from the rear of the building to the garage, is in a falling condition.

30 Q. Can you tell us how much of it has fallen? A. Well, it is falling little by little. It will all fall down if he stays there long. These sheds (indicating) are hanging on the bank.

Q. The little squares marked "Shed" and Water-closet" are hanging? A. Yes.

Q. Hanging above what? A. Over the bank.

Q. The earth has fallen from under? A. Yes.

40 Q. Where do you find that condition? In what distance of the way? A. The condition of the

John B. Acoccella, direct.

falling of the bank is all the way along; the bank is not protected and naturally it caves in.

Q. How wide is that shed? A. This is about 6 feet wide.

Q. How did you find the old fence between 47 and 49? A. Well, there is an existing old fence there that starts from this (indicating) party wall here where these two buildings come together and run back to this point, which is 22 feet away from that other fence. 10

Q. Did you find that the plaintiff had his 18 feet in the rear of his lot? A. No.

Q. How many feet did you find there? A. There are about 16 feet from the fence here to the garage.

Q. And where were the other two feet? A. Taken up by the garage. 20

Q. And as you come down in an easterly direction do you find the garage overlapping on the fence lot? A. Yes.

Q. To what extent—at the base, for instance? A. At this point (indicating) it is about a foot and a half inch over.

Q. That is at the easterly extremity? A. Yes, of the wing.

Q. To the wing of the garage? Why do you refer and gauge your measurements from the old buildings and the apparent occupations? A. Because the measurements from the city monuments disturb all the occupations on that block. 30

Q. Does No. 47 and 49 completely take up the lot 95 on the Innes map? A. Yes.

Mr. Hood: I object. I do not see that we are concerned with 49; it is irrelevant.

The Court: Objection overruled. 40

John B. Acoccella, direct.

Q. Your answer is yes? A. Yes.

Q. And the lots 94 and 93, and No. 92, extend north up to the present line of Central avenue? A. Yes.

10 Q. In other words, starting on the south line of Innes street, as shown on the Innes map, you have three lots, first lot No. 92, and that is how many feet? A. 30.

Q. And lot No. 93? A. 30.

Q. And lot No. 94? A. 40.

Q. And then comes the northerly line of the lot in question, which is also a 40 foot lot? A. Yes.

Q. That is to say, premises No. 47 are 18 feet and premises No. 49 are 22 feet? A. Yes.

20 Q. And that is the scheme that is laid down in the original Innes map? A. Yes.

By the Court.

Q. Is it a fact, that your entire map is based upon the locations of what you have designated there the old fence on the south side of No. 49 Lock street, between 47 and 49 Lock street? A. Not only on that, no.

30 Q. Upon what else is it based? A. Upon the occupations of the whole block.

Q. What do you mean by that? A. The occupations of all these buildings all the way up.

Q. Well, so far as this map shows upon what is it based besides these two fence lines? A. So far as this map shows it is based only upon the occupations of the two properties here shown.

Q. And the houses upon these lots, and the fence lines? A. Yes.

40 Q. You have fixed the northerly boundary line

John B. Acoccella, direct.

of lot No. 94 upon these lines, have you? A. Yes.

Q. And the boundary lines of 93 upon these lines? A. Yes.

Q. You have fixed the southerly side of Central avenue by these lines, have you? A. I don't say that I have fixed the side of Central avenue by that.

Q. That is what I am asking you. Did you? 10
A. Yes:

Q. You fixed the southerly line of Innes street by this means, too? A. Off Innes, street, yes.

By Mr. Finelli.

Q. What else did you do in order to fix the garage as being over the plaintiff's lot? A. I measured up all buildings on the block and also all fences on the other side; but this fence is the one marked "Fence" in the rear. That also shows an old occupation. 20

Q. (By the Court.) There is, now, a fence which is an extension of the northerly line of lot 47? A. Yes.

Q. (By Mr. Finelli.) Whose fence is that? A. This one?

Q. Yes. A. I think it is Mr. Smith's, I am not sure. 30

Q. On the south? A. On the south side, yes.

Q. Whose property is it on the north?

Mr. Hood: I object. I don't see how that is relevant.

The Court: I notice that the lots on the Innes map come to the corner there, four lots. I observe that lots 101 and 121 corner at that 40

John B. Acoccella, direct.

same place, that is, the same place as lots No. 94 and 95.

10 Mr. Hood: I do not see how, if the question of location were proper at this time, a fence on an adjoining property to the west, which so far as we know, may, and probably does, take its location from a point on Central avenue and Innes street—how the distance and dimensions, crosses, and so forth, can be recognized for any purpose, even in connection with these things.

20 The Court: Unless it be shown by ancient monuments it cannot have practical weight; but I presume this is merely testimony of what now appears. If it does not appear that it is an ancient monument there—

Mr. Hood: Then it will be subject to be stricken out.

The Court: Yes.

Q. Did you say you measured all along the block? What is the width of the blocks?

Mr. Hood: Which block?

30 Mr. Finelli: The block that the witness measured.

Mr. Hood: Won't you please designate it?

Mr. Finelli: I believe it is south.

The Court: That is not the way to conduct the case. We do not know and the jury does not know.

Q. Did you survey the southwesterly block of Lock and Central avenue? A. Yes, sir.

40 Q. Up to what points and from what points?

John B. Acoccella, direct.

A. After this 22 foot lot comes the 40 foot one; then two twenty-fives, making a distance of 90 feet up from this point (indicating).

Q. (By the Court.) That is, you have extended your map that much beyond what is shown on the map, 90 feet? A. Yes, sir.

Q. (By Mr. Finelli.) Did you extend your survey westerly? A. Not westerly, no, except in so far as this fence here (indicating) is concerned. 10

Q. Do you know how far back that fence at that rear end of the plaintiff's lot comes?

Mr. Hood: I take it that all of these questions are subject to the ruling that your Honor has made, that if they are not connected up they may be stricken out. 20

A. This fence starts at the rear of the property in question, 100 feet away from Lock street.

Q. I say, the fence that runs parallel with the westerly boundary of the plaintiff's lot, how far back? A. You mean this fence (indicating)?

Q. Yes. A. How far back it goes that way (indicating)?

Q. Yes. A. I don't know how far it goes in, but it is a considerable ways; I think it is continuous; I don't know just how far back it goes; I didn't measure. 30

Q. Would an examination of your notes show how far that goes back? A. Not the measurement of the fence; I didn't measure the length.

Q. Can you say whether it goes back as far as the canal? A. No; I cannot say.

Mr. Hood: I desire to renew my applica- 40

John B. Acoccella, cross.

10 tion, if it is proper at this time to do so, as to the admissibility of this map, because it appears from the witness' testimony that he has fixed the line of the public street by the location of an old fence. It seems to me that that fairly impugns the integrity of that map. He attempts to fix the southerly line of a public highway by taking it from an old fence on the property.

The Court: I assume the motion is to strike out the map?

Mr. Hood: Yes.

The Court: The motion will be denied.

An exception to this ruling is noted by the defendant as ground of appeal.

20 Cross-examination by Mr. Hood.

Q. Now, you say the distance from the rear of the frame building, No. 47, to the rear of the garage, is about 45 feet? A. That is what I said.

Q. Have you the exact distance? A. I have not the exact distance.

Q. You say the land in the rear of the building, 47 Lock street, is from 8 to 9 feet above the grade?

30 A. Yes, sir.

Q. Have you the exact height that it is above the grade? A. No, sir; from 8 to 9.

Q. You say the driveway to the north of No. 47 is about 10 feet in width. Have you the exact width of it? A. No, sir.

Q. Surveying is rather an exact science, is it not? A. It is.

40 Q. Now, in order to find out how much land there was in the rear of 47 Lock street you pro-

John B. Acoccella, cross.

ceeded by old occupations to ascertain that fact, didn't you? A. Yes, sir.

Q. In other words, you were sent up on No. 47 Lock street to see if there wasn't less than 18 feet in the rear of that lot, that is true, isn't it? A. I cannot say that that is true.

Q. So you started south and took these old fence lines and laid off a distance of 22 feet from this fence to this fence (indicating), because you found the deed called for 22 feet—you laid off 22 feet in width there, did you not? A. I didn't just lay off 22 feet from that fence, no. 10

Q. What did you do? A. I laid off everything that included, in that block, the monuments from Central avenue.

Q. Didn't you say, in answer to the Court's question, that you measured, in determining these respective boundary lines, from the old fence on the southerly line of No. 49? A. Yes. 20

Q. And you measured 22 feet in order to determine the northerly line of that property, did you not? A. Yes, sir.

Q. And then drew a line which showed the fence northerly of No. 49, that is correct? A. Drew it, because it agreed with the fence that was there. 30

Q. But you drew it after you had set out 22 feet? A. Yes.

Q. Then you laid off 18 feet from No. 47 Lock street, from the old fence on the northerly line of No. 49, and found you had only about 16 feet up there at the extreme westerly end? A. Yes.

Q. You therefore found that there were 2 feet missing? A. Yes.

Q. What did you do to try and find these feet? 40

John B. Acoccella, cross.

Did you make any effort to try and find where these 2 feet had gone? A. Yes.

Q. You found what? A. I found that the garage had occupied that.

Q. What effort did you make to find these two feet? I measured to Central avenue.

10 Q. You measured from this supposed fence line? A. Yes.

Q. You measured from the southerly end of this building to Central avenue? A. Yes.

Q. Did you start to work the problem out from the other direction? Did you go back to your public street on Central avenue and make your survey south from that point instead of working north from old occupations? A. I did both.

20 Q. Have you your notes here of your survey beginning with the monuments on Central avenue? A. No monument notes, no.

Q. Where are they? A. They are in my other notebooks.

Q. Are they down at your office? A. Yes.

Q. And you can get those? A. If I want them, yes.

30 Mr. Hood: I ask that they be produced.

Q. (By the Court.) Are you willing to produce them? A. I am afraid that I haven't got all the necessary data that I would want for the purpose.

Q. The question is are you willing to produce what you have? A. I am not.

40 Q. (By Mr. Hood.) Why not? A. Because I have not got complete records of all of that testimony. When everything was completed I concluded the way it ought to have been made and

John B. Acoccella, cross.

made it that way then, and this is the data that I have.

Q. In other words, you started to make the survey from monuments in Central avenue? A. Yes, sir.

Q. And when you got to a certain point you concluded, before completing it, that that was not the way to make that survey? A. Yes. 10

Q. So you thought you would go about making it the other way? A. Yes, sir.

Q. Now, what was there in the intimation that you had arrived at in making your survey, beginning from the Central avenue monuments, that caused you to come to the conclusion that that was not the way to make that survey? A. When I started to make the survey from the monuments I found that I would make every building on that block over the next lot, and from that I concluded that the monuments were put there after the buildings were built and after the property owners had located themselves with reference to a certain line. 20

Q. So you thought that the buildings would be in the right place and that the monuments would be in the wrong place? A. I wouldn't say that the monuments would be in the wrong place, no. 30

Q. As a matter of fact, it very frequently happens, particularly with real old buildings, that their location is not definite with the lines of a survey as made from recognized public monuments? A. I do know that in very many cases the lines as we have them from present monuments do not agree with the old lines and we always take the old lines in preference. 40

John B. Acoccella, cross.

Q. I didn't say anything about old lines. I am comparing them with objects, with old buildings, as compared with property lines fixed by public monuments. In other words, the buildings are sometimes out of gee, isn't that true? A. Yes.

10 Q. So that when you go to work and start to make a survey on a piece of property the first thing you go to are public monuments? A. Yes, sir; we use them when they occur.

Q. So, when you went up to make this survey you went up to Central avenue and started with the public monuments? A. I did.

20 Q. You got to a certain point and the thing didn't work out the way you wanted it to work out, so you concluded to make your survey from the other end and work up from old locations, isn't that true? A. Yes.

30 Q. Now, what was the controlling thing, what was the only thing that occurred, when you made that survey from the monuments on Central avenue, to lead you to believe, or brought you to the conclusion, that that was not the way to make that survey, but that you would go back and make it from the other end, from old landmarks? A. When I finished the survey I found I couldn't agree with the old buildings. I consulted a surveyor of old standing.

Q. I don't care about what the result of your conference was. You had a consultation? A. I answered the question.

Q. You had a consultation? A. Yes.

40 Q. Then you did finish your survey on Central avenue, that is, your survey, taking your beginning points from the monuments of Central avenue?

John B. Acocella, cross.

A. I started to make a survey in that way, and when I got in trouble, as I said, I consulted an old surveyor, and we together agreed—

Q. Never mind what the other man agreed to, or what you said or talked about. I object to it. So, as a matter of fact, you had not completed the survey from the beginning point on Central avenue? You had not completed such a survey? A. No.

10

Q. And not having completed it you cannot tell what that would show? A. No.

Q. Now, let me ask you a question about Lock street. On your map, what is the angle of the northerly line of the lot with Lock street, to the property No. 47 Lock street, as shown on the map?

A. The angle of the map.

Q. Yes. A. I haven't got it stated on the map.

20

Q. You haven't got it on the map? A. No.

Q. Well, look at your records and see what that is? A. I have not turned that angle.

Q. (By the Court.) Well, what would it be to the line, south 28 west, and the other is north 62, 40 west? A. That is 90 degrees and 40 minutes.

Q. (By Mr. Hood.) What I mean is, how could you complete the map if you had not these angles?

Q. (By the Court.) Why do you say 90, 40? One is less than the other, isn't it? An angle of 47 is north 62, 40 west. That would make it less than 90, wouldn't it, the interior angle of 47? A. North 62, 40, isn't it?

30

Q. Then you say it is 40 degrees? A. What is the other angle?

Q. South 28 west? A. It is the complement, which is, then, 89, 20.

Q. That is the interior angle of No. 47, is it? A. Yes.

40

John B. Acoccella, cross.

Q. (By Mr. Hood.) Now, you fix that angle with reference to the Court's suggestion. A. I computed it from the bearings.

Q. You had not done so when you made the map?
A. For the drawing of the map a minute or two minutes, you can never show it on the map. For
10 all practical purposes the angle can be turned as it has been. It doesn't have to be within a minute or two in order to be a true map.

Q. Well, as a matter of fact, when you drew that north line of the property, No. 47 on your map, you drew it to be parallel with Inness street? A. Yes.

Q. And you drew it to be parallel with Inness street because your description called for it to be parallel to the southerly line of Inness street? A.
20 Yes, sir.

Re-direct examination by Mr. Finelli.

Q. How much are you charging for your trouble?

Mr. Hood: I object.

The Court: What is your idea of that?

Mr. Finelli: I believe it is an item of damage.

The Court: Objection sustained.

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

Exception noted as ground of appeal.

Q. How much have you received from the plaintiff?

Mr. Hood: I make the same objection.

The Court: Objection sustained.

40 An exception to this ruling is noted by the plaintiff as ground of appeal.

Charles A. Smith, direct.

CHARLES A. SMITH sworn in behalf of plaintiff.

Direct examination by Mr. Finelli.

Q. Where do you reside? A. 283 High street.

Q. Are you in business? A. I am.

Q. Where? A. 59 to 71 Lock street.

10

Q. Are you familiar with the property of the plaintiff, No. 47 Lock street? A. Well, I have been in that section since '87. On the 12th of November of that year we started in, and there is a great deal of old land open through there, around the canal property.

Q. And was the plaintiff's house up at that time?

A. Oh, yes.

Q. Were there any other buildings up between 59 Lock street and 47 Lock street? A. There were.

20

Q. How many buildings? A. They were all up at that point.

Q. Was there anything marking the division lines of the respective buildings? A. Fences.

Q. What sort of fences? A. Low wooden fences.

Q. Attached to what? A. To the houses to the rear.

Q. How far back would they run? A. To our factory line.

30

Q. Does your factory line run back within 100 feet from Lock street? A. Yes.

Q. How far north does it extend with reference to Central avenue? A. It is the property in the rear, and all those butt lots. Our property adjoins all the butt lots and all the property on Lock street, also on Central avenue.

Q. How many fences parallel with Central ave-

40

Charles A. Smith, direct.

nue were there between your property, in 59, and this property here, 57?

10 Mr. Hood: If the Court please, the question assumes a situation of which there was no proof, that the fences were parallel with Central avenue.

The Court: Objection sustained.

Q. Is there a fence dividing these lots in Central avenue and your property in the rear? A. Oh, yes, they were all fenced up.

Q. Do you remember this particular point, this northerwesterly corner of the plaintiff's lots 47? A. There was a fence post there that was thrown down when this building was put up.

20 Q. Which building? A. This new garage.

Q. When was this new garage put up? A. Within the last couple of years.

Q. How long had that post been there? A. Always been there.

Q. (By the Court.) I suppose since you have known it? A. Yes, since '87.

Q. (By Mr. Finelli.) What was the condition of it in '87? Was it old at that time? A. Yes, it was old.

30 Q. An old fence then. What did that post connect?

Mr. Hood: I object.

The Court: Objection sustained.

Q. Was there anything attached to the post? A. The fence.

40

Charles A. Smith, direct.

Q. What fence? A. The wooden fence that is to the rear of all these properties.

Q. What properties did the fence that you have mentioned separate or divide? A. It divided this man by the name of Carp Cohen's property.

Mr. Hood: That property is west of our holdings, if your Honor please. 10

The Court: Adjoining?

Mr. Finelli: Yes.

Mr. Hood: Between ours and this man's.

Witness: Yes, they all adjoin.

The Court: Objection overruled.

Q. Now, the Carp Cohen lot runs south on Central avenue up to what point? A. To that post that was thrown down. 20

Q. Can you designate that post on the map there? A. Yes (witness indicates).

Q. Right there where I am pointing? A. Yes.

M. Finelli: How shall we designate that—as the westerly end of our northerly line?

The Court: It is the corner of the line as indicated on Mr. Acocella's map, the northwesterly corner of the plaintiff's lot is connected by lines on the Acocella map. 30

Q. Now, having in mind the southerly end of the garage, where was that post before the garage went up?

Mr. Hood: I object; I do not think that that is the best evidence, observation on the part of this witness, Mr. Smith, as to a sit- 40

Charles A. Smith, direct.

uation which existed on lands adjoining ours and which he does not own, as compared with a mark that he did not make.

The Court: I understood the witness to say that that post had attached to it the fences on the plaintiff's lot.

10

Q. (By the Court.) Is that correct? A. Yes, sir; that is correct.

Q. How many lots corner at that post, Mr. Smith? A. Well, adjoining Carp Cohen's, and then these lots of Fitzsimmons, and then this property adjoining that, which there is a dispute about, and ours coming in all on the same corner, and this post has—

20

Q. Four lots, then, corner there? A. Yes; this post has always made the corner post of all the property.

Q. (By Mr. Finelli.) Having in mind the southwest corner of the garage as built to-day where was that post?

Mr. Hood: I say that is with reference to that map.

30

The Court: No, counsel is using a pointer. The question, of course, is proper. It should be stated without reference to the map.

Q. (By the Court.) Where, with reference to the southwest corner of the garage, was that post? A. The Central avenue garage extended beyond the post now.

Q. (By Mr. Finelli.) Is the post still there? A. No, sir.

40

Charles A. Smith, direct.

Q. This garage extends further south than the post? A. Yes.

Q. How far? A. A foot and a half.

Q. Mr. Smith, was there a fence dividing that property from the Cohen property? A. The garage extended some distance, 2 feet; then we put a fence, added to that to extend from this (indicating) garage, which was newly built, to our cement building. 10

Q. Where is your cement building? A. Right within a foot of this garage.

Q. How long is your building? A. About 59 or 60 feet.

Q. How long has your building been there? A. About six years.

Q. (By the Court.) Was your building 59 feet along the rear lot on Lock street or Central avenue? A. Lock street. 20

Q. (By Mr. Finelli.) How far along the rear of the lot fronting on Central avenue does that building run? A. It runs to the alley.

Mr. Hood: I object. I do not think this witness is competent to testify to that in this case.

The Court: (After argument). Objection overruled. 30

Q. What is the length of the cement building facing Central avenue? A. About 30 feet.

Q. And then beyond that, in a still westerly direction, do you have any other property? A. Yes.

Q. How far back? A. Back to the other garage of the Charles Smyth Company.

Q. Before you put up the cement block building 40

Charles A. Smith, direct.

I understood you to say that there was a fence connecting with the post in question, and it ran westerly. How far west did it go?

10 Mr. Hood: I object. I do not think it is competent to this issue as to how far the fence on any other man's land went away from this property.

The Court: Objection overruled. The map, which is in evidence, apparently shows that the southerly line of lots on the southerly line of Inness street was a prolongation of the northerly line of lot 95.

20 A. There was a fence there which ran in the rear of all that property along Lock street from Central avenue, corner lot, through to where we have our boiler rooms.

The Court: You have mistaken the location.

Q. I mean the prolongation of this fence (indicating). How far west did that fence go? A. That went from that corner post all the way through to Charles Smyth & Company's property.

30 Q. Approximately how many feet? A. Four lots.

Q. How wide? A. I think they run 30 feet; I know ours ran 30 feet.

Q. Now, taking the Smyth property and coming down the fence, to the extent, to the post that you have mentioned, was there anything connecting the post with Lock street? A. Oh, a fence.

40 Q. How did that fence run? A. That ran straight with the house.

Charles A. Smith, cross.

Q. Which house? A. The house adjoining this new garage that has just been built.

Q. In other words, taking the map, the fence ran from the post all the way down to this point (indicating)? A. To the house.

Q. To the rear end of the house which faces Lock street? A. Yes. 10

Cross Examination by Mr. Hood.

Q. Mr. Smith, did I understand you to say that there was a fence which ran from the post at the northwest corner of No. 47 Lock street straight to the house? A. As straight as I knew; I don't know how straight it was but it was a fence.

Q. You were in business whereabouts on Lock street? A. 59 is our office. That is extended along up to the bridge. 20

Q. You weren't particularly interested in fences? A. Oh, yes, we were.

Q. You were? A. Yes.

Q. You were interested in the fence on No. 47 Lock street? A. We had repaired them.

Q. The northerly fence of No. 47 Lock street, you had no interest in that? A. Oh, not that fence. 30

Q. You had no occasion to look at it, had you? A. Just to see it from time to time.

Q. Isn't it a fact that for years and years the greater part of the fence on the northerly line of 47 Lock street was down, or don't you know? A. It was up for awhile; they propped it up; then that fell down because nothing was in under holding it up.

Q. It was a tumbled down old fence on the north- 40

Charles A. Smith, cross.

erly line of that property? A. It was kept in good repair until it was sold.

Q. When was that? A. When Fitzsimmons sold his property to this garage property.

10 Q. Before that this fence on the northerly line of 47 Lock street was, in your eyes, in a ramshackle condition, bending in and out? A. They were old posts and it took a great deal of time keeping them in repair, yes.

Q. It was a very old fence. I am talking about the old fence on the northerly line of 47? A. They kept the line. When the old posts rotted off they put new posts down.

20 Q. You say they put new posts where the old posts were? A. Whenever the old posts rotted away they kept the line.

Q. Do you say they put new posts down on the northerly line of 47 Lock street? A. I don't know about new posts but posts going down to hold the line fence up.

Q. Where do you say they put the posts on the northerly line of 47 Lock street? A. The man who could tell you better is the man who repaired it.

30 Q. I am asking you. When did you see them put posts down there in place of old posts that rotted away? A. I say they kept the line, that is all.

Q. I say, did you ever see them put new posts in place of rotted posts? A. What would they do?

Q. (By the Court.) No. Did you see that? A. No.

Q. (By Mr. Hood.) You didn't pay attention? It wasn't any concern of yours? A. No.

40 Q. You don't know as an actual fact what the

Charles A. Smith, cross.

condition of that fence was on the northerly line?

A. No.

Q. You don't know whether it was straight or wobbling? A. I was not interested.

Q. Not at all interested? You wouldn't want to say on the witness-stand that that fence went straight from the post on the northwest corner when you testified as to the house? A. No. 10

Q. You don't know anything at all about the condition of that fence? A. Only that the fence was there.

Q. But how it ran, whether zig-zag or straight, you don't know anything at all about it? A. Nothing more than the fence line, that is all.

Redirect Examination by Mr. Finelli.

Q. Mr. Smith, prior to this garage being erected weren't you interested in the rear part of your property which connected with Carp Cohen's property? A. We had it surveyed. 20

Q. You were very much interested in that line, weren't you? A. Oh, yes.

Q. You are certain that that line is about a foot and a half north of the northerly line of the garage? A. Oh, yes, it has always been so.

Mr. Hood: There has been no testimony about a line on or about a post. 30

Q. Was that post on the line? A. They were; that was the line.

By the Court.

Q. Your cement building, the northerly end of your cement building, was how far south of that post? A. 3 feet. 40

Charles A. Smith, cross.

Q. The southerly end of the garage is how far from the northerly end of the cement building, now? A. I suppose a foot and a half.

By Mr. Finelli.

10 Q. Mr. Smith, wasn't there some litigation between you and Cohen? A. There was.

Mr. Hood: I object to that. What have we got to do with that?

The Court: Objection sustained.

By the Court.

20 Q. Mr. Smith, for how long have you known the fence—how far back did you know of that fence extending from this post to the northwesterly corner of the house line? A. Well, since '87.

Q. What was the condition of the fence at that time? A. They were dilapidated; we kept them in repair continually.

30 Q. No; I am talking about the fence coming from this post to the northwesterly corner of the house on No. 47 Lock street. That wasn't your property? A. No.

Q. Now, the question is whether you observed the fence there as early as '87, to know that there was a fence there? A. Not any more than observation by repairing our own fence.

Q. That is what I asked you. Do you know that there was? A. There was.

Q. What was the condition of the fence as far back as '87? A. They were not in good condition.

40

Rosetta Frazier, direct.

ROSETTA FRAZIER sworn in behalf of plaintiff.

Direct examination by Mr. Finelli.

Q. Mrs. Frazier, where do you live? A. 47 Lock street.

Q. How long have you lived there? A. I have lived there about six months. 10

Q. Where were you living before that? A. I was living in Alexandria, Virginia.

Q. Where do you live now? A. 47, now.

Q. 47 Lock street? A. Yes.

Q. Did you ever live at No. 45 Lock street? A. Yes, sir.

Q. When? A. I lived there in 1903, I think it was. 20

Q. You moved away from there or to there? A. I moved there.

Q. Where were you living before that? A. I lived in No. 10 Hoyt street.

Q. Who was your landlord in 45 Lock street? A. When I first moved in, Mr. O'Donnell.

Q. Do you remember the house No. 47? A. Yes.

Q. How long have you remembered that house? A. From the time I moved. 30

Q. Did you know it before then? A. No, sir.

Q. How long did you live in it? A. Well, I moved out of that house about five years ago; I moved out of the house.

Q. (By the Court.) Out of 45 Lock street five years ago? A. Yes, sir; about five years ago.

Q. How many years did you live there? A. I never counted up. I moved in in 1903 and moved out about five years ago. 40

Rosetta Frazier, direct.

Q. (By Mr. Finelli.) But you first went there in 1903, about fourteen years ago? A. Yes, sir; as near as I remember.

Q. It was about fourteen years ago that you first went and lived there? A. Yes, sir; I think it was longer than that.

10 Q. Well, how long is it? A. My husband and I were speaking about it. He said they lived there—

Mr. Hood: I object.

Q. We want to know what you remember. How many years ago is it that you first went to live there? A. I went in 1903 as near as I remember.

20 Q. How many years is that? I know it is fourteen; you say it is more. How many years do you say it is?

Mr. Hood: Well, she says 1903.

A. I moved five years ago. It would take me awhile to count it up. Count it up yourself.

Q. Now, please tell me how many years ago was it that you first moved into Lock street? A. I told you it was 1903, as near as I remember.

30 Q. You cannot fix the date any better than 1903 or 1893?

Mr. Hood: I think that is leading.

A. I am most sure that it was 1893; I am most sure it was.

Q. Was the house you are now living in up at that time? A. Yes.

40 Q. What sort of a house were you living in at

Rosetta Frazier, direct.

45? A. The house that I lived in was a three-story structure and it was a pretty old house; it was frame on top and the bottom was brick.

Q. Was there anything separating the house you were living in from the house adjoining on the south? A. Yes, sir.

Q. What was it? A. A fence.

10

Q. What sort of a fence? A. Well, it was a pretty shackelly fence.

Q. What was the material? What was it made of? A. Boards.

Q. How far back did that fence run to? A. The back fence, to a fence that divided Mr. Smith's from us.

Q. Where is Mr. Smith's property? A. It was right back of there; he was in back of my house; Mr. Cohen's property was right back of my house.

20

Q. Do you remember what, if anything, there was dividing the Smith, Cohen and your property? A. What is that?

Q. Was there anything at the corner to indicate the point where the properties divided? A. The fence was on a post.

Q. Well, now, where was that post? A. The post was right at the end of the fence, between me and 47.

30

Q. And the end of the fence? A. Yes.

Q. What did that post divide? A. Divided my yard, 45, from 47.

Q. And what else? A. And Mr. Cohen's, and Mr. Smith's, like that (indicating).

Q. You say that post was up there in 1893? A. It was up there when we went there.

40

Rosetta Frazier, direct.

Q. What became of the post after that? A. It was there after we left.

Q. When did you leave? Five years ago? A. Yes.

Q. Is that post up there today? A. I couldn't tell you; I don't know anything about it now.

10 Q. Was there any other fence further south dividing the property, No. 47, from the property 49? A. Yes, there are fences all along.

Q. Fences all along? You can go back into Lock street in from Central avenue? A. Yes, sir.

Q. Can you tell us the condition of the other fences, and particularly that fence between 47 and 49? A. The fence between 47 and 49, that was—wait a second. Well, it is just a straight fence so far as I know; I didn't take any particular pains—

20

Q. A straight fence? A. So far as I know.

Q. What about this fence between 47 and 45? A. The fence between 47 and 49, it was, as far as I can tell, it was kind of—it was straight some ways and ran in the middle. It had a kind of a—I don't know, a zigzag a little way to it.

Q. In the middle? A. Yes; and we took boards and we nailed boards on it.

30

Q. And was the house in 45 attached to the house in 47? A. No, sir.

Q. What was between, if anything? A. Just a very small—

Q. There was some room? A. No rooms between.

Q. I mean some room, some space? A. Yes, just a little, to keep the houses from coming close together.

40

Rosetta Frazier, cross.

Q. There wasn't any alleyway in between? A. No.

Q. How far back did your house go? Did it go further back than the rear of 47? A. 45. It didn't run exactly to the end of 47.

Q. I mean, was it a shorter house or was it longer? A. I don't know; I think it must have been a little shorter, because the fence was nailed on 47. 10

Q. (By the Court.) What do you mean by that? A. On 47, the house was nailed right against 47, the house fence that runs between was.

Q. At the corner you mean? A. Yes.

Q. Then, from that point at the corner of the house where did it run? A. What do you mean?

Q. Where did the fence run from the corner of the house? A. It ran right straight on back. 20

Q. To where? A. Back to the back yard, to the back fence in the rear of the yard.

Q. Except this zigzag place in the center you speak about? A. Yes, sir; that was just on account of its being shackelly, don't you know?

Cross-examination by Mr. Hood.

Q. Mrs. Frazier, talking about fences, when did you become interested in the fence around 45 and 47 Locke street? A. When did I become interested? Only when I lived there; I had children; I often had to nail boards on the fences. 30

Q. Was the fence in such a condition that tenants had to nail boards on it? You were tenants? A. I mean by the children pulling them down, playing. 40

Rosetta Frazier, cross.

Q. The children would pull them down. Now, that was about the extent of your interest in the fences, to see that the boards would be replaced, to see that the children wouldn't go through? A. That is all I was interested in

10 Q. Just how they ran you didn't care anything about, you weren't interested? A. No, sir.

Q. Whether they ran straight or crooked didn't make so much difference to you as long as the boards would be put back so the children wouldn't get in or out, that is true, isn't it? A. Certainly.

20 Q. When was it that the question of fences became important to you, to determine as to how they ran? When did that become important to you? How long ago? A. Just as soon as you got me up here on the stand.

Q. Then you had said something, hadn't you, to Mr. Finelli, about fences? A. I was speaking about fences.

Q. What? A. I guess so, yes, sir.

Q. You had said something about fences to Mr. Finelli, wasn't that true? A. No more than what I am speaking to you.

30 Q. When was it that you told Mr. Finelli about fences? A. I don't know exactly when it was.

Q. A week ago? A. Who is Mr. Finelli?

Q. This gentleman who has been examining you. A. Oh, pardon me!

Q. The lawyer? A. You see how much I was interested.

Q. About a week or two ago? A. No.

Q. Longer than that? A. No, sir.

Q. Not as long as that? A. No, sir.

Herman B. Lehlbach, direct.

Q. When was it, please? A. Two or three days ago, I guess.

Q. So that was the first time that it really became important to you to recollect just how the fences were running? (No response.)

Q. Now, you lived at 47 Lock street and you have been living there six months? A. Yes. 10

Q. Before that you were down in Alexandria, Virginia. That is true, isn't it? A. Yes, I was down there about two years.

Q. You had moved away from 45 Lock street about five or six years ago? A. Yes, sir.

Q. So that as to any changes that occurred between the time you moved away, five or six years ago, until you moved back to the locality, five or six months ago, you, of course, haven't any knowledge? A. No, sir. 20

HERMAN B. LEHLBACH sworn in behalf of plaintiff.

Direct examination by Mr. Finelli.

Q. Mr. Lehlbach, where is your office? A. 196 Market street, Newark, New Jersey.

Q. I know you are a professional man. Are you a member of the firm of Lehlbach Brothers? A. I am. 30

Q. They are surveyors? A. They are.

Q. And real estate experts? A. They are.

Q. How long have you been engaged in that profession? A. Twenty-eight years.

Q. Are you familiar with the premises 47 Lock street, in that vicinity? A. I am.

Q. Have you made any surveys in that locality? 40

Herman B. Lehlbach, direct.

A. I either had charge of surveys, or was on surveys as assistant, of 47 and 49 Lock street, and 55 Lock street, and several properties surrounding on Central avenue west of Lock street, on the south side of the same.

10 Q. How many feet west from Lock street about? A. 130 feet west of Lock street and one, my recollection is, about 190 feet west of Lock street, in that immediate vicinity.

Q. When did you have the first opportunity of making a survey in that block? A. In the whole block?

Q. In that block? A. Why, about twenty-four years ago we made a survey on the south side of Central avenue, near Newark street.

20 Q. When did you first make a survey of 47 Lock street, the premises owned by the plaintiff in this case? A. I believe it was in 1904.

Q. Did you make a resurvey of the property? A. I did.

Q. When? A. In June, 1916.

Q. When you made the first survey what description did you have?

30 Mr. Hood: I think that we are entitled to the best evidence on that. I think we are entitled to the description if the survey is material at all.

A. I can give you the description upon which I based my survey. I have that here.

The Court: The question may be answered.

40 Witness: Shall I answer it?

Herman B. Lehlbach, direct.

By the Court:

Q. You may answer the question. A. My description?

Q. This was your 1904 survey, now. A. This survey, made in 1907.

Mr. Hood: The witness, your Honor, didn't tell us anything about a 1907 survey. 10

Witness: I understood I was asked what time I made a survey of the property. I said in 1904. I also made a survey in 1907 by the description which I have here.

Q. Then you have made three surveys of it? A. I have been on the ground and measured these properties three different times. This is the 1907 description. Beginning on the westerly side of Lock street, 100 feet south, 28 degrees west, from its intersection with the southerly line of Inness street, which streets are particularly designated on a map of the property called Inness place, in the city of Newark, made by Francis W. Brinley, Surveyor, thence running along Lock street south 28 degrees west 18 feet in width, thence extending from Lock street by lines parallel with Inness street, north 62 degrees, 40 minutes west 100 feet in depth, carrying the said width of 18 feet along the whole of said depth, and being the northerly portion of lot No. 95, on the aforesaid map, subject to the observation that an alleyway of about 3 feet in width— 20 30

Q. Never mind the observation. Is that description similar to the description which you had in 40

Herman B. Lehlbach, direct.

1915 or 1916? A. No, it is not. It is similar to it, but it differs in that—

Q. What is the difference? A. That the beginning point is described as being also distant southerly about 80 feet from the present southerly line of Central avenue.

10 Q. That is the only difference? In other words, the description that you had last year had a supplemental beginning point? A. It had.

Q. For whom did you make that survey in 1904? A. For Lowy, Lownstein and somebody.

Q. And Leber? A. I don't know whether it was Leber at that time.

Q. You don't know who was the owner of the property at that time? A. No, I do not.

20 Q. What was the condition of the block at the time you made that survey?

Mr. Hood: I object to that question. I think it is rather indefinite. We have no way of arriving at just what counsel does mean by that question.

The Court: I do not understand your question, Mr. Finelli.

(Question withdrawn.)

30 Q. Did you locate the premises? A. I did.

Mr. Hood: May it please the Court, Mr. Lehlbach is a surveyor and here is a map which he apparently is referring to.

The Court: There should be no reference to that map.

A. I found a house situated on the front part of the lot covering a full frontage of 18 feet, bounded
40 on the southerly side by a party wall. The house

Herman B. Lehlbach, direct.

measured 18 feet from the southerly line of the wall to the northerly side of the house. I found at the rear of the house it measured 18 feet from the center of the party wall, from the house which we surveyed, from the one adjoining on the south. We did also measure this 18 feet. I found that the fences extending from the rear of the house to the rear of the lot were in line, the northerly one with the northerly side of the house and the southerly fence with the extension of the center of the party wall, and that they measured 18 feet substantially in all places, and I based the survey of the property on these practical occupations as they had existed apparently for a very long time. 10

Q. What were the practical occupations? A. The houses and the fences. 20

Q. Was the fence on the northerly line of the house prolonged in a westerly direction? A. It was.

Q. How far? A. To a point 100 feet west of the practical line of Lock street.

Q. Was there anything to designate the end of the line, to indicate that particular line? A. A cross fence.

Q. How did that cross fence run? A. Practically on a line parallel with 100 feet westerly from the westerly line of Lock street. 30

Q. Do you know where the Smith property is? A. I do not.

Q. Do you know where Carp Cohen's property is? A. I do.

Q. Does the Carp Cohen property meet at a point, the property of the plaintiff here? A. I don't know that. Carp Cohen owns several prop- 40

Herman B. Lehlbach, direct.

erties along Central avenue. You asked me if I knew the property. I know one of his properties.

Q. Have you seen that map before, Mr. Lehlbach (referring to P4)? A. No, not in its present condition.

10 Q. Did you supervise or direct, or have anything to do with, the making of that map? A. I saw it before it was inked out.

Q. (By the Court.) What do you mean by "inked out"? A. Well, it was in pencil before it had been finished and inked out.

Mr. Finelli. I beg leave to use the map for the purpose of illustration.

20 The Court: I cannot rule that you may not do so but I will have to see what questions you ask with regard to it.

Q. Does the present south line of Inness street exist? A. It does not.

Q. Did you find 18 feet at the rear of the plaintiff's lot? A. I did.

Q. When did you find it? A. When I surveyed in 1907.

30 Q. Was the south fence defined and fixed at that time? A. It was.

Q. When you resurveyed in 1916 did you find 18 feet? A. I did not.

Q. How much did you find? A. About 15 feet 9 inches.

Q. Where was the other ground? A. It was occupied by the brick building.

40 Q. How far south does the occupation of the building extend? A. At the rear side about 2 feet 3 inches beyond the fence as it originally existed.

Herman B. Lehlbach, direct.

Q. Was there anything to indicate, I mean in 1904, the westerly line of the lot 47, on the northerly side? A. In 1904?

Q. Yes. A. I believe that conditions were the same in 1904 as they were in 1907.

Q. Was there a fence on the north side of the lot in question? A. There was. 10

Q. Where did that fence begin? A. It began at the rear of the house, No. 47 Lock street, and extended to a point 100 feet west of Lock street, on beyond the same, in a direct line, making the rear line of the lots fronting on Central avenue.

Q. Was there anything to indicate the point in the rear of the lot? A. Only as I have testified, a cross fence.

Q. Was that cross fence attached to anything? A. Not to my recollection. 20

Q. I mean how had the fences— A. There was a post.

Q. Was there a post there? A. I cannot recollect exactly whether there was a post exactly in the corner or not. The fence was held up by posts; the location of the posts I don't know.

Q. Was there anything over the land in the rear of the plaintiff's lot, in 1904, anything built on it? I mean the surface of the land. Was in its natural state, was it, except for little sheds? A. Except for little sheds. 30

Q. Light sheds, were they? A. That is right.

Q. And the condition that you found last year was just the same, there was nothing built over the plaintiff's lot from the southerly part of the garage to the northerly part of the plaintiff's 40

Herman B. Lehlbach, direct.

house? A. There was nothing built on the land between the garage and the house.

Q. Is the land holding firm—is it in its natural condition? A. No.

10 Q. What has happened. A. They have excavated the space between the southerly side of the garage and the property line between 45 and 47 Lock street for the purpose of making a driveway, and by reason of that excavation they have allowed the land of the property No. 47 to slide down to meet its angle of repose; there is nothing there, in other words, to sustain the ground of the property No. 47 Lock street.

20 Q. The grade of the property in the rear of the house is higher than the grade of Lock street? A. It is.

Q. How much higher? A. I should judge about 7 feet; I have never measured it.

Q. How many feet into the plaintiff's lot has there been falling away of earth? A. At the time I was there in 1916 I should say an average of 4 feet at the top.

30 Q. In your opinion did that have any bearing upon the value of the plaintiff's lot? A. Undoubtedly so.

Q. And did it tend to increase or diminish the value? A. In its present state to diminish the value?

Q. To what extent would it diminish the value?

40 Mr. Hood: I object. Does it appear that Mr. Lehlbach is an expert qualified to testify as to the diminution of value because a slide of earth runs up a distance of 7 feet from the

Herman B. Lehlbach, direct.

street level that is to be expected on account of the street levels?

The Court: The objection will be sustained.

Q. Do you know about the value of real estate in this locality? A. Only generally.

Q. Do you know generally the value of plaintiff's lot? 10

Mr. Hood: I object, because he has not qualified; he says he knows generally.

The Court: The objection will be sustained.

Q. Independent of values, Mr. Lehlbach, has the property of the plaintiff been damaged? 20

Mr. Hood: I object.

The Court: He has already stated that there was a condition there showing a depreciated value of the lots.

Q. What remedy would there be in order to fix up the conditions?

Mr. Hood: I object to that. In the first place, it is not quite clear in my mind what counsel means by remedy, whether he means the fact that the lands were not backed against something else, or a falling wall, or anything else; and it does not appear that he is qualified to testify on that point. 30

The Court: Objection sustained.

Herman B. Lehlbach, cross.

Cross Examination by Mr. Hood.

Q. Mr. Lehlbach, you pursue another calling besides that of surveyor, do you not? A. Not professionally, no.

Q. You are not a member of the bar? A. I am.

10 Q. But you do not practice? A. I do not practice.

Q. But you do instruct, do you not? A. I do.

Q. When you made this survey in 1907 you went upon the ground and you found a building at 47 Lock street. That is true? A. I did.

Q. You found that that building had a frontage of 18 feet? A. I did.

20 Q. That the rear of that building was 18 feet wide? A. It was.

Q. That is what your description called for? A. It did.

Q. That is what your description called for, a building 18 feet wide? A. 18 feet wide, running parallel within that street, 100 feet distant therefrom.

Q. Then you measured off 18 feet from the southerly fence of No. 47 Lock street. That is true? A. What is the question?

30 Q. You measured 18 feet then from the southerly fence that you found on 47 Lock street? A. I did.

Q. That projected your line on your survey 18 feet from that southerly fence? A. Yes.

Q. Parallel with Inness place? A. Inness place, or Inness street, whichever it is.

40 Plaintiff rests.

Herman B. Lehlbach, cross.

Mr. Hood: May it please the Court, it seems to me that from the case that has thus far been produced we are entitled to a nonsuit. In the first place, as I understand it, the question of paramount title would have to be perfect; but apart from that, it seems that the proof, so far as the plaintiff's case goes, has been confined to the locating of a piece of property according to what they called old occupations, and I don't think there is any proof as to the character or nature of those occupations. In the first place, they must prove that they are old occupations; second, they must prove that they are occupations that control; and third, they must prove that they are occupations which control over other conditions.

10

20

The Court: Does not your very last question to Mr. Lehlbach cure that difficulty? It has been shown that these old occupations show by the evidence here that for twenty or thirty years at least that line was in that position.

Mr. Finelli (after further argument): I cannot say very much, if the Court please, except that, taking the proofs at the best, as they ought to be taken, and associating the proof of Mr. Acocella with the proof of the witnesses as to the occupations there can be no doubt at all that the beginning of Central avenue and Inness place has been definitely fixed, and I think it has also been definitely fixed by Mr. Lehlbach. If there is any doubt about that particular point Mr. Lehlbach is here and I

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40

Herman B. Lehlbach, Recalled—Direct.

should ask the Court's indulgence to have the matter more definite and more plain.

The Court: I think you are wrong about that; he did not fix the beginning point with reference to Inness street.

10 Mr. Finelli: Then may I recall Mr. Lehlbach?

The Court: Mr. Lehlbach may be recalled.

HERMAN B. LEHLBACH recalled in behalf of plaintiff.

Direct examination by Mr. Finelli.

20 Q. Mr. Lehlbach, there has been some question as to whether or not you did find the beginning point on the westerly side of Lock street, 100 feet south and 28 degrees west.

Mr. Hood: I object.

The Court: Objection sustained.

Q. Did you find the beginning point of the premises, No. 47 Lock street? A. I did.

30 Q. Where is it? A. 10 feet from Inness street.

Q. In finding that point what did you use? A. I used Inness street as located by the practical occupation, and the mute testimony which now exists as to where Inness street was at the time the Inness map was laid out. That mute testimony is testimony of occupations along the intersecting streets. There are no monuments defining the lines.

40 Q. Are you familiar with the Inness place map? A. I am.

Herman B. Lehlbach, Recalled—Cross.

Q. Did you use it for your purposes in this case? A. I did not.

Q. You say that there are no monuments? A. There are no monuments defining the line of Inness place as it existed in 1835 when the Inness map was made.

Q. (By the Court.) There are no monuments? A. There are no monuments. 10

Q. (By Mr. Finelli.) Consequently what did you do? A. I established the line of Inness place by measuring out from the practical occupations by the streets intersecting Inness place, the distances given by the map and by the various deeds on those intersecting streets.

Q. Was this a well known and recognized method of procedure? A. The only method of procedure where there are no monuments. 20

Q. Well, are there at present monuments on Central avenue? A. Yes.

Q. Are they a guide towards solving the problem? A. They are not.

Q. Why not? A. Because they do not define the lines of Inness place.

Q. What do they define? A. They define the commissioner's idea of where Inness place should be put. 30

Cross examination by Mr. Hood.

Q. Mr. Lehlbach, you knew that there was an Inness street? A. What?

Q. There was an Inness street? A. I don't know whether it was Inness place or Inness street; it is termed differently on different maps.

Q. You knew there was a map on file showing 40

Herman B. Lehlbach, Recalled—Cross.

Inness street and Inness place, and surrounding land? A. I did not know that it was on file; I have never seen it.

Q. Didn't you know that map No. 68 of the Inness property was on file in the Register's office?

A. I did not.

10 Q. Dated 1835, and recorded in the Register's office in 1836, I think it was, and which has been marked in evidence? Didn't you know that there was such a map in existence? A. Not from personal knowledge; I have never seen it.

Q. You have never seen it and never consulted it? A. Not the original filed map. We have a lithograph copy in our book and in our records.

20 Q. Well, if you had a copy in your office you knew there was such a map in existence? A. Yes.

Q. But you didn't know that it was filed? A. Didn't know it was filed.

Q. Didn't know that it had been filed since 1836? A. I didn't know that.

Q. And you also knew that there was action taken for the widening of Inness street into Central avenue and that an ordinance to that effect was passed by the city authorities? A. I knew

30 that it was widened.

Q. Did you know, when you made this survey, that there was an ordinance actually passed setting forth the width to which it would be widened, to 80 feet? A. I knew that, yes.

Q. And you knew that commissioners were appointed for the widening of the street, who made a map for the widened street? A. I didn't know that they made the map; I presumed that they

40 did.

Herman B. Lehlbach, Recalled—Cross.

Q. You didn't know that the commissioner's map was filed, did you? A. I didn't know that, no.

Q. You did know that Inness street was 60 feet in width? A. I did.

Q. You did know that Central avenue is monumented? A. The present Central avenue is monumented in relation to the commissioner's line of Inness street. 10

Q. When you say the commissioner's line, that is the appointed officer, appointed by the proper authorities of this state for the purpose of widening this street? A. They were appointed by an act of the legislature to find the best line for the street that they could determine.

Q. They went to work and made this map and filed it? (No response.) 20

Q. What is the present width of Central avenue? A. 80 feet.

Q. That is so recognized, by every surveyor, and by all authorities? A. Yes.

 RECESS.

Q. Mr. Lehlbach, as I called to your attention this morning, you testified that Inness street, as laid out on the map of the Inness property, was 60 feet wide? A. It does. 30

Q. And you say that in the widening of Central avenue 20 feet additional was added to the southerly line of Inness street? A. I did not.

Q. Central avenue was widened by adding 20 feet additional on the south? A. Not in addition 40

Herman B. Lehlbach, Recalled—Cross.

to Inness street as laid out, as Inness street should be, but as laid out on the commissioner's map.

Q. The commissioners were appointed by an act of the legislature? A. They were acting under an act of the legislature, yes.

10 Q. So that the northerly line of Inness street—there was no change made as to that? A. I think there was.

Q. So far as the map in the register's office is concerned, or a public office, there is no change in the northerly line of Inness street so far as any public record is concerned? A. You mean recorded in the register's office?

Q. Or any public record? A. Not that I know of.

20 Q. You say there was no monument as to what was formerly Inness street? A. Not as to what was formerly Inness street.

Q. What did you say as to the monument at the corner of Central avenue and Dey street? A. It was placed there about 1860.

Q. By the commissioners? A. By the commissioners, yes.

30 Q. There are other monuments along Central avenue, about two blocks apart, placed there by the commissioners? A. I think there are none in existence.

Q. You are not positive? A. I am positive.

Q. What is the distance from the monument at Dey and Central avenue, from the northerly line of Central avenue? A. 30 feet.

40 Q. What is the distance from the monument at Dey and Central avenue to the southerly line of Central avenue? A. 50 feet.

Herman B. Lehlbach, Recalled—Cross.

Q. Is there any public document or map on record, so far as you know, which does not show that the northerly line of Inness street and the northerly line of Central avenue are not coincident? A. No public document or map to my knowledge.

Q. Are you familiar with the map made by the commissioners for the widening of Central avenue? A. I have never seen it. 10

Q. You do not think there is such a map in existence? A. I don't know; I have not seen it.

Q. You have heard so? A. I have heard so, yes.

Q. You don't know of its being filed, do you? A. I do not know.

Q. In making your beginning point 100 feet westerly from the southerly line of Inness street did you take into consideration the northerly line of Inness street as laid down on the map of the Inness property which is filed? A. Casually, yes. 20

Q. What do you mean by that? A. I know that the northerly line of Inness street is laid down on the Inness map as considerably north of the present northerly line of Central avenue.

Q. Do you know that from any public record? A. No. 30

Q. (By the Court.) How do you know it? A. I know from measuring out the beginning distance of properties located on intersecting streets, Lock street and Dey street, and the rest of the streets, that they have been practically occupying more land out to the central line of Central avenue than is called for at the beginning of Inness street, showing that the line of improvement of 40

Herman B. Lehlbach, Recalled—Cross.

Inness street is north, or was north, of the present line of Central avenue. That is how I determined.

10 Q. Then fixing your beginning point 100 feet westerly from the southerly line of Inness street, you would fix that point without regard to, or paying no attention to, the southerly line of Inness street as laid down on the map on file. A. If you mean the point 100 feet south of the southerly line of Inness street, would I fix them with relation to the southerly line of Inness street? I did fix it with relation to the southerly line of Inness street.

20 Q. (By the Court.) No, the question is, did you fix it with reference to the map on file. I understood you to say you had never seen it? A. I have a copy of it.

Q. Did you fix it with reference to the map which is on file, which you say you have a copy of? A. I never saw the map on file but I made it with reference to the copy of the Inness map which we have in our books, and which was made by Mr. Louis Dunn at the time the property was originally laid out.

30 By Mr. Hood.

Q. You don't know whether that is an exact copy of the map which is on file? A. I know it is not; I know there are differences from this map, and the map on file, from hearsay.

40 Q. So that in fixing the line 100 feet westerly from the southerly line of Central avenue, you knew that that point, as compared with that particular point on the map differs from the map in your of-

Herman B. Lehlbach, Recalled—Cross.

vice prepared by Mr. Dunn? A. No, I don't know that.

Q. I understood you to say, in answer to the last question, that you knew the southerly line on your map was different to the map on file? A. I didn't say that.

Q. What did you say? A. I say there are differences in the map. 10

Q. I am speaking of the southerly line of Inness street as laid down on the map of the Inness property on file. Now, you made your beginning point without reference to the southerly line of Inness street as laid down on the map on file?

A. I haven't seen the map on file. I made the beginning point 100 feet from the point as laid down on the map made by Mr. Dunn, the copy made by Mr. Dunn. 20

Q. Of course, never having seen the original map you cannot tell whether your copy and the original map on file are coincident? A. No.

Q. (By the Court.) Had you better not refer to the map? A. I had better see that. (After consulting map.) This map and the copy in my book is the same so far as lot No. 59 is concerned.

Q. (By Mr. Hood.) I am not asking you about that; I am asking you about the southerly line of Inness street. A. They are the same on both maps. 30

Q. During their full length? A. I will make a qualification in answer to this. The maps are the same, so far as the lines are concerned around Inness street, except that the map made by Mr. Dunn has no name, but calls it a proposed street, and the bearing of the street differs in Mr. Dunn's 40

Herman B. Lehlbach, Re-direct.

map, or the copy of the map, from the original map on file.

Q. What do you mean by bearing? A. The bearing of degrees; it describes the line of the street.

10 Q. That would cause some difference in the fixing of angles? A. Not unless it was established in relation to some other bearing.

Q. In making surveys you had to use one bearing in relation to the other? A. In surveying we never use bearings to define lines if we can possibly help it.

20 Q. (By the Court.) Do you use angles? A. We use angles defined by bearings, but we never use bearings to define lines where we have a distance to measure by.

Q. (By Mr. Hood.) So that when you located the southerly line of Inness street you located it from old locations of properties on the side streets? A. Exactly. There is no other way to locate it.

Q. That is the way you located it? A. Yes.

Re-direct examination by Mr. Finelli.

30 Q. Is there any other way of locating it?

The Court. He just said there was not.

40 Q. In order to find the length of the rear line of the plaintiff's lot did you do anything else besides measure from the south fence to the north fence? A. I made a survey of lot No. 49, I also made a survey of the property No. 55. In making any of these surveys we do not just measure the distance between one single property, we meas-

Herman B. Lehlbach, Re-direct.

ure all of adjacent adjoining properties in relation to which this property is situated and the lines of which might be governed in any way by practical occupations existing on the other lands.

Q. (By the Court.) Did you do that in this case? A. I did.

Q. Just what property did you measure? A. 10
I measured the street No. 49; I surveyed that; then I surveyed street No. 55.

Q. You said "street"? A. Street No. 49 and street No. 55, which was situated two lots further to the south than street No. 49; and after surveying each of these properties I located the distance between each of the avenues.

Q. Of the lots between 55 and 49? A. Yes, 20
sir; between 55 and 47; and found them all in possession of what their deeds called for, and no more; and in addition to that I once surveyed the property lying about 30 feet west of Lock street on the southerly side of Central avenue and extending very nearly to the rear line of the lots fronting on Lock street. That property was 40 feet in depth, by deed, from Central avenue, and I found that at the westerly side of that block the fence which defined the line, which appeared to be an ancient occupation, was 2 feet 3 inches north of 30
the 40-foot line; or, in other words, 37 feet 9 inches south of the present line of Central avenue, instead of 40 feet, which it should have been by the deed; and I found that it measured 40 feet from that fence to the northerly fence of street No. 47, showing that all of these occupations along the block agreed within themselves so far as the distance required by their deed was concerned. 40

Herman B. Lehlbach, Re-cross.

Q. Where did you say the lot was? A. Situated on the southerly side of Central avenue 30 feet west of Lock street, and was a property 60 feet long and 40 feet deep, and the fence along the avenue was—

10 Q. I understood that part of it? A. Shall I indicate on the map where it was?

Q. Yes. A. The lot running from a point 30 feet west of Lock street to a point about 7 feet east of the hundred foot line.

Q. (By Mr. Finelli.) Is there any substantial difference on the map which you have examined, and which is on file, and the map which you have in your office?

20 The Court. He has already explained the difference. He has stated what the difference is.

Q. (By the Court.) Did you observe any other difference than what you have stated? A. No.

Q. (By Mr. Finelli.) Would the discrepancy that you found make any difference in making your survey? A. No.

30 Q. It wouldn't affect the matter at all? A. No.

Re-cross examination by Mr. Hood.

Q. You say that a difference in angles would not make a difference? A. No, because I ignore degrees in angles; I define the streets by practical occupation.

40 Q. I am aware of the fact that you ignore angles, but I say, supposing you had not ignored angles, but I say, supposing you had been governed

Herman B. Lehlbach, Re-cross.

by angles as shown on the degrees, that would make a difference in describing your land, wouldn't it? It makes a difference whether that angle is 80 or 90 degrees? A. Not if you measure parallel with the street.

Q. But if you did not measure parallel with the street it would make a difference? A. Yes. 10

Q. In making your measurements the sum and substance of it was that you made your locations in reference to no monuments on Central avenue, or with reference to the filed map showing Inness street, but simply with reference to old occupation?

A. Except that I know that there should be 100 feet out to Inness street from these occupations. If Inness street could be re-established where it did exist in 1835 I base my locations, as you see, on the occupations. 20

Q. That would be your individual opinion not supported by any public record on file? A. To date, everything supported the established line on file.

Q. That would be to establish it without reference to the map of Inness street on file and without reference to the map of the commissioners for the widening of Central avenue? A. Yes, sir; absolutely ignoring that. 30

Mr. Hood. Absolutely ignoring both of the official maps that are of record. That is all.

Mr. Finelli. If your Honor please, I desire to call the plaintiff's wife, if I may, although it is out of order.

Jennie Imbeninato, direct.

JENNIE M. IMBENINATO, sworn in behalf of plaintiff.

Direct examination by Mr. Finelli.

- 10 Q. Is Pietro your husband? A. Yes.
 Q. Where do you live? A. 47 Lock street.
 Q. How long have you lived there? A. Eight years.
 Q. Do you understand the map (indicating)?
 A. No.
 Q. Well, this (indicating) is Mr. Mendl's garage. This (indicating) is 47. You can read that. That (indicating) is your house. When you bought the property, eight years ago, was there a fence between the rear of your house all the way up to here (indicating)? A. Yes.
 20 Q. When was the fence taken down?

(Witness proceeds to testify through the interpreter.)

- A. When the garage was built.
 Q. How long ago? A. I don't remember, one year, two years.
 30 Q. Was there any fence separating your property from Mendl's property, No. 45 Lock street?
 A. Sure, yes. (In English.)
 Q. (Question repeated.) A. (Through the interpreter.) No; after the garage was built there was no more fence there.
 Q. Has any part of your land fallen down on Mr. Mendl's property? A. Yes; there is about 2 feet. I am always afraid to let the children stay
 40 around there; I keep my children; I am afraid they will get hurt.

Jennie Imbeninato, cross.

Cross-examination by Mr. Hood.

Q. Madam, are you sure there was a fence where the brick building is? A. Yes, sure.

Q. What kind of a fence was there on that property that you say has been taken down? A. The boards did get in by the yard.

10

Q. Well, was it broken down, all the fence?

A. Some was broken, some was all right.

Q. Some was going one way and some was going another? A. I didn't put a line on it.

Q. Then when the building was finished Mr. Mendl started in to put up a nice cement wall along the back of his property next to yours, did he not? A. I didn't see any.

Q. Didn't you see the men come along and drop lots of cement and stone and start to work to lay a foundation for a cement wall between your property and Mr. Mendl's property? A. He wanted to build in my property.

20

Q. But you saw the men bring the cement and the broken stone in order to bring up this stone wall between your property and his property, didn't you? A. I said yes, sir, but he wanted to build in my property.

30

Q. Then you and your husband drove the men away? A. No, sir. I said, "Yes, put them off. You want to build a wall, build the wall in Mr. Mendl's property, not in mine, that is all."

Plaintiff rests.

Mr. Hood. I renew my motion now, upon the ground that it appears from all the proof in the case, in the first place, that the plaintiff

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Theodore Umbscheiden, direct.

10 has not shown by the preponderance of evidence its location, and secondly, that he has distinctly shown that his location is not fixed by public monuments in the streets and public records, but that on the contrary, he has fixed them from what the witness calls old locations; that they have not been established as old locations; that the old locations do not prevail over the fixed defined public monuments and street lines as fixed by the properly constituted authorities.

20 The Court. (After argument.) I am not prepared to say, now, that there is no testimony fixing the line there. Mr. Lehlbach says, you will recollect, that there are no monuments which fix the southerly line of Inness street as fixed by the Inness map of 1835; he says that there is a monument there fixing the southerly line of Inness street as conceived by the commissioners at the time that Central avenue was laid out; so I think I shall have to deny your motion, and an exception to that ruling will be noted.

30 An exception to this ruling is noted by the defendant as ground of appeal.

THEODORE UMBSCHIEDEN, sworn for the defendant.

Direct examination by Mr. Hood.

Q. Mr. Umbscheiden, what is your occupation?

A. I am the clerk of the municipal records of the City Hall.

40 Q. How long have you held that position? A.

Theodore Umbscheiden, direct.

This particular position for ten or more years, about eleven years.

Q. And as the clerk you have the custody of the municipal records, I understand? A. Yes, sir.

Q. Have you brought with you a resolution relating to the widening of Central avenue? A. An ordinance.

10

Q. An ordinance? A. I have.

Q. Is that an official document? A. This is the original ordinance passed in 1870.

Q. Please open it. Who is it signed by? A. Signed by A. C. Westervelt, president of the Common Council, and James Gillen, City Clerk, and S. W. Record, Mayor.

Q. You procured that where? A. From the files in my office.

20

Q. Is there a record on this instrument of its filing? A. There is a record that it was passed on June 3, 1870, and approved June 4, 1870.

Mr. Hood. I offer it in evidence.

Mr. Finelli. I want to cross-examine.

By Mr. Finelli.

Q. Who was your superior officer? A. The city clerk.

30

Q. He is the custodian of that document then?

A. I am the actual custodian, designated by him. The city clerk knows nothing of these papers. The city clerk is changed from time to time, owing to the political complexion of the Common Council. We are protected by civil service and remain. We are more familiar with these documents

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Theodore Umbscheiden, direct.

than the officer occupying the office for the time being.

10 Q. Would such an ordinance as that be contained in the book of ordinances? A. Yes. These (indicating) are general ordinances. Specific ordinances as to streets, or rather highways, are never published, they are entered in the written ordinance book.

Q. There is such a book? A. Yes.

Q. That is in possession of the city clerk? A. This is the original ordinance from which that is copied; this is the original document.

20 Q. How do you know that is the original document? A. From the entry made at the time. I found it in the file where it should be among the ordinances of 1870.

Q. You only have been there ten years. You found that paper in your office? A. I did.

Q. You don't know how it got there? A. No, not definitely.

Q. But there is an official record of it that the city keeps? A. There is an ordinance book.

Q. Which includes all ordinances passed by the city? A. I presume there was at that time; there is now.

30 Q. Supposing this paper was lost. Wouldn't there be an official record of the ordinance that you speak of? A. I cannot testify as to this time, but there is such a provision in the ordinance book in which every ordinance is engrossed.

Q. There has been for the last ten years? A. Yes.

40 Q. And more, for that matter? A. Very likely.

Theodore Umbscheiden, direct.

Mr. Finelli. I don't think that is the best evidence.

The Court. The ordinance will be received.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Marked Ex. D1.

(Mr. Hood reads Ex. D1 to the jury.)

10

By Mr. Hood.

Q. Have you with you any record as to the opening and widening of Central avenue subsequent to the adoption of that resolution? A. I have.

Q. What is it? A. It is the damage map of the opening of Central avenue.

Q. It is No. 1493? A. City record of such maps.

20

Q. Will you please open it? (Witness complies.)

Q. Is that signed? A. The map is signed by the commissioners, James G. Burnett, Henry N. Parkhurst, Thomas Malone, Frederick Volz. I am not certain of the last name—Joseph C. Young.

Q. Is it dated? A. It bears date the 31st day of January, 1871.

Q. What is that, you say, a map of? A. It is a map of the widening of Central avenue, showing the properties taken for that purpose. There (indicating) is the property that was already in possession of the city as occupied streets.

30

Q. Can you tell on examination of that map from what street to what street it shows Central avenue? A. It shows Central avenue from Warren street to High street.

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Theodore Umbscheiden, direct.

Q. Warren street is how many streets west of Lock street? A. About twelve.

Q. High street is how many blocks east of Lock street? A. Four.

10 Q. (By the Court.) Won't you state again what it shows? A. It shows the line of property taken for the widening of Central avenue.

Q. From what street? A. From Warren street to High street.

Q. I thought Warren and Central avenue ran in the same direction? A. Not at that point. In the northerly section of the city Warren street turns to the northeast and runs four blocks east. At Sixth street, Warren and Central avenue come together, at about that point (indicating).

20 By Mr. Hood.

Q. Newark street is where with reference to Lock street? A. West.

Q. How many blocks? A. On one side of the street, on the southerly side it would be one block.

Q. And you say High is four blocks east on Lock street? A. Yes.

30 Q. Now, on your map where does it show that the city took the property and awarded damages? On which side of Central avenue does it show that the city took the property and awarded damages? On that portion which extends from Newark to Summit? A. On the south side of Central avenue.

40 Q. I call your attention to the southwest corner of Central avenue and Lock street. What does the map show that the city took over and awarded damages for? A. It shows that it took a plot

Theodore Umbscheiden, direct.

20 foot front and rear by 100 along Central avenue. It is No. 12 on this map, as the number of damage; supposed to be owned, at that time, by Patrick Madden.

Mr. Hood. We offer that map in evidence.

The Court. If there is no objection it will be received. 10

Marked Ex. D2.

Q. Now, Mr. Umbscheiden, have you any other record with you? A. I have the map of what is called the opening of Inness street, but which is, in reality, the acceptance of Inness street, in its relation to Newark. Inness street, as opened up, was a blind street at that end, did not extend all the way to Newark street. The city opened it to Newark street and appointed commissioners, who filed their maps in the same manner as is customary. 20

Q. Newark street is west of Lock street? A. Yes.

Q. One block? A. One block, figuring on the southerly side of Central avenue.

Q. And that map shows the opening, of Inness street west of Newark street the award of damages? A. The award of damages. 30

Q. What is the date of that map? A. The 4th day of May, 1855.

Q. Who were the commissioners? A. John C. Pierson, James G. Burnett, James H. Tichenor.

Q. Where did you get that map? A. From the files in the City Hall.

Q. Where did you get the preceding map, D2? A. From the files. 40

Theodore Umbscheiden, direct.

Mr. Hood. I offer the Inness map in evidence.

(Marked Ex. D3.)

10 Q. What is this map, do you say (indicating D3)? A. The opening map showing the assessments for openings which I have just described.

Q. The opening from the westerly end of Inness street as shown in it? A. Yes.

Q. (By the Court.) That is what it shows? A. It is an accompanying map to the damaged map that counsel offered before. In the one map they show the property taken.

Q. It is the map taken in connection with the map marked D3? A. Yes.

20 Q. (By Mr. Hood.) Now, referring to D1, does this map show—

The Court. D2.

Mr. Hood. The openings was D1.

30 Q. (Continuing.) Does this map show that the city took any property on the north side of Inness street, Newark street down to Summit street for the opening and widening of Central avenue? A. It does not.

Q. Does it show as to where the city acquired land, on which side? A. It acquired on the south side only.

Q. All along that section? A. From Newark to Summit street.

Q. Lock street is an intersecting street? A. Between Newark street and Summit street.

40

Theodore Umbscheiden, cross.

Mr. Hood. I understand all three maps are now in evidence, your Honor.

The Court. You have not offered the opening map, yet.

Mr. Hood. I offer it.

The Court. It will be received.

(Marked Ex. D4.)

10

Q. This is the extension of Inness street from Newark street? A. That is a map of the opening area.

Q. (By the Court.) For the extension of Inness street, from the westerly end of the Inness property to Newark street, is that right? A. Yes.

Q. (By Mr. Hood.) What does that show? What would you say about that map? How would you explain that map? A. It shows the dimensions of various properties on the street as Inness street was at that time.

20

Q. What does it show as to the property of Mr. Madden on the southwest corner of Inness and Lock street? A. It shows that he is assessed on the building No. 7 on this map, the dimensions being given 30 feet on Lock street, 100 feet on Inness.

Q. And this map shows all that the city took of Mr. Madden's property? A. Took 20 feet on Lock street and 100 feet on Inness street.

30

Cross-examination by Mr. Finelli.

Q. The assessment commissioners have an office of their own? A. Yes.

Q. They have an office of their own? A. Yes; they have now; at that time they did not.

40

Theodore Umbscheiden, cross.

Q. And was the opening map made in 1855?

A. It is so endorsed and signed as of that time.

Q. And the damage map was not made in 1871? A. No; you are confusing the maps. One is the damage and benefit map and is all that related to Inness street, going back to about 1855; the other is as to the opening of Central avenue, and is of the date of 1870.

Q. Is the width of Inness street shown on that map of 1855? A. It shows at Newark street that the city paid damages on 60 feet down, 28 and 30 and 10.

Q. This particular map which you have in your hands here, I think it is D3, refers to property probably 1000 feet west of Lock street, does it not? A. I don't know; I have not measured it; it is within the block.

Q. Is Newark street the block immediately west of Lock street? A. On the south side of Central avenue, it is.

Q. You don't know the width of the block from Lock to Central avenue? A. The width of the block?

Q. Yes. A. The width of the street, along?

Q. Yes. A. Central avenue as it is now?

Q. Do you know what the distance is, now, of the southerly line of Central avenue from Lock to Newark street? A. No, I do not.

Q. Then this map of 1854 and the other map of 1855 relates to property up in Newark street? A. No; the benefit map relates to property up in Newark street?

A. No; the opening map relates to property on the corner of Lock street and that property along

Theodore Umbscheiden, cross.

Central avenue from Summit to Newark street.
This proceeding follows the award for damages.

Q. This award for damages does not concern Central avenue at Lock street at all, does it? A. Central avenue didn't exist at that time.

Q. Or Inness street, at Lock street? A. Not on that map.

Q. Not this map. Now, does this map D3 show the width of Inness street at Lock street? A. No, it does not.

Q. Does it show the width of Lock street. A. It does not.

Q. As a matter of fact, this map merely indicated that there was a certain report which the commissioners made in which they say, for instance, "We have assessed in favor of Patrick Madden, one thousand dollars?" A. Not in this case; it would be against him.

Q. That is all this map was for? A. Yes.

Q. Merely a reference map which goes with a certain report? A. It shows what they assessed for and where located.

Q. Isn't it a fact that this map is merely connected with any part of a report which the commissioners made? A. Yes, this is a part of the report; it so states.

Q. And it is merely used as a guide? You don't know whether it was really or positively \$1000 or \$100? A. From this?

Q. From the west point of Lock street up to the end of the line here. A. I am not endeavoring to do anything here; only endeavoring to show what or taking anything from it.

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Theodore Umbscheiden, cross.

Q. Now, take D2. Does this give the width of Lock street? A. No.

Q. Does it give the width of Central avenue? A. It does, at parts.

Q. Does it, between Newark and Lock street and between Newark and Dey street? A. No, it does not.

10 Q. This map is merely used in connection with a certain report that the commissioners made when they awarded a certain amount of damages to the party designated on this map? A. This is part of the report.

Q. This map is for the general public so that they may consult this merely as a reference map? A. You will have to interpret that; I don't know.

20 Q. Do you know who made this map? A. No, I do not.

Q. Do you know whether a surveyor made this map? A. I cannot testify to that.

Q. Does this map have any bearings? A. I cannot testify to that.

Q. Examine it. A. I am not a surveyor or an engineer.

30 Mr. Hood. I object. This witness is merely the custodian.

The Court. The map is in evidence. If it has bearings on it, that is a subject of comment.

Oscar De Camp, Recalled—Direct.

OSCAR DE CAMP, recalled in behalf of defendant.

Direct examination by Mr. Hood.

Q. What book have you there? A. Deed book, P16.

Q. Where did you get it from? A. The register's office. 10

Q. That is an official record? A. Yes.

Q. In which deeds are recorded? A. Yes.

Q. Please turn to page 105 of P16. Please read what you have there.

Mr. Finelli. I object.

The Court. Then I offer the book in evidence.

Mr. Finelli. I don't think it is competent or relevant. I don't suppose it is a deed of any of the parties to this suit. We don't know. 20

The Court. Well, I think it should be stated what the deed is.

Mr. Hood. It is a deed from the Mayor and Common Council whereby the city takes over the Madden property, 100 feet.

The Court. I do not know what the Madden property is. 30

Mr. Hood. The southwest corner of Central avenue and Lock street—for the purpose of showing the widening of that street a map has been offered in evidence and we simply want to present the record of the conveyance from the owner of the property at that point to the city which was embraced in this widening and for which damages were awarded.

The Court. What is your objection? 40

Frank T. Shepard, direct.

Mr. Finelli. I don't know whether Mr. Madden was conveying anything that he owned.

The Court. That is the difficulty; it is not shown here that Mr. Madden was the owner of the property.

10 Mr. Hood. There is this record which appears from the map that it appears on the map that Mr. Madden was the owner of the southwest corner of that and the city took over that amount and assessed damages.

The Court. The objection will be sustained.

An exception to this ruling is noted by the defendant as ground of appeal.

20 FRANK T. SHEPARD, sworn in behalf of defendant.

Direct examination by Mr. Hood.

Q. Mr. Shepard, what is your profession? A. I am a civil engineer and surveyor.

Q. Where is your office? A. In the Essex building, Newark, New Jersey.

Q. How long have you been a civil engineer? A. Twenty-nine years.

30 Q. Have you been engaged in any public work? A. I have been town engineer of Belleville and Nutley for the past eight years and engineer in Nutley for fifteen years.

Q. In your experience as a surveyor have you surveyed a large part of Newark? A. A great deal.

40 Q. Have you surveyed property located on the southwest corner of Central avenue and Lock street? A. I have.

Frank T. Shepard, direct.

Q. Have you surveyed the premises known as No. 45 Lock street? A. I have.

Q. Can you tell us how many surveys you have made? A. Two.

Q. Can you tell us when you made the first survey? A. The first survey was made on April 28, 1913.

Q. Before making that survey you went upon the premises? A. Yes, sir.

Q. You made the survey of 45 Lock street? A. I did.

Q. What did you observe, if anything, as to fences between 45 and 47 Lock street—their condition? A. At the time I made my survey there wasn't any fences between these premises.

Q. That was when? A. April 28th.

Q. Was there any building erected at that time on the southwest corner of Lock street and Central avenue? A. There were old frame buildings.

Q. Was there any brick buildings erected on the rear of 45 Lock street at that time? A. There was not.

Q. When you made that survey, Mr. Shepard, how did you go about it? A. I was furnished with a description which made the southerly line of the premises parallel with Inness street.

Q. Did you establish that line? A. From the interpretation of the city of the line of Inness street I established it and measured parallel.

Q. Where did you secure the data in order to make the interpretation? A. I have a copy of the city map showing that the northerly line of Inness street and the northerly line of Central avenue are coincident.

Frank T. Shepard, direct.

Q. Which map is that? A. A copy of the map which is offered here in evidence.

Q. The Inness map? A. No, the opening map of Central avenue is the one here referred to now.

Q. Look at D2. Is that the map? A. That is the map.

10 Q. You have got a copy? A. Of that map, I have.

Q. What did that map show as to the northerly line of Inness street as compared with the northerly line of Central avenue? A. It shows that they were the same lines.

Q. Coincident? A. Coincident.

20 Q. What did you do then? A. I measured in accordance with my deed parallel with the line of Central avenue to fix the southerly boundary line.

Q. From which line of Central avenue? A. From the southerly line.

Q. How did you determine the southerly line of Central avenue? A. 80 feet from the northerly line.

30 Q. Where did you get the data from? A. There is a monument one block west of Lock street, on Dey street, which is placed 30 feet southerly from the northerly line of Central avenue.

Q. Taking into consideration that monument how did you find the southerly line of Central avenue? A. Measured 50 feet from it.

40 Q. Why is it that you measured 50 feet from the monument at Dey street and Central avenue in order to locate the southerly line of Central avenue? A. Because Central avenue is 80 feet in width and the monument stone is 30 feet southerly

Frank T. Shepard, direct.

from the northerly line of Central avenue and Dey street.

Q. How did you determine, from what record, if any, did you determine that the southerly line of Central avenue is 50 feet southerly from the monument at Dey street and Central avenue? A. From the record on file in the city engineer's office, City of Newark. 10

Q. What maps? A. The map showing the location of the monument stone.

Q. That map shows Central avenue to be 80 feet? A. Yes.

Q. Have you ever examined the map that has been offered here in evidence as to Inness street? A. I have.

Q. You knew that map was filed, didn't you? A. I did; I have a copy of it in my office. 20

Q. What does that map show the width of Inness street to be? A. 60 feet.

Q. What does it show the southerly line of Inness street to be? How does it show the southerly line of Inness street to run as compared with the northerly line of Inness street? A. Parallel with and distant 60 feet southerly therefrom.

Q. Then from that date, from the date in the engineer's office, how would you run the southerly line of Central avenue as compared with the northerly line of Central avenue, which you say was coincident with the northerly line? A. I would fix the line as being parallel with and distant 80 feet southerly from the southerly line. 30

Q. Then, in going upon the premises, 45 Lock street, to make your survey, you took your begin-

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Frank T. Shepard, direct.

ning point from what? A. From the southerly line of Central avenue.

Q. A public street? A. Yes, sir.

Q. That was distant how many feet from the southerly line of Central avenue? A. The beginning point?

10 Q. Yes. A. 80 feet.

Q. Then explain how you ran your line. A. I measured 80 feet along Lock street; went to a point 100 feet along Central avenue and measured off 80 feet to parallel, fixing the southerly line, 80 feet from Central avenue.

Q. You fix the southerly line 80 feet parallel from the southerly line of Central avenue? A. That is right.

20 Q. That is the line that is here (indicating)? A. It is not.

Q. It is not indicated on that map? A. No, sir.

Q. If the beginning point is 80 feet southerly from the southerly line of Central avenue, what distance would it be from the southerly line of Inness street as appears on the map? A. 100 feet.

30 Q. Then you made a subsequent survey, did you? A. I did.

Q. When was that? A. That was on July 28, 1915.

Q. Was there any brick building at 45 Lock street at that time? A. There was.

Q. How did you make that survey? A. Just in the same manner that I made the original survey.

40 Q. You took a point 80 feet— A. On Lock street.

Frank T. Shepard, direct.

Q. From the southerly line of Lock street? A. From the southerly line of Central avenue.

Q. And ran your line parallel with the southerly line of Central avenue? A. I did.

Q. In running your line westerly and parallel with the southerly line of Central avenue out to the beginning point 80 feet from the southerly line of Central avenue, and then westerly 100 feet, where did that line strike with respect to the brick building in the rear of 45 Lock street? A. The front corner of the building nearest the street line, as I ran it, was three-quarters of an inch away from the building, cleared the building three-quarters of an inch, and at the rear one-quarter of an inch.

Q. Did you make a map at that time of your survey? A. I did.

Q. Did you make a subsequent survey of the premises? A. I did.

Q. When? A. About two weeks ago.

Q. Did you make a map of your survey at that time? A. I did.

Q. Have you it here? A. I have.

Q. Please unroll it? A. (Witness unrolls map, which is placed on the wall.)

Q. This street here is Central avenue (indicating)? A. It is.

Q. This is Lock street. This line is what? A. That is the southerly line of Central avenue.

Q. That (indicating) is what? A. The northerly line of Central avenue and also the northerly line of Inness street.

Q. And this green line? A. That is the old southerly line of Inness street.

Q. How did you determine that on this map?

Frank T. Shepard, direct.

A. 60 feet southerly from and parallel with the northerly line of Central avenue.

Q. How did you determine this southerly line of Central avenue? A. 80 feet southerly from the northerly line.

10 Q. You have explained these things by reference to the engineer's map or maps on record. When you made this survey two weeks ago where did you take your beginning point? A. 80 feet southerly from the southerly line of Central avenue.

Q. Then you say this beginning point is 80 feet from the southerly line of Central avenue? A. Yes.

20 Q. Then what did you do? A. I ran that line westerly 100 feet parallel with and distant 80 feet southerly from the southerly line of Central avenue.

Q. The northwest corner of 45 Lock street, this line (indicating)? A. The northwest corner of 45 Lock street is—

The Court: That is the southwest corner.

30 Q. (Continuing). The southwest corner is how many feet from the southerly line of Central avenue? A. The corner of the property is 80 feet.

Q. How does this line run in relation to the southerly line of Central avenue? A. Parallel with it.

40 Q. In running that line you found this brick building where? In running this westerly line and this southerly line you found that brick building where? A. At the point you have your pointer indicated, 79 feet $11\frac{1}{4}$ inches from Central avenue, or $\frac{3}{4}$ of an inch away from the line.

Frank T. Shepard, direct.

Q. Well, within the line? A. Within the line.

Q. And the further extreme corner of the brick building— A. Is 79 feet $\frac{3}{4}$ inches, or $\frac{1}{4}$ of an inch within the line.

Q. (By the court.) As I understand your testimony, then, Mr. Shepard, the correctness of your location of this building depends entirely on the correctness of the northerly line of Central avenue? 10

A. Yes, sir.

Q. (By Mr. Hood). That line is fixed by what?

The Court: He has already stated that.

Q. Mr. Shepard, does the variance in an angle in any way affect the direction of the line of the property? A. It does in every way.

Q. Suppose you explain to us the method of projecting your lines and making your survey in order to set up the survey of a piece of property? 20

A. It is an unfailing rule of all surveyors to use distances in preference to bearings where there are distances showing angles. In cases where there are no distances you are governed then by bearings. For instance, a bearing of north 60 degrees west and another one of north 30 degrees east would in themselves form an angle of 90 degrees that would be turned by the surveyor in making the survey. 30

Q. (By the Court.) Just what is here, south 28, east, north 62, west? A. 62—40 west.

Q. (Continuing.) Would be a 90 angle, 90 degrees; but if it is 60 to 40, that would throw it out of the angle that many minutes? A. Yes. As I recollect that bearing in this Inness map Lock street is 62 east; bearing on the side line, is 42 minutes, making an interior angle. 40

Frank T. Shepard, direct.

Q. That would be 89, 20. You said 89, 40. A. 89, 40. That is, the opposite angle would be 90, 20. If you survey a lot strictly on a bearing basis you wouldn't make this line parallel with Central avenue; there would be thirteen minutes out on the angle.

10 The Court: What is the purpose of this? It does not appear that any of the surveyors adopted the course method.

Mr. Hood: Mr. Lehibach testified that it wouldn't be any different.

Q. (By Mr. Hood.) Would a line extending from Lock street north 62 degrees 40 minutes west, 100 feet in depth, be parallel with the southerly line of Inness street or Central avenue? A. Well, I cannot answer that unless you give the qualifying bearing on Lock street. It depends entirely on the bearing of Lock street.

20

Q. (By the Court.) What would that have to do with the question whether it was parallel with Inness street? A. The line of Inness street, this southerly line, would have to have the same bearing in order to be parallel.

30 Q. What is that? A. The southerly line of Inness street and the southerly line of these premises in question.

Q. That is not what he said. He said Lock street. A. I didn't understand it that way. He said a line extending 100 feet from Lock street.

Q. (Question read.) A. I answered that by saying that you would have to have the bearing on Lock street first to determine whether it would or not. If the map shows Inness street to be 62, 40,

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Frank T. Shepard, direct.

west, it would be parallel, yes, but to turn that angle you would have to have the bearing on Lock street to determine that.

Q. (By Mr. Hood.) Is there any way of determining that angle on Lock street? A. Yes.

Q. (By the Court.) Of course, if Lock street is south 28 west it wouldn't be the right answer? A. No. 10

Q. It still might be parallel with the southerly line of Inness street and Central avenue? A. Yes.

Q. (By Mr. Hood.) Taking your description in the amended plan, which I hand you, can you tell whether the second course as there laid out would be parallel with the southerly line of Inness street?

Q. (By the Court.) Do you know the course of Inness street, the bearings of Inness street and Central avenue? A. Yes. The second course in this description is north 62 degrees 40 minutes west, and is the same course as shown on the Inness map of the line of Inness street. 20

Q. And hence would be parallel? A. Yes, certainly.

Q. But you didn't count that plan in arriving at it? A. I paid no attention to bearings, but I measured the parallel as my description ran, because the description read parallel I took that as my bearing. 30

Q. (By Mr. Hood.) Does that govern? A. It does, in my opinion.

Q. Is it controlled by reason of the location of the northerly line of Central avenue and Inness street being coincident? A. Yes.

Q. And the monument at Central avenue and Dey street? A. Yes, sir. There is another factor 40

Frank T. Shepard, cross.

that enters into that. You couldn't turn an angle to fix a lot line on Lock street unless you get proof that Lock street today is the same as shown on the Inness map.

Q. (By the Court.) That same thing applies to Central avenue, doesn't it? A. Yes.

10 Q. (By Mr. Hood.) Then as I understand you that made your survey based on the lines of Central avenue, as appears on the respective maps on record and the monuments? A. I did.

Cross-examination by Mr. Finelli.

Q. Is the stone monument at Central avenue and Dey street of any use to you in determining the southerly line of Central avenue? A. It is.

20 Q. As a general rule stone monuments are not described by surveyors? A. Not as a general rule.

Q. Why did you adopt it in this particular case? A. Because the setting shows it to be a stone fixed for the intersection of those two streets, and it has been used by surveyors and by myself for a great many years for that purpose.

30 Q. (By the court.) Have you ever endeavored from that monument to verify the practical occupations of surrounding lots? A. Not on Lock street, no.

40 Q. On any of the streets? A. Yes, I have done on Summit street. I found that the Inness map—and this will hold good with a great many of the old maps of the City of Newark and other cities—is not exactly accurate. There may be a surplus in some maps throughout; on other maps I find, on Summit street, that the practical occupation do not

Frank T. Shepard, cross.

reconcile with the monument lines in some cases; but I never had any occasion to do anything on Lock street except on that particular corner.

Q. Have you ever made any surveys in that locality where you found the practical occupations to correspond to a nicety with this monument? A. Not this particular monument, no, sir.

10

Q. (By Mr. Finelli.) Have you with you the description that was furnished in 1913? A. I think perhaps my counsel has. I haven't it with me.

Q. Were you furnished with the description of 1915? A. Yes.

Q. Have you that here? A. No.

Mr. Finelli: I ask them to give us the description of the defendant's premises.

20

Mr. Hood: All right; we will offer our deed in evidence; that is where I took my description from. I would like to offer this deed in evidence.

The Court: Just give the description of it so it will go on the record.

Mr. Hood: Deed made by direction of the building and loan association to Max Mendl, dated April 22, 1912, recorded in the office of the Register of Deeds for Essex County on the 23rd day of April, 1912, at 12:41 o'clock, and recorded in Book Y, 50 of Deeds for said county, on pages 126 and 127.

30

(Marked Ex. D-4.)

Q. Is this the description that you used? A. This is a part of it; this is the description of the strip 20 feet front and rear by 100 feet in depth, as

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Frank T. Shepard, cross.

I recollect. I haven't the description, but I recollect that there were two or three strips in the premises I was called upon to survey.

10 Q. You now have in your hand a deed of Mr. Mendl of all this property, 45 Lock street. A. Do you want me to answer that? You made a statement that I had it in my hand.

The Court: It was not in the form of a question.

Q. Have you in your hand, now, a deed of the property, 45 Lock street? A. Yes.

Q. That conveys the strip of land 20 by 100? A. That is true.

20 Q. And it immediately adjoins the property of the plaintiff on the right or on the north? A. That is right.

30 Q. Will you please read that description? A. Beginning on the west side of Lock street at a point therein distant 80 feet south from its intersection with the line of Inness street, as shown on the map of Inness place, and being 20 feet in front and rear, by 100 feet in depth, on each side, being further known as street No. 45 Lock street, Newark, New Jersey, by lot No. 34, block No. 398, and is laid down and designated and described on the block map of the City of Newark by the same lines conveying to the party of the first part by Robert F. W. Bues and wife.

Q. That is all that refers to the description of the premises? A. Yes.

40 Q. Therefore, in order to find the defendant's line you had to find the southerly line of Inness street as shown on the Inness map? A. I did.

Frank T. Shepard, cross.

Q. Can you find it? A. I did.

Q. And did you find that the defendant's north line was parallel to Inness street? A. I so interpreted it.

Q. You interpreted it, but you did not read that in the description? A. The description? I did make the southerly line parallel with Inness street and I so surveyed it. 10

Q. Then the description you took was that description that you had in the deed now before you? A. I did not, because I didn't have the description of my comparison at that time.

Q. The description you now have does not make either line, either north or south line of the defendant, parallel with Inness street? A. No, it does not. 20

Q. Then why do you say that these lines should be parallel with Inness street? A. Because the description I had made them parallel with the Inness map.

Q. Where did you get the description? A. It was furnished to me by Mr. Hood at the time I made the survey.

Re-direct examination by Mr. Hood.

Q. You also made surveys of adjoining properties to the north, that is, properties on the southwest corner of Central avenue and Lock street, at that time? A. I don't quite get your question. 30

Q. I mean to say that you made surveys of the adjoining lands to the north of 45 Lock street. A. Yes, I did. There were two or three parcels on my original survey.

Q. These were the three parcels that you surveyed? A. Yes, sir. 40

Edward G. Kempf, direct.

EDWARD G. KEMPF, sworn in behalf of defendant.

Direct examination by Mr. Hood.

Q. Mr. Kempf, you are a surveyor? A. I am.

Q. How long have you been a surveyor? A.
10 Over fifteen years.

Q. You survey properties in Newark? A. Yes.

Q. Your office is where? A. 164 Market street.

Q. Have you surveyed the property No. 47 Lock street? A. No.

Q. What property did you survey? A. I surveyed the northerly line, a line which would be 80 feet southerly from the southerly line of Central avenue and parallel therewith.

20 Q. I want to direct your attention to the map in the lower corner on that board. Can you indicate on that map the line that you surveyed? A. It would be the southerly line as shown 80 feet southerly from the southerly line of Central avenue.

Q. Point it out. (Witness complies.) When did you make that survey? A. I don't know; I have not got that sketch with me.

30 Q. Well, approximately. About how long ago? A. December 30, 1916.

Q. You established that line for what purpose? A. To find out how the building on the Central avenue and Lock street was located in relation to the present southerly line of Central avenue.

Q. In relation to the line running parallel with the southerly line of Central avenue at a distance of 80 feet from it? A. That is right.

40 Q. What did you find as to that brick building

Edward G. Kempf, direct.

which extends through? A. I found the southeasterly corner of the westerly section of the brick building to be three-quarters of an inch within the line of the lot or 79 feet 11 $\frac{1}{4}$ inches from the southerly line of Central avenue and the southwest-erly corner of the brick building as being one-quarter of an inch away from the line.

10

Q. How did you establish that line? A. By measuring 80 feet southerly from the southerly line of Central avenue and parallel with the southerly line of Central avenue.

Q. How did you establish the southerly line of Central avenue? A. By monuments planted by the City of Newark.

Q. Where are those monuments located? A. At a point 50 feet northerly from the southerly line of Central avenue. The stone showed in the middle of Dey street and 50 feet northerly from the southerly line of Central avenue, and there was one, at one time, in the center line of Lock street and Central avenue, 50 feet north of the southerly line of Central avenue.

20

Q. (By the Court.) What reference has that to your present surveys? A. I have made a mark that I made from that monument when it was there.

30

Q. (By Mr. Hood.) When did you make that mark? A. I don't know; I haven't got it here.

Q. Approximately? A. It may have been eight or ten years ago.

Q. At that time there was a city monument? A. There was a city monument there.

Q. That was placed by whom? A. By the commissioners to lay out streets.

40

Edward G. Kempf, direct.

Q. What is the width of Central avenue? A. 80 feet.

Q. How do you determine that? A. By the commissioner's map.

10 Q. I show you D2, Mr. Kempf, and I ask you whether that is a map you have reference to? A. No.

Q. Which is the map you have reference to? A. I don't believe you have it here.

Q. Do you know how it was entitled?

Mr. Finelli: I want to definitely fix that the witness did not use D2.

The Court: He did not fix the line by D2.

20 Q. How is the map entitled that you have reference to? A. I really don't know what it is; we always refer to it as the commissioner's map of the City of Newark, showing monument stones in all streets where they have been planted.

Q. Can you tell me the relative position of the northerly line of Central avenue and the northerly line of what was formerly Inness street, the relation of one to the other? A. I have always presumed that they were parallel.

30 Q. The northerly line of what was formerly Inness street with the northerly line of what is at present Central avenue? A. The northerly line is 30 feet northerly from the monumented line as noted there (indicating).

Q. That is the northerly line of Central avenue? A. Yes.

40 Q. And the northerly line of Inness street? A. I always considered them to be the same.

Edward G. Kempf, direct.

Q. In other words, are they coincident? A. Yes.

Q. They are coincident. You would fix the southerly line of Central avenue as being 80 feet south from the northerly line of Central avenue?

A. I would.

Q. That, you say, would be 80 feet south of the northerly line of Inness street? A. As I think it is, yes. 10

By the Court.

Q. You said that when that monument was at the intersection of Lock street and Central avenue you made a mark? A. Yes.

Q. Now, where was that monument? A. That monument was in the center line of Lock street, going south, 30 feet southerly from the northerly line of Central avenue. 20

Q. Where did you make that mark? A. The southeasterly corner of Lock street and Central avenue, on the brick building, 9 feet southerly from the southerly line of Central avenue.

Q. On which side of Lock street? A. On the easterly side of Lock street.

Q. In what direction? What was the bearing upon the monument? A. It would be southerly from the monumented line of Central avenue. The mark was made 50 feet southerly from the monumented line of Central avenue, so in order to establish the southerly line of Central avenue you would measure 9 feet northerly. 30

40

Edward G. Kempf, cross.

Cross examination by Mr. Finelli.

Q. Can you find the established line of the street by locating one stone monument? A. No.

Q. You need two? A. You need two.

10 Q. Where did you get the second? A. I had it at the time, the monument.

Q. One was on the east side of Lock street at Central avenue and the other was where? A. Dey street.

Q. When did you last see the one down at Lock street? A. It was just before the street was paved—repaved.

Q. How many years ago? A. I don't know how many years ago that was.

20 Q. About twenty-two years ago? A. No; only a few years ago.

Q. Why did you say that you merely presumed that was the northerly line?

The Court: He said, "I always considered."

30 Q. Why did you always consider that? A. Because I had no reason to doubt it; I knew of nothing else that would lead me to believe that it is not so.

Q. Did you measure it from the monument? A. What, Inness street?

Q. Yes. A. No.

Q. Did you try to ascertain whether the monument distances disturbed the occupations in the vicinity? A. No.

40 Q. Well, isn't it so that at times you did find that the monument distances had disturbed the occupations in the vicinity? A. Yes.

Edward G. Kempf, cross.

Q. When you did find that the monuments had disturbed the occupation what did you do? You dropped the monuments, didn't you? A. That is a question I cannot tell until I have the case.

Q. Well, in a case where the monument lines disagreed with the line of occupation then what did you do?

Mr. Hood: I object. I think this is apparently a question of law. I don't think this witness is qualified to pass on that.

The Court: Objection sustained.

Q. Did you ever make a survey in the vicinity of Central avenue and Lock street? A. Yes.

Q. Where? A. I surveyed a piece quite some south of Central avenue; quite a ways beyond.

Q. Didn't you once also survey a piece of land about 30 feet west from Lock street on Central avenue? A. If I did I don't remember it; I didn't look it up.

Q. Weren't you in a case with Carp Cohen about—

Mr. Hood: I object to any reference to any case that we are not concerned with.

The Court: Objection overruled.

Q. Weren't you a witness in the surrogate's court in a case where Carp Cohen was the plaintiff, or Smith was the plaintiff against Carp Cohen ten years ago? A. I think I was.

Q. Wasn't the point of dispute there either 30 or 100 feet west of Lock street and south of Central avenue?

Edward G. Kempf, cross.

Mr. Hood: I object. If it is at all competent we are entitled to have specifically set forth what the point of dispute was. It doesn't appear that counsel was in the case.

The Court: That would not be necessary if he testified differently then.

10

A. I don't remember what it was.

Q. Do you remember that it was a dispute to fix the southerly point of Mr. Smith's land or the northerly point of Mr. Smith's land and the southerly point of Mr. Cohen's land? A. I was requested to make measurements from Central avenue to the land that was occupied by the Smiths. What that was I don't remember; I haven't got it with me. What the results were I don't know.

20

Q. You were engaged in this case to find this particular imaginary line 80 feet south from Central avenue? A. Yes.

Q. How long have you known that line?

Mr. Hood: Which line?

Mr. Finelli: The line in question.

30

Q. (Continuing.) 80 feet south? A. How long have I known that line? I don't know how to answer that question.

Q. Then I will change it. Is this the first time in your experience as a surveyor that that particular line has been in dispute? A. Yes.

Q. Did you have particular instructions to find the south line of Inness street? A. No.

40

Q. Well, then, in making your calculations here did you have a description? A. I believe I had a description furnished me of 47 Lock street.

Edward G. Kempf, cross.

Q. Oh, you had our description? A. I think I did.

Q. But you didn't have Mr. Mendl's description? A. No.

Q. Does our description indicate that it is 100 feet south from Central avenue? A. I don't know; I haven't got the description with me. I made a survey of this property. It was requested to give the distance from the rear of the brick building that is now established on the southwesterly corner of Lock street and Central avenue to the present line of Central avenue, and also the distance from the frame building, 47 Lock street, to the present line of Central avenue. 10

Q. That is as far as the request went and that is as far as you went? A. That is as far as we went. 20

By the Court.

Q. And the correctness of the line which you fixed depends upon the correctness of the southerly line of Central avenue? A. Not particularly; I measured; I went by my reference.

Q. What else does it depend upon? A. I rest my results on what the distance is from how that building would stand, the present brick building, and that present line of Central avenue. 30

Q. I say, the correctness of your location of that line depends upon the correctness of the location of the southerly line of Central avenue? A. Yes, sir.

Q. And that in turn depends upon the correctness of your two monuments upon which you depend? A. Yes. 40

Theodore Umbscheiden, Recalled—Direct.

By Mr. Hood.

Q. And your purpose was to determine whether the brick building on the southwest corner of Central avenue and Lock street went over that line?

10 A. I went ahead to determine whether that building was within the limits of 80 feet distant from the southerly line of Central avenue and parallel with Central avenue.

Mr. Hood: He made reference to a certain commissioner's map which we want to produce here tomorrow morning, and of course, in order to complete his testimony, I can have that map brought up from the City Hall. I suppose I will have to have Mr. Kempf here in order to identify that map?

20

The Court: You will have to arrange that with counsel.

Adojurned to Friday, March 23, 1917, at ten o'clock A. M.

SECOND DAY.

30 Newark, N. J., March 23, 1917.

Continued pursuant to adjournment.
Appearances as before.

THEODORE UMBSCHIEDEN recalled for the defendant.

Direct examination by Mr. Hood.

Q. What book is that you have before you? A.
40 This is a part of the report of the commissioners

Theodore Umbscheiden, Recalled—Direct.

appointed under the act of 1857 to lay out the streets, avenues and squares of the City of Newark, under the act of 1857, and the supplement thereto.

Q. That is the report, you say? A. This is the report, the map showing the streets, surveys, the landmarks, the monuments, and lines of various streets.

10

Q. Is it dated? A. It is; each map is dated.

Q. Will you please turn to the map of Inness street running from Summit street to Newark street?

Mr. Finelli: Before the witness testifies I have an idea that this is either an old record, or it is a record which is kept up to date; if it is kept up to date, I suspect that this witness is not the custodian of it, or this witness is not the person who makes the entries on it, because, as I understand his former testimony, he is merely the custodian of some old records, and we might first ascertain where this book comes from, and what it is.

20

Q. Where did you get that book? A. From my office.

Q. You are the custodian of— A. Custodian of it. This is the record originally filed in the City Clerk's office, and continuously in the clerk's office, with the exception of such time as engineers note a change therein.

30

Q. Is that record, so far as it relates to Inness street, extending from Summit street to Newark street—have any changes been made upon those records?

40

Theodore Umbscheiden, Recalled—Direct.

Mr. Finelli: I object; the witness cannot know. On the other hand, it is clearly apparent that other persons have access to the books.

10 Q. Since your connection with it, on those maps. A. Changes are frequently made on these maps from time to time, and have been since they have been in my custody.

Q. On those particular maps? A. I cannot say as to these particular pages.

Q. Will you turn to the map of Inness street extending from Summit street to Newark street?

A. In order to do that I would have to show two maps.

20 Q. What maps are they? A. On range 3, No. 2, Inness street shows from Summit to Lock; on range 3, No. 3, shows the continuation from Lock to Newark street.

Q. And, so far as Inness street is concerned, does it show any changes noted by anybody, or do the maps appear in their original condition?

Objected to.

(Question withdrawn.)

30 Q. During the period that you have been custodian of these maps have any changes been made on those two maps that you have referred to?

Mr. Finelli: I object, because that question has already been answered.

The Court: He says changes have been made on the maps in the books, but has not testified to these particular maps.

40

Theodore Umbscheiden, Recalled—Direct.

A. I don't know of any particular changes made on those particular maps while in my possession; none have been made on those particular books while in my custody.

Q. Those two plates I am referring to. A. I am referring to the same thing.

Q. Now, Mr. Umbscheiden, referring to these two maps of Inness street from Summit street to Newark street, are there any monuments indicated in Inness street? A. There are. 10

Q. Where do they appear from the maps to be located? A. There is one monument at the intersection of Summit street.

Q. And what other street? A. Of Summit and Inness.

Q. Where is the next one? A. At the intersection of Lock street with Inness street. There is another one at the intersection of Inness street and Newark street. There is another one at the intersection of Dey street, and Inness street. 20

Q. That is a distance of how many city blocks on those maps, those four monuments that you have indicated? A. The first one is at the beginning of the streets at Summit street; the second one three blocks west at Lock; the third one block west of Lock street at Dey, and the fourth at Lock street one block west of Dey street. 30

Mr. Hood: We offer the record in evidence.

The Court: If there is no objection it will be received.

(Map not marked.)

Q. Now, have you any other record with you besides those you have shown, relating to assess- 40

Theodore Umbscheiden, Recalled—Cross.

ments, award of damages to property holders on Inness street for the widening of Central avenue?

A. I have. I have produced at your request the tax assessment records of 1871 affecting property in this immediate location, and those of 1874 immediately preceding the opening of the new street, and immediately after the physical opening of the street.

Q. Where are they? A. I have them here in court.

Q. What is the book you have here now? A. This is the revision of taxes for the seventh ward for the year 1871.

Q. And Inness street extending from Summit street to Newark street, what ward is that in? A. In the seventh ward.

Q. Turn to the record that you have there, and, so far as it relates to the section extending from Summit street to Newark street what does it set forth, generally speaking? A. On the northerly side of Inness street, immediately west of Lock street, it shows the assessment for taxes, giving the dimensions of the lots; the first assessment known as No. 63 Inness street at that time, and as plot 4 on section 15 of Book 6, shows a plot 40 feet front on Inness street, and 60 feet in depth.

Q. Where is that located? A. That is just west of Lock street on the north side of Inness. The next plot known as No. 65 Inness street shows a plot 30 by 100; the next one, No. 67, 30 by 100; the next one, 69 Inness street, 35 by 159.

Q. Explain what you show by those two records. A. The record in 1874, subsequent to the physical opening of the street shows the same condition, that

Theodore Umbscheiden, Recalled—Cross.

the lots on the northerly side were taxed as of the same dimensions as they were prior to the opening.

Q. What does it show as to the southerly side?

A. These taxes show on the southerly side a decided change; there is a change of 20 feet in depth all the way through; that there is less depth after the physical opening of the street to the lots fronting on Central avenue as it was then laid out. 10

The Court: That is an admitted fact in the case, Mr. Hood.

Mr. Hood: I offer these two records.

The Court: Any objection?

Mr. Finelli: I do not think the assessment book ought to go in evidence.

The Court: The question is do you object? 20

Mr. Finelli: Yes, sir.

The Court: The objection will be sustained.

Mr. Hood: As to the last two books?

The Court: Yes.

Cross-examination by Mr. Finelli.

Q. When did you first see this large book here?

A. About twenty-five years ago.

Q. Where was it at that time? A. In the City Clerk's office, City Hall. 30

Q. And what is it supposed to be? A. It is supposed to be the report of commissioners appointed under the act of 1857 to lay out the streets, alleys, avenues and squares, and public places, of the City of Newark.

Q. What is the distance of the block on the southerly side of Central avenue between Newark 40

Theodore Umbscheiden, Recalled—Cross.

and Lock street? A. The distance given on the Central avenue line?

Q. Yes. A. 680 feet 7-10.

Q. (By the Court.) That is on the south side, isn't it? A. On the south side.

10 The Court: Mr. Umbscheiden says that the distance shown from the easterly side of Newark street to the westerly side of Lock street is 680.7 feet; by adding together the distances shown on the Inness map, and the southerly side of the street as shown from the westerly boundary of the Inness map to the easterly side of Newark street, 79.6 feet, makes 667; that is 13.1 feet short of the distance given on the city map, the difference between the sum of the Inness map and the city map of the opening west of the Inness tract, and the city map last referred to of 1857.

20

Q. (By Mr. Finelli.) Does that book show the premises now known as 47 Lock street? A. This map does not show any premises; no figures of the blocks; simply streets and highways.

30 Q. You say that the map shows the monuments, how do you know? A. I have handled these maps for various purposes, searching, for more than twenty-five years, and I know that those squares indicate or represent surveyor's monuments.

Q. (By the Court.) Where are the other monuments shown that you spoke of, Mr. Umbscheiden? A. There is shown a monument that is at Summit, the next one shows at Lock, then at Dey, and at Newark, apparently the center line of Inness street, having been crossed out in red, and Central avenue

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Edward G. Kempf, direct.

having been written in after the projection.

Q. (By Mr. Finelli.) This map was apparently prepared before the opening of Central avenue? A. Undoubtedly.

Q. As now laid out? A. Yes.

EDWARD G. KEMPF resumes the stand.

10

Direct examination by Mr. Hood.

Q. You testified yesterday that in finding the northerly line of Central avenue and also locating the northerly and southerly lines of Inness street you had reference to maps that showed monuments?

A. Yes, sir.

Q. Will you please turn to this book that is in evidence known as D5? A. The monument as shown on range 3, No. 2, of D5, shows a monument that I have used in making my survey.

20

Q. And where is that monument? A. That is in the center of the old center line of Inness street, or 30 feet southerly from the northerly line of Central avenue.

Q. At what street is that? A. At Lock street and Central avenue.

Q. Now, does that map, that range, and range 3, and any other map, indicate monuments that you used in making surveys in determining the lines? A. This map coincides with a map I have in my possession in my office.

30

Q. And where else on those maps are the monuments you used in determining these lines, if you did use any other monuments except that one you testified to at the Central avenue line?

40

Edward G. Kempf, cross.

The Court: He also testified to one at Dey street.

10 Q. I asked you yesterday whether you had been furnished with a description in making the survey of 47 Lock street, I think you said you had, but you did not have it with you, have you that description with you? A. I have.

Q. And it was furnished by whom? A. By you.

Q. And that relates to the property 47 Lock street? A. Yes.

20 Q. Will you please read the description you used in making that survey? A. "Beginning on the westerly side of Lock street 100 feet south, 28 degrees west, from its intersection with the southerly line of Inness street, which streets are particularly designated on a map of the property called Inness place in the City of Newark, made by Francis W. Brinley, surveyor, said beginning point being also distant southerly about 80 feet from the present southerly line of Central avenue; thence running, first, along Lock street south 28 degrees west 18 feet in width; thence, 2, extending from Lock street by lines parallel with Inness street
30 north 62 degrees 40 minutes west 100 feet in depth, carrying the said width of 18 feet along the whole of said depth and being the northerly portion of lot No. 95 on the aforesaid map."

Cross-examination by Mr. Finelli.

Q. You have just read the description of the plaintiff's lot? A. Yes, sir.

40 Q. Did you make the survey of that lot? A.

Edward G. Kempf, cross.

I did—not of the lot, the northerly part of it, the northerly line of that lot.

Q. You had a survey for a quadrangular piece of land, did you not? A. Yes.

Q. You were to survey and find 18 feet in front and rear? A. Yes.

Q. The lines 100 feet in length. Those were your instructions? A. Yes. 10

Q. Did you make that survey? A. The instructions were also to survey the northerly part.

Q. Then, although you got a description of a quadrangular tract you merely surveyed one line? A. The one line; that was all that was wanted.

Q. Let us understand it. Did I understand you to say yesterday that when the monument fixed in the map or found in the middle of a street, disagreed with the actual location of property in the adjoining block, that you used the location in preference to the line? A. No. 20

Mr. Hood. Objected to. I think your Honor has passed upon that question as to what governs, and not as to what a particular witness did.

The Court: What the witness did in this particular case can be taken into consideration, of course. The question in its present form is objectionable, and the objection will be sustained. 30

Q. What did you do in this case to find that line?

The Court: He went over that twice yesterday, you know, Mr. Finelli, in the questions 40

Edward G. Kempf, cross.

of Mr. Hood, and your questions. Do you want him to do it again?

(Question withdrawn.)

10 Q. You said that the monument at the corner of Central avenue and Lock street is obliterated, is gone? A. It is covered with asphalt.

Q. How many years has it been covered? A. I don't know, but I had it in June, 1908; that is when I had it.

Q. And after that it was covered? A. I don't know when it was paved; it was when Central avenue was paved.

20 Q. (By the Court.) Isn't there at the southeast corner of Lock and Central avenue the same building now that was there in 1908 when you made your mark?

A. Yes, sir.

Q. (By Mr. Finelli.) Made your mark on a frame building? A. On the brick building which is at the southeasterly corner.

Q. The monument was in the center of the square? A. In the center of the square, 30 feet south of the northerly line of Central avenue.

30 Q. Central avenue was widened, and therefore the mark was not exactly in the center line of Central avenue? A. No.

Q. Where is this mark? A. 59 southerly from the line of Central avenue.

Q. Describe it to the jury, just what it was, and what you did? A. I did?

40 Q. What did you do? A. I ran a line on the centre line of Central avenue, using the monument located at Lock street and Central avenue and the

Edward G. Kempf, cross.

monument located at Dey street and Central avenue, and produced my line easterly to the easterly line of Lock street, and measured 59 feet southerly therefrom, and made a mark on the building.

Q. You don't remember just where that mark was? A. Yes, I do.

Q. Is that mark open to inspection? A. Open to inspection of anybody now. 10

Q. It is not merely known to you? A. I don't know whether it is or not.

Q. Is there any discrepancy between the southeast corner of Lock street and the southwest? A. No.

Q. Are the lines of Lock street parallel with each other? A. Yes.

Q. Can you give us the line of Lock street—can you give us the westerly line of Lock street south of Central avenue? 20

The Court: I don't understand that question. What do you mean by "Can you give us?"

Mr. Finelli: If he knows the line.

The Court: Do you mean the course?

Mr. Finelli: Yes. 30

Q. You know? A. I can give the different courses, I suppose; there is a course marked in the description I just read which is north 28 degrees east.

Q. Is that course correct? A. I presume it is.

Q. Well, did you find it? A. No, we don't use bearings.

Q. What did you do in this case? A. Used 40

Edward G. Kempf, cross.

the line of Lock street and the line of Central avenue as now established.

Q. Then you cannot give us the bearing of Lock street? A. No, only from what is on record.

Q. And you don't know whether that is correct or not? A. It probably was correct when it was made.

10

Q. You don't know whether it is correct today? A. If I took the bearing today it would not agree within a good deal, because of constant changes of the needle, which is quite a little.

Q. Let me understand you. 28 degrees—according to the way you found the line when you made your last survey the northerly part of the plaintiff's building would be encroaching upon the defendant's land; would it not? A. Yes, sir.

20

Q. On points you found it 79— A. You are referring to another map; that is not my map.

Q. Did you make a map? A. I made one and delivered it to Mr. Hood.

Q. Have you got it here in court? A. I haven't, no; I have my survey.

Q. Where did you find the northerly boundary of the plaintiff's building? A. I found it 80 feet southerly from the southerly line of Central avenue, and parallel with Central avenue.

30

Q. You found it within the boundary lines described? A. The frame building?

Q. Yes. A. No, I found that over the line.

Q. (By the Court.) The plaintiff's house? A. The plaintiff's house I found to be 79 feet 10 inches southerly—the front at Lock street 79 feet 10 inches from the southerly line of Central avenue, and

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Edward G. Kempf, re-direct.

found the rear of the building 79 feet $4\frac{7}{8}$ inches from the southerly line of Central avenue.

Q. (Mr. Finelli.) At that point? A. Yes.

Q. The northerly line of the plaintiff's building would be 100 feet southerly from Inness street? A. The line, yes.

Q. Which is 100 feet from Inness street, or 79 feet 10 inches from the southerly line of Central avenue? A. No. 10

Q. What was it that you gave it? A. 79 feet $4\frac{7}{8}$ inches southerly from the southerly line of Central avenue.

Q. You had a description to find a lot more or less 80 feet south of Central avenue?

Mr. Hood: I object; there is no testimony where he was to find 79 feet more or less. 20

Witness: The description read 80 feet more or less—not "more or less," but "about," which is the same thing.

Re-direct examination.

Q. Which description did you follow? A. The one I read.

Q. The one which determines the location with certainty, or the one which does not determine the location with certainty? A. Well, this one says about 80 feet, which is not a certainty. 30

By the Court:

Q. You assumed in making your description it was exactly 80? A. I assumed it was exactly 80.

Q. Does it describe the course parallel with any street? A. Yes, it describes the course going westerly as being parallel with Inness street. 40

Edward G. Kempf, re-cross.

Frederick F. Jones, direct.

Re-cross-examination.

10 Q. Can you tell us today whether the southerly line of Inness street of old is parallel with the present southerly line of Central avenue? A. I am perfectly satisfied it is; I have no reason to doubt.

Q. If you omitted reference to the map there before you then would you give us the same answer? A. I will.

Q. What will you say about the present northerly line of Inness street, will you say that is similar to the old line of Inness street as laid out on the Inness map? A. I would so use it.

20 Q. Will you say that it is? A. Yes.

Mr. Hood: I do not recall whether I offered my map in evidence, whether it was marked, if not I want to renew the offer and have it marked.

The Court: It may be received.

Said map marked Ex. D6.

30 FREDERICK F. JONES, sworn for defendant.

Direct examination by Mr. Hood.

Q. You are a practicing attorney of this state?

A. I am.

Q. And have been such for how long? A. Practically sixteen years.

40 Q. Do you specialize in any particular line of work? A. Real estate work, examination of titles.

Frederick F. Jones, direct.

Q. Have you examined titles for me? A. I have, on several occasions.

Q. Have you examined the title of property located at the southwest corner of Central avenue and Lock street? A. I have.

Q. When did you examine that title? A. In 1912, I think it was.

10

Q. Have you your record of the abstract that was made at that time before you? A. I have.

Q. Suppose you turn to it and tell us— A. In the year 1835—

Q. One moment. Suppose you give us the chain of title of the plot at the southwest corner of Central avenue and Lock street?

Mr. Finelli: I object.

20

Mr. Hood: My purpose, may it please the Court, is to show when and how and from whom the city acquired it and that the title was in the grantor from whom the city derived it.

The Court: If you think that that method of proof is proper, then you must think the Court erred in rejecting it on the part of the plaintiff when it was offered yesterday. There is nothing to show that Mr. Finelli's searcher was not as competent as Mr. Jones.

30

Mr. Hood: There was not any question about the title being in the plaintiff in that block; that was admitted on the record. Mr. Finelli said he had not made the search; he said he had compared his typewritten search with certain records. The only purpose is to show the plot that was acquired for the widen-

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Frederick F. Jones, direct.

ing of Inness street into Central avenue, that 20 feet wide, the southwest corner, which appears from the testimony to have been in Madden's. Simply desire to prove that Madden was the title holder, and that it was acquired by the city, and for the purpose of showing properly and definitely that 20 feet was taken.

10

The Court: Any objection to that?

Mr. Finelli: Yes, sir. I say that this is a subsidiary theory. I would not have any objection at all if they were inquiring concerning that property immediately adjoining our property on the north, but I do object to this method of inquiry concerning a strip of land on the corner, because they merely want to plot one theory on another, and also want to draw one inference from another inference. They merely want to show that the city acquired 20 feet. That would not necessarily prove that the surveyors took 20 feet; that would not necessarily prove the accuracy of the map, or of the surveyor's measurements. In addition to the same objection which they made to my testimony, it is not a proper way of proving the record title.

20

30

The Court: That objection is good, it seems to me, Mr. Hood. If the official record is produced, Mr. Jones might say that he has searched between those dates, and knows that there are no other conveyances.

Mr. Hood: Then we will have Mr. DeCamp bring up the record, and I will recall Mr. Jones.

40

Frederick F. Jones, direct.

Mr. Finelli: I will waive the objection in order to facilitate the trial.

Q. Now, Mr. Jones, trace the origin of your title to where it comes from Madden to the city. A. In the year 1835 John W. Inness sold to Moses Ward by deed recorded in E 4 17, dated November 5, 1835, recorded February 3, 1836. 10

Q. What are the premises? A. The second lot—he sold three lots—is as follows: “Beginning at the intersection of a street called Lock street, that is to say at the intersection of the westerly line of Lock street with the southerly line of a street called Inness street (both designated on said map of the property called the Inness place in the town of Newark made by Francis W. Brinley, surveyor); thence running along Hoyt street south 28 degrees west 30 feet in width and extending along Inness street and by lines parallel thereto, from Hoyt street north 62 degrees 40 minutes west 100 feet in depth, carrying the said width of 30 feet on the whole of the said depth, and being designated on the said map as lot No. 92, bounded north by Inness street, easterly by Lock street, southerly by lot 93, sold to Daniel Terrel, and westerly by lot No. 121 sold to Thomas E. Nichols. 20 30

Q. Now, Mr. Jones, please refer to this map, which is marked Exhibit P1, and see whether lot No. 92 is indicated, and where it is as indicated on that map. A. 92 is located on the southwest corner of Lock street and Inness street, according to this map.

Q. And is that the lot of which you have read the description? A. Yes. 40

Frederick F. Jones, direct.

Q. Now read the next, proceed with your chain, read the next deed. A. By deed in Q 8, page 427, dated September 12, 1853, recorded September 13, 1853, Moses Ward and Fannie, his wife, conveyed to Patrick Madden.

Q. How are the premises described in that deed?

10 A. The premises are the same as described in the former deed, E 4, page 17, except Lock street is used throughout instead of Hoyt street.

Q. What is the next deed in your chain of title?

20 A. In D 16, page 105, deed dated April 15, 1872, recorded June 6, 1872, Patrick Madden and Ella, his wife, conveyed to the Mayor and Common Council of the City of Newark the following premises, beginning at the intersection of the southerly line of Central avenue as opened with the westerly line of Lock street, thence running northwesterly along said southerly line of Central avenue 100 feet more or less to the easterly line of lot No. 13 on said map marked Garrity; thence northerly along the same 20 feet to the southerly line of Inness street; thence southeasterly along the same 100 feet to said westerly line of Lock street, and thence southwest-
30 erly along same 20 feet to the southerly line of Central avenue and place of beginning, taken and appropriated by the Common Council aforesaid for the widening of Central avenue in said city, said lot being designated as lot No. 12 on map and report of damgaes to be sustained by the widening of Central avenue.

Not cross-examined.

Max Mendl, direct.

MAX MENDEL, sworn in behalf of defendant.

Direct examination by Mr. Hood.

Q. You are the owner of the property on the southwest corner of Lock street, of which No. 45 is part? A. Yes, sir.

Q. When did you buy the property No. 45? A. 10
About 1912.

Q. And did you go upon the premises? A. I did.

Q. Did you observe anything as to the fence separating 45 and 47 Lock street? A. Why, there was nothing there to separate them.

Q. You mean to say there was no fence there? A. No, the fences were all down when I bought it.

Q. Have you been upon the property recently? 20
A. I have.

Q. When was your last time? A. This month.

Q. Did you observe in your inspection of the premises an apartment building on the property of Mr. Smith in the rear of your property? A. I did.

Q. And did you measure the distance from the southwesterly—extreme southwesterly corner of your brick building to the extreme northeasterly corner of Mr. Smith's apartment building? A. I 30
did.

Q. How did you measure that, with what? A. With a three-foot ruler.

Q. And what did you find to be the distance? A. 3 feet exactly.

Q. Did you observe the condition of the fences on the property south of No. 45 Lock street? A. Yes, sir. 40

Max Mendl, cross.

Q. And did you look at the condition of the fence on the southerly side of No. 47 Lock street separating it from 49 Lock street? A. I did.

Q. What is the condition of that fence? A. In a dilapidated condition.

10 Q. How does it run? A. Why, zig-zag. One part leans over on lot 47, the other part on 49; that is an incline running down from the upper part of the southerly part of the lot that brings the water down, and that wrecks this fence.

Q. Did you look at any other fences? A. I looked at three more fences.

Q. What is their condition? A. The same condition.

20 Q. On Lock street? A. None of them are straight.

Cross-examination by Mr. Finelli.

Q. What business are you in? A. Real estate.

Q. How long have you been in that business?
A. About eight years.

Q. And are you in partnership with anyone?
A. Yes, sir.

Q. What is the firm name? A. Mendl & Ganz.

30 Q. Do you own this building in your own name?
A. Yes, sir.

Q. You say there was a distance of 3 feet; you mean in a westerly direction? A. No, southerly direction.

Q. You mean that the building which has been put up by Mr. Smith is 3 feet south of this point?
A. Yes, sir.

40 Q. It is not north of it? A. No, sir, south of my building.

Max Mendl, cross.

Q. Oh, it is south of your building? A. Yes, 3 feet.

Q. When did you see that particular point? A. This morning.

Q. Did you notice it any other time? A. Why, yes, I did.

Q. When? A. I noticed it some time ago, that is the reason I went up there when I heard this evidence given it was only a foot and a half, that was my reason for going up. 10

Q. In other words, the end of your building is further back, or towards Bleeker street, than Mr. Smith's building? A. No, Mr. Smith's building, that apartment building is exactly 3 feet south of the corner of my building.

Q. Was anyone up there with you? A. No, nobody was with me there, except a man that lived in the adjoining house. 20

Q. Is he here? A. No, not as I know of.

Q. When you got this lot in 1912 you bought 20 feet? A. Yes, sir.

Mr. Hood: I do not think that is proper cross-examination in the first place, because I have limited it only to the condition of the fences. 30

The Court: That is not cross-examination. The answer may be recorded.

Q. Did you make inspection of the lot? A. I engaged a lawyer, and he in turn engaged a surveyor to take care of that for me.

Q. Cannot you answer that question whether you personally inspected the lots? A. Yes, sir, I did. 40

Max Mendl, cross.

Q. Was it fenced? A. No, sir.

Q. What was on the lot? A. The house I bought was an old shack, had been occupied for some time prior to that by colored people, and they had wrecked it, and the fences were down.

10 Q. Was there any fence on the southerly line of your lot? A. No, sir.

Q. Was there any fence on the northerly side of your lot? A. Yes, sir, an old broken fence.

Q. On the northerly side of the lot you had divided other property bought by you? A. Yes, sir.

Q. And there was a fence? A. Yes, sir, broken down fence.

20 Q. And to what was that fence connected? To a post in the rear of the premises? A. It was nailed against the rear fence.

Q. Was there a cross fence in the rear of the property? A. Part of one, yes.

Q. Was there a post there? A. No, sir.

30 Q. How were the fences crossed? A. They were crossed in a zig-zag condition in the back as well as on the side, the same with property 45, between 43 and 45, there was simply nails against a few boards in the back of the house.

Q. Did you engage Mr. Shepard? A. I left that to my counsel.

Q. You did not engage him? A. No, sir.

Q. Do you know who went up there? A. No, I don't.

Q. You did not act, then, from the report of your surveyor? A. Acted on the report of my counsel.

40 Q. Just answer my question, please.

Max Mendl, cross.

Mr. Hood: I object.

The Court: I felt the examination with reference to the fences and related matters was proper cross-examination, because he had stated he bought this property in 1912, from the owner of No. 45, and there were no fences there at that time. I do not quite see how this is cross-examination. 10

(Question withdrawn.)

Q. Was the fence in the rear of the property good? A. No, sir.

Q. Was there a fence all along from No. 49 down to No. 45? A. I had no occasion to look at 49 at that time.

Q. Didn't you observe the condition of all the fences? A. I observed they were in very bad condition all along there. 20

Q. Who took the fence down? A. Which fence?

Q. The fence that divides your property from No. 47? A. There is no fence there.

Q. No fence there? A. No, sir, there is no fence there.

Q. Since 1912? A. Not since I owned it. 30

Q. Since 1912? A. Yes, sir.

Mr. Hood: I want to ask Mr. Finelli whether he will produce the paper I gave him notice to produce.

Mr. Finelli: I was served with a notice to produce a paper this morning, I have not had time to look for it, and I don't know whether any such paper exists. 40

Max Mendl, cross.

Mr. Hood: I have a copy of it, but if he stands upon his rights I cannot force it.

Mr. Finelli: I don't know how relevant or what the contents are.

The Court: You are not willing to admit the paper?

10 Mr. Finelli: Oh, no, of course not.

Defendant rests.

Mr. Finelli: I wish to call a real estate expert who knows the value of diminution in the lot. I should like to offer that proof now.

Mr. Hood: It is objected to as not rebuttal, I cannot meet it now, I have no witness here now.

20 Mr. Finelli: That condition does not appear. The defendant himself is a real estate man.

The Court: On your direct case you failed to offer competent testimony on the diminution in value, and the defendant now says he is not prepared to meet it; because of that fact. I think I should decline to permit it.

30 Mr. Finelli: I think there is nothing else.

Testimony closed.

Mr. Hood: I desire to make a motion which had almost escaped me. Your Honor will recall that certain testimony was given by some of the witnesses for the plaintiff, including Mr. Lehlbach, as to making old surveys on old locations. Objection was made to that line of testimony, and your Honor withheld a ruling

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Max Mendl, cross.

until an opportunity would be presented to find out whether they had connected that up.

The Court: That testimony was admitted over your objection, with permission to move to strike it out.

Mr. Hood: It seems to me there is no testimony in this case which tends to support a contention that the survey was made upon an old location. In other words, it does not appear that locations, as termed by the witnesses, old locations, were made in reality upon what are legally old locations. There is no evidence to show that they are those old established lines which have been mutually recognized among grantors and grantees as being dividing lines between properties, nor are they in any way indicated by objects which were natural objects at that time, and which may have disappeared; they simply call them old locations, and it does not seem to me that those old locations are really what is contemplated in considering what constitutes old locations. There is another thing which I think governs absolutely in this case, and which makes it a question for the Court to dispose of on the motion; and that testimony is met by official records offered by the defendant. First, there is the map which has been introduced showing the layout of Inness street in 1835, about that time, or 1836, showing a street extending 60 feet in width, which ran to about Newark street, I think; it says the lines are parallel. We showed an ordinance which was passed by the governing body of this city. Before I get

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Max Mendl, cross.

to that, we showed next an extension of that street down to Summit street, showing that 60 feet is taken to continue that street.

The Court: To Newark street.

10 Mr. Hood: To Newark street. We show them an ordinance providing for the opening of Central avenue, and fixing a width of 20 feet additional to be acquired by the city. And we produced the maps of the surveyors on file in the city offices, which show that 20 feet was actually acquired by the city from Newark street to Summit street on the southerly side of that street. We show the deed by which the city acquired a plot of ground 100 feet in length on Central avenue by 20 feet in depth, at the southwest corner of Central avenue and
20 Lock street. We show by the production of a map from the city records the location of Inness street, the location of fixed monuments along Inness street, that those monuments were in existence, or placed, rather, in the laying out of Central avenue; that they are located at intervals of two or three blocks apart, with the exception of places, where, I think, they have been located at a distance of one
30 block; Lock street to Central avenue.

The Court: Let me make this suggestion with reference to those monuments. Do you find any evidence in the case showing when those monuments were put there?

Mr. Hood: Why this map shows—

The Court: There is one witness, Mr. Lehl-
40 bach, who testifies that the monument at Dey street was put there in 1860, but I assume from

Max Mendl, cross.

his appearance on the stand that he does not know that himself, as I doubt if Mr. Lehlbach was born at that time.

(Argued.)

Mr. Hood: The proposition I make to strike out that testimony is, first, that it is not of that character which is entitled to receive great credit and weight, because of the fact that it does not possess the history of the old location, and is not a matter of evidence before the Court upon which the Court should rule that they are old locations, being merely a verbal statement on the part of one surveyor. On that ground I ask that the testimony of all the witnesses so far as it relates to old locations be stricken out.

The Court: The motion will be denied and an exception to that ruling will be noted.

An exception to this ruling is noted by the defendant as ground of appeal.

Mr. Hood: Now I ask for the direction of a verdict on behalf of the defendant. Your Honor will bear in mind what I have said in support of the other motion.

The Court: Yes, that applies to this motion as well.

Mr. Hood: The testimony is that Inness street was laid out in 1835 to the width of 60 feet and was extended later to a width of 60 feet. That subsequently a resolution was adopted by the Common Council for the widening of Central avenue. That there is evidence in the case that shows clearly that widening was 20 feet, exact, definite, specific 20

Max Mendl, cross.

10 feet. That the testimony in the way of records shows that this particular locality the widening of 20 feet was made by taking it from the lines of the southerly side of Inness street; and deeds have been produced as to this particular corner showing that 20 feet were actually acquired. That it appears from the testimony that there are certain fixed monuments in the street, one at Dey street, one at Lock street, Newark street, and so forth. That these monuments are located 50 feet from the southerly line of Central avenue, and 30 feet from the northerly line; that the one at Lock street has been covered by paving since 1908, and that the surveyor was at the monument on Lock street and Central avenue and made a mark on the building on the southeast corner which definitely locates it. That Central avenue is a public highway and thoroughfare; that it is mostly built up. There is no evidence to prove that there was any change in the line of Central avenue; and where a deed calls for the line of a street as the monument, the line of the street as it is opened and built upon will be held to be the line intended. (Citing 20 N. J. Equity, p. 33.) In other words, in my judgment, where there is a public street laid out and built upon, that monument controls.

The Court: That controls, of course, as to an owner abutting on that street. There is no question about that.

Mr. Hood: I also call your Honor's attention to the case of Smith vs. State, 23 N. J. L. Upon that ground I make my motion for the

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direction of a verdict in favor of the defendant.

(Mr. Finelli replied in opposition.)

The Court: The motion for direction of a verdict will be denied and an exception will be noted.

An exception to this ruling is noted by the defendant as ground of appeal.

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Counsel summed up.

 RECESS.

The Court charges the Jury as follows:

DUNGAN, J.

Gentlemen: The plaintiff in this case, the owner of No. 47 Lock street, which is the northerly 18 feet of lot 95 on the Inness map, about which we have heard so much in this case, demands of the defendant, Mr. Mendl, the possession of all that tract of land beginning on the westerly side of Lock street, 100 feet south 28 degrees west from its intersection with the southerly line of Inness street, which means the southerly direction of Inness street, which streets are particularly designated on the map of the property called Inness place in the City of Newark, made by Francis W. Brinley, surveyor, and filed in the office of the register of deeds of Essex county; thence running (1) along Lock street south 28 degrees west 18 feet in width; thence (2) extending from Lock street by lines parallel with Inness street north 62 degrees 40 minutes west 100 feet in depth, carrying said width of 18 feet along the whole of said depth. The only

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10 difference between the description contained in the complaint, and the deed, is that in the deed it says: "Said beginning point being also distant southerly about 80 feet from the present southerly line of Central avenue." That is inserted, you will perceive. The answer filed by the defendant in this case says the defendant was not at the commencement of this action, nor has he since been, in possession of the premises described in the amended complaint, which is the description I have just read, or any part thereof, nor has he at any time before the commencement of said action, nor since, claimed title to the premises described in the plaintiff's complaint.

20 It appears that in 1835 these same premises were conveyed by John W. Inness and wife to one Johnson G. Baldwin, by description substantially similar to that in plaintiff's complaint, except that that lot was 40 feet wide, or the whole of lot 95. The northerly boundary of the lot conveyed in 1835 was the same as the northerly boundary of the lot described in plaintiff's complaint, the only difference being, as I have already called to your attention, that in the deed to the plaintiff it describes that line as being 80 feet southerly from the southerly
30 line of Central avenue.

The defendant's deed describes his lot adjoining as beginning on the west side of Lock street at a point therein distant 80 feet south from its intersection with the line of Inness street as shown on a map of Inness place, and being 20 feet in front and rear by 100 feet in depth on each side, and being further known as street No. 45, Lock street, Newark, N. J., being lot 34. So that the defendant's
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Charge to Jury.

deed is 20 feet northerly—the entire tract runs 20 feet northerly from the plaintiff's northeast corner, and refers particularly to the southerly line of Inness street as laid down on the Inness map.

I have quoted these deeds at length so you may have thoroughly in your mind the importance of the line which has been fixed as the southerly line of Inness street as described in the Inness map, which is Exhibit P1. So far as the evidences of title are concerned, there appears to be no difference in the location of this line, that is, the northerly line of the lot claimed by the plaintiff, and the southerly line of the lot claimed by the defendant. The whole difficulty arises in this case in the location of the southerly line of Inness street, as laid down upon the Inness map, which is now obliterated. This southerly line is obliterated by the opening of Central avenue in Inness street to a width of 20 feet greater than Inness street as laid down upon the Inness map, and as laid down upon the city map, which was 60 feet wide. Both the plaintiff and defendant rely upon that line for their boundary.

In disputes over lines three or four classes of markings, or designations, are frequently relied upon. The first is natural monuments, trees, shrubbery, streams, rocks, and the like. These, of course, furnish the most substantial kind of monument. Neither party in this case relies upon natural monuments as determining the boundary. The next in importance are artificial monuments. Artificial means a monument which is placed upon the land by man for the specific purpose of marking the boundary. But artificial monuments may include

Charge to Jury.

actual locations, or occupations of buildings and fences in the surrounding neighborhood. That has come to be recognized as a method by which lines may be determined, and old buildings and old fences may serve as artificial monuments. Then there is a third in importance, a third kind, a third method of fixing boundary lines. That is by courses and distances. Although we have heard that mentioned in this case, neither party relies upon a course or a bearing for the location of this line. And fourth in importance is the quantity of land involved; and that does enter to some extent in the controversy in this case.

It has been suggested that by fixing the line where the defendant insists the line is, it will decrease the width of the plaintiff's lot from 18 feet to less than 16 feet, and would result in moving the other lines to the south of it which have been surveyed, in order to give the plaintiff the width of land to which he is entitled by his deed. As I have already suggested the line which is in dispute in this case, and the line upon which the boundary line between the plaintiff and the defendant depends, is the southerly line of Inness street as fixed by the Inness map. That southerly line of Inness street is fixed by the plaintiff's surveyors by what they call practical occupations, or locations, of houses and fences on intersecting streets. And right here, as was insisted by the defendant's attorney in his argument, and was frankly admitted by the plaintiff's attorney in his argument, the burden is upon the plaintiff to establish by the greater weight of the evidence in the case, before he is entitled to your verdict, that the southerly line

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of Inness street, according to the Inness map, was where Mr. Lehlbach and Mr. Acocella fixed it by the method which they used in fixing the line, which I shall mention presently in more detail.

First I shall mention the testimony of Mr. Charles Smith. Mr. Smith says that he came to this part of the city in 1887, and purchased land which is directly in the rear of No. 47 Lock street, and extending on to the south of that. That when he came there all the buildings were upon these lots, and that the fences marking lines were there, fences attached to the houses upon this lot, and that there was a fence post at the westerly end of the plaintiff's north line as it was then marked, which he says is about a foot and a half east of the southwesterly corner of this garage erected by the defendant. That is, in erecting his garage, the defendant erected it a foot and a half about, he says, beyond this fence post. The designation upon the map is 2 feet short, Mr. Lehlbach says 2 feet and 3 inches short. He says that not only did the post stand at the intersection of these fences, but that it was the corner post for four lots, and extended on westerly between the lots westerly. And it appears by this Inness map here that this line, which is the extension of the line between lots 94 and 95, extends for 180 feet in the rear of lots fronting on Central avenue, or Inness street, as it is marked on the map. He says that this fence and this post appeared to be old when he came there in 1887, and, as I have already stated, that the four lots cornered to it; and that he has known this post and fence upon the northwest corner of the plaintiff's property since 1887.

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Charge to Jury.

Mrs. Frazer says she lived there in 1893, and lived there until about five years ago, and during that time there was a fence. She lived in No. 45, which is the defendant's lot. And that at that time there was a fence dividing this land, which ran to a post at the end of the fence at Mr. Smith's land, and divided No. 45 and 47, that being what was called the Cohen and Smith corners. And she says that was a straight line—that is, that the fence between No. 45 and No. 47 was straight, as far as she remembers, except in the centre where it was a little zigzag on account of its being "shackelly," the way she used the word. And the way she came to notice it, she says she had children, and she went out there and fixed it.

Mr. Lehlbach says that he made a survey there in 1904, made another survey in 1907, and another survey in 1916 in this locality; not at this particular lot. I think he said in 1904 his survey was No. 45, three or four lots below, and at that time there were fences extending from the houses to the rear line of these lots, to the Smith property, and that all of those lots at that time had fences there, and that there was the distance between these fences called for by the deed for the various lots, because he said he measured all the intervening lots, that is between 55 and 45, which was the lot which he subsequently surveyed. And he also testifies to the fence in the rear of the lots fronting on Central avenue, in direct line with his north fence, which was between the two periods. He locates the line of Inness street, and when asked how he locates the line of Inness street he says—I am quoting almost his exact words—that Inness street is located by

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practical occupations along intersecting streets; and he located the southerly line of Inness street by mute testimony as to where Inness street was at the time the Inness map was laid out; and that that mute testimony is the occupations along the intersecting streets. He says that there are no monuments, no actual monuments, defining the line, and that there is no monument defining Inness street as it was when it was laid out. His attention being called to the monument at the corner of Dey street and Central avenue he says that that monument is not a guide, because it does not define the line of Inness place, but defines the commissioner's idea of what the lines of Inness place or Inness street should be. But this, of course, must be accepted by you as only the opinion of Mr. Lehlbach, who says that this monument, or these monuments, were put in there about 1860. Mr. Lehlbach plainly, from his appearance, could not have been born in 1860, so when he makes these statements as to when the monument was placed there, and his definition of what they show, it must be taken as Mr. Lehlbach's opinion, not as the statement of fact. But what Mr. Lehlbach does say is that the line of Inness street as fixed by him corresponds with the locations of the various properties surveyed by him, that is, the houses and the fences surveyed by him in the vicinity of Central avenue, and that the practical occupations or locations of those buildings, so far as he surveyed them, all correspond, and correspond with the line which he has fixed as the southerly line of old Inness street. I say "of old" Inness street, as designating it from Inness street

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Charge to Jury.

as fixed by the commissioners of the City of Newark, rather than by the Inness map.

10 Mr. Acoccela, whose testimony I shall not recite in detail, says that he has fixed the southerly line of old Inness street in the same way, by taking the practical occupations, and he says that he is acquainted with this monument, and with the loca-
 20 tion of the northerly and southerly line of Central avenue; and he says that measurements from the city monument would disturb all the occupations on that block. That is, that if the city monument be taken as a test of the correct location of the southerly line of Inness street, then that would disturb the location or lines of all the lots on that block. As I have already suggested, old occupa-
 20 tions, that is buildings and fences themselves, when the location of the line is in doubt, may become monuments.

30 If the southerly line of Inness street is where Mr. Lehlbach and Mr. Acocella say it is, and as shown upon the map which is in evidence before you, then, according to Mr. Lehlbach's testimony, this garage of the defendant is 2 feet and 3 inches, and, according to Mr. Acocella, 2 feet at the southwest corner, and, according to the testimony of Mr. Acocella, 1 foot and $\frac{1}{2}$ inch at the southeast corner, over on the plaintiff's land.

40 But the surveyors who appear for the defendant disagree with those who appear for the plaintiff. Inness street is designated upon the Inness map, to which your attention has been directed, and this map is dated in 1835, and lots were sold with reference to that map soon after that time; we have the records of two in evidence here; and it is the south-

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erly line of Inness street as fixed upon that map which is the controversial point in this case.

It appears that in 1855 Inness street was opened to Newark avenue. That appears by the testimony of Mr. Umbscheiden, and by the maps which are produced here by him, and by the assessment map. And by the testimony of Mr. Jones it appears that, at the time, Madden owned the lot at the southwest corner of Central avenue, or Inness street at that time, and Lock street, which is designated by the map upon the board as lot No. 92. It further appears that in 1870 there was an ordinance passed by the City of Newark for the purpose of opening Central avenue, and the description of that portion of it which is important in this case gives the line of the street as thence easterly along the northerly line of Inness street to the easterly line of Summit street; that is, from Newark street, which includes the street in front of the defendant's property; then on the return it says the southerly line of the said avenue, the line parallel with and 80 feet southerly from the above described northerly line from street to Summit street, so that by this ordinance the description shows that Central avenue was to be 80 feet wide, the northerly boundary of which was the northerly line of Inness street, and the southerly boundary of which was 80 feet south of the northerly boundary of Inness street. Then there was the map of the commissioners, made in pursuance of this ordinance in 1871. That shows that Central avenue was 80 feet wide, and that 20 feet was added to the then southerly side of Inness street, that is marked upon that map, and that 20 feet of Patrick Madden's lot,

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Charge to Jury.

which is lot No. 92, was taken at that time; and the deed of Patrick Madden, a copy of which is in evidence, or the description of which was read, shows that he conveyed 20 feet of that lot which was bounded by the southerly side of Inness street. Mr. Shepard, a witness produced on the part of the

10 defendant, says that he has made a survey, and he says that his survey was made from the interpretation of the city of the southerly line of Inness street as shown by the maps on file in the city clerk's office, and that the northerly line of Inness street is coincident, the same as the northerly line of Central avenue. And he says that there is a monument at Dey street in Central avenue, which is 30 feet from the northerly line of Central avenue, which, as you can see, would be in the middle of a 60 foot street, and the testimony is that old Inness street was 60 feet wide, and Inness street, as fixed by the map, was 60 feet wide. And then he measured from that to the southerly side of Central avenue, 50 feet, and found that the southerly side of Central avenue corresponds with that monument; that is, that it was 50 feet from that monument to the southerly side of Central avenue, and 30 feet to the northerly side of Central avenue.

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30 He said that he made a survey of this property, and that he measured 80 feet on Lock street, and then went up Central avenue and measured in 80 feet, and fixed the southerly line 80 feet southerly and parallel with the southerly line of Central avenue, and that he determined the line between these parties with reference to the southerly line of Central avenue; and he said that determining the lines

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this way the garage of the defendant is wholly within the lines of that description.

Of course, the correctness of Mr. Shepard's survey depends upon the correctness of the city map, and the correctness of the location of the southerly line of Central avenue as 20 feet south of the southerly line of Inness street as located on the Inness map. Mr. Shepard admits that he has not found any of the practical occupations in this vicinity to correspond with the monuments at Central avenue and Dey street. 10

Mr. Kempf made a survey only to locate this line between the parties, that is, the northerly line of plaintiff's lot and the southerly line of defendant's lot. He says that he measured exactly the same way, that is, by measuring 80 feet southerly from Central avenue and parallel thereto; but in addition to this he says that he had two monuments there, a monument which has already been testified to at Dey street and Central avenue; but he says that about eight years ago he made a survey up there and discovered another monument at the corner of Lock street which, at that time, was 30 feet south of the northerly line of Central avenue, which, as you can see, would be the center line of Inness street, if Inness street was 60 feet wide, and located as Central avenue is now located with reference to this northerly line. That monument now is utterly obliterated, but he says he took a measurement 59 feet southerly from that monument and marked it upon a house which he has marked, from which he can locate that monument. He says that in making his measurement he surveyed and located it with reference to the monument on Cen- 20 30 40

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tral avenue and Dey street, and the place where he had previously located the monument at Lock street and Central avenue. The correctness of Mr. Kempf's survey of this line depends upon the same state of facts as that of Mr. Shepard, and, in addition, upon the location of this monument at Dey street, and the one formerly at Lock street; and he says he made no measurement to see if the monumental distances disturbed the occupations.

Now, if the monuments were the center of Inness street as fixed by the Inness map, and if the southerly line of Central avenue as now located is 20 feet south of the southerly line of Inness street as located on the Inness map, then, according to the testimony of Mr. Shepard and Mr. Kempf the defendant's building is erected entirely north of the line 100 feet south of and parallel to the south line of old Inness street.

To sum up what I have said, if you find it established by the greater weight of the evidence that the southerly line of Inness street was where it is located by Mr. Acocella and Mr. Lehlbach with reference to practical locations and occupations of buildings and fences, then your verdict should be in favor of the plaintiff, and the form of your verdict should be guilty of trespass in ejectment, and the plaintiff's damages may be fixed by you at the nominal sum of six cents. I noticed that the plaintiff's attorney said in his argument that you should fix substantial damages. This is not like an accident case where, after you have heard the nature of the plaintiff's injuries, and the pain and suffering which he has undergone, you can estimate what will be a return for that in dollars and

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cents. You cannot do that in a case like this. There must be some proof before you of the diminished value of the property, or the rental value of the property, one or the other, or both, before you can award substantial damages. That has not been shown in this case. So, if you find the plaintiff is entitled to your verdict, your verdict should be for six cents damages in his favor, and that the defendant is guilty of trespass in ejection. If, on the contrary, you find the southerly line of Inness street as originally located was 20 feet north of the present location of the southerly line of Central avenue, then your verdict should be in favor of the defendant.

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I am requested by the plaintiff to charge:

1. Mesme profits are the moneys recovered for the value or benefit which a person in wrongful possession has derived from his wrongful occupation of land.

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Well, that is a correct definition. The second, third and fourth I decline to charge.

5. In construing descriptions effect must be given to the intention of the parties, and to that end that shall be considered certain which can be made certain.

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Well, I would put that in another way, which I think is just a little plainer, and say when two monuments, or sets of monuments, conflict, that shall be adopted about which there is the least likelihood of mistake. The plaintiff's request is a correct one, but I think that is a little plainer, and I shall add that to his request, that when two monuments or sets of monuments conflict, that

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shall be adopted about which there is the least likelihood of mistake.

6. Where the true location of premises conveyed is doubtful a practical location by consent of the parties will aid in the construction of the deed, and in some instances be conclusive as to the boundaries thus fixed, although the acquiescence be for a less period than twenty years.

Well, that is true, but I do not quite see the application to this case, and it is not made particularly applicable to the facts proven in this case, so I will decline to charge that, except as I have charged.

The seventh request I decline to charge.

I have certain requests to charge on the part of the defendant. The first I decline to charge, because it is not applicable to this case; that reputation in the neighborhood is inadmissible as traditional proof of a boundary. There has been no such evidence offered, and I decline to charge that.

2. Where a deed calls for the line of a street as a monument, the line of the street as it is opened and built upon will be held to be the line intended.

I charge you that.

3. Acquiescence by the owner of land permitting another to build and improve without objecting has been held to settle the location of a boundary.

That is not made applicable to the proven facts in this case, and I decline to charge that except as I have charged.

4. The boundaries of land as marked out by definite monuments will control courses and distances called for.

As I have already said neither party in this case

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relies upon courses and distances; that is, neither party relies upon a course, as that is understood. I decline to charge that. You may retire.

(The jury retires.)

Mr. Finelli: I pray exception to the refusal of the Court to charge the plaintiff's second request as follows: 10

2. In assessing the mesne profits the jury might include in the damages all the plaintiff's reasonable and necessary expenses.

The exception is allowed and noted by the plaintiff as ground of appeal.

Mr. Finelli. I also pray exception to the refusal of the Court to charge plaintiff's third request as follows: 20

3. The jury might also include in the damages the diminution in the value of the plaintiff's lot by reason of the acts of the defendant.

The exception is allowed and noted by the plaintiff as ground of appeal.

Mr. Finelli: I also pray an exception to the refusal of the Court to charge plaintiff's fourth request as follows: 30

4. The plaintiff may recover compensation for his trouble in keeping his children out of the yard in rear of his house.

The exception is allowed and noted by the plaintiff as ground of appeal. 40

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Mr. Finelli: I pray exception to the refusal of the Court to charge the plaintiff's sixth request specifically as requested, as follows:

- 10 6. Where the true location of premises conveyed is doubtful a practical location by consent of the parties will aid in the construction of the deed, and in some instances be conclusive as to the boundaries thus fixed, although the acquiescence be for a less period than twenty years.

The exception is allowed and noted by the plaintiff as ground of appeal.

Mr. Finelli: I pray exception to the refusal of the Court to charge plaintiff's seventh request as follows:

- 20 7. Boundaries specified in the original Inness place map are presumed to continue the same as those originally designated in the absence of a description by metes and bounds in intervening conveyances.

The exception is allowed and noted by the plaintiff as ground of appeal.

- 30 Mr. Hood: I pray exception to the refusal of the Court to charge defendant's first request as follows:

1. Reputation in the neighborhood is inadmissible as traditional proof of a boundary.

The exception is allowed and noted by the defendant as ground of appeal.

- 40 Mr. Hood: I pray exception to the refusal of

the Court to charge the defendant's third request specifically as requested, as follows:

3. Acquiescence by the owner of land permitting another to build and improve without objecting has been held to settle the location of a boundary.

The exception is allowed and noted by the
defendant as ground of appeal. 10

Mr. Hood: I pray exception to the refusal of the Court to charge the defendant's fourth request as follows:

4. The boundaries of land as marked out by definite monuments will control courses and distances called for.

The exception is allowed and noted by the
defendant as ground of appeal. 20

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*Exhibit.***EXHIBIT D-1.**

An Ordinance to Open Central Avenue from Warren Street to Nesbitt and High Street.

Be it ordained, by the Common Council of the City of Newark, as follows:

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Section 1. A street to be called Central Avenue shall be opened from Warren Street to Nesbitt and High Streets as follows: The northerly line of Central Avenue to begin at the northwesterly corner Central Avenue as now opened and Warren Street; thence running easterly in a direct line to a point in the westerly line of Hudson Street distant southerly one hundred and seventy-five feet from the intersection of the same with the southerly line of Dickerson street; thence easterly in a direct line to the northeast corner of Inness and Newark Streets; thence still easterly along the northerly line of Inness Street to the easterly line of Summit Street; thence northerly along the said easterly line of Summit Street to the southerly line of Nesbitt Street; thence along the same easterly line to High Street. The southerly line of the said avenue to run parallel with and eighty feet southerly from the above described northerly line from Warren Street to Summit Street, from which street the same is to be continued to High Street on the same course with the said southerly line west of Summit Street.

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Section 2. The Common Council doth hereby determine to take and appropriate the lands and real estate necessary to be taken and appropriated for opening Central Avenue as aforesaid: and the Com-

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Exhibit.

missioners hereafter to be appointed shall make an estimate and assessment of the damages sustained by the owner or owners thereof, and an assessment of the benefits received upon the owner or owners of all the lands and real estate intended to be benefitted thereby.

Passed June 3, 1870.

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A. C. WESTERVELT,
President of Common Council.

JAMES GILLEN,
City Clerk.

F. W. RICARD,
Mayor. 20

Approved June 4, 1870.

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*Notice of Appeal.***NOTICE OF APPEAL.**

Filed May 29th, 1917.

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ESSEX COUNTY CIRCUIT COURT.

PIETRO IMBENINATO,

*Plaintiff,**vs.*

MAX MENDI,

Defendant.

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*In Ejectment.**Notice of Appeal.**To Anthony R. Finelli, Attorney of Plaintiff.*

Take notice that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in the above stated cause.

CHARLES HOOD,

Attorney of Defendant-Appellant.

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Dated May 28th, 1917.

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*Grounds of Appeal.***GROUNDS OF APPEAL.**

Filed June 29th, 1917.

NEW JERSEY SUPREME COURT.

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PIETRO IMBENINATO, <i>Plaintiff-Respondent,</i> <i>vs.</i> MAX MENDEL, <i>Defendant-Appellant.</i>	}	<i>Grounds of Appeal.</i>
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The appellant states the following grounds of appeal in this cause.

1. Because the Court erred in denying the defendant's motion for a non-suit upon the evidence at the close of plaintiff's case.

2. Because the Court denied the defendant's motion to strike out the testimony of plaintiff's witnesses relating to the character of the fences adjoining plaintiff's and defendant's land, although there was no evidence to connect this line of testimony to show that these fences were ancient monuments, or boundary lines.

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3. Because the Court erred in denying the defendant's motion for a direction of the verdict in favor of the defendant at the close of defendant's case.

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Grounds of Appeal.

4. Because the Court erred in refusing to charge defendant's fourth request to charge, viz.: "The boundaries of land as marked out by definite monuments will control courses and distances called for."

10 5. Because the verdict was contrary to the weight of the evidence.

6. Because the verdict was contrary to law.

CHARLES HOOD,

Attorney for Defendant-Appellant.

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Opinion of Supreme Court.

OPINION

Filed February 27, 1918.

NEW JERSEY SUPREME COURT

November Term, 1917.

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PIETRO IMBENINATO, <div style="text-align: right;"><i>Respondent.</i></div> <div style="text-align: center;"><i>vs.</i></div> MAX MENEL, <div style="text-align: right;"><i>Appellant.</i></div>	}
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Submitted Dec. 6, 1917; decided Feb. —, 1918. 20

Appeal from Essex Circuit Court.

Before Gummere, Chief Justice, and Justices
Parker and Kalisch.

For the appellant, Charles Hood.

For the respondent, Anthony R. Finelli.

PER CURIAM:

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This is an ejectment suit, based on an alleged encroachment of defendant's garage building over plaintiff's line. The pleadings and judgment erroneously describe plaintiff's entire property as conveyed to him by deed, as well that part of which he was in possession at the beginning of the suit, as that part of which defendant had, as he claimed, deprived him, and which is all that he should have sued for. No question is raised, how-

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Opinion of Supreme Court.

ever, about the description of the land in dispute.

10 Plaintiff had a judgment and defendant appeals. The grounds of appeal are that the Court erred in denying a non-suit and a direction for defendant; in refusing to strike out certain testimony; in refusing defendant's fourth request to charge; and that the verdict was contrary (a) to the weight of evidence, and (b) to law. This last points out no error in the conduct of the trial and is therefore not considered. The refusal to charge is not argued and is therefore not considered.

20 The crucial point in the case was the location of the southerly line of an old street called Inness Place, which had disappeared on the ground because merged in the opening of Central Avenue. The description of plaintiff's lot began 100 feet south of this line of Inness Place, and called for eighteen feet frontage on Lock Street. There being no existing monument to mark Inness Place, plaintiff undertook to show where it should be and where his own lot should be, by testimony of surveyors and others as to the general layout of the block, including buildings and fence lines. Defendant's case rested largely on maps filed in the city hall relating to the opening of Central Avenue, assessment of taxes and so on.

40 As the case developed there was a plain question of fact, whether the jury were to accept the evidence of the city maps and other evidence favoring defendant, or adopt the location of plaintiff's lot as worked out by his surveyors by examination of the property lines marked on the ground. They chose the latter, and on this appeal it is not for us to

Opinion of Supreme Court.

question their finding if there was legal evidence to support it, and there was such evidence. Hence the motions to non-suit and to direct were properly denied.

The sole remaining point is the refusal of the court to strike out certain evidence. This is somewhat obscure in the printed record, and appellant's counsel has nowhere pointed out where in the book the precise ruling appears of which he complains. We have searched the book for an exception in this regard, and find that in the examination of the witness Acocella objection was made to the testimony of the location of fences of other property, and the Court said it might be struck out if not connected with an old monument. The next mention of the matter seems to have been at the close of the testimony, when a motion was made to strike out the testimony of all the witnesses so far as it relates to old locations, apparently on the ground that there was nothing to fix them or any of them as old locations. In our judgment the testimony of Lehlbach and Smith, not to mention others, indicated old locations, and if there was any such testimony there was no error in refusing to strike it all out.

We find no error calling for a reversal and the judgment will therefore be affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ON APPEAL FROM

New Jersey Supreme Court

PIETRO IMBENNINATO,

Plaintiff-Respondent,

vs.

MAX MENDL,

Defendant-Appellant.

On Appeal
From Cir-
cuit Court.

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BRIEF FOR RESPONDENT.

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POINT I.

The plaintiff has the elder title and the prior right of location.

The parties derived title originally from the same source and the only question in the case concerns the practical location of the boundary between the lots. The lands in question are situated in a block of land located upon a map referred to in the title deed of both sides as the map of "Inness Place," in the City of Newark, made by Francis W. Brinley Surveyor.

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~~made by Francis W. Brinley, an appointed Surveyor.~~

John B. Acocella, made a survey in August 1916 and a re-survey in January 1917; he was furnished with the description contained in the plaintiff's deed and he found that the plaintiff

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did not have the described 18 feet in the rear of his lot; that two feet of the plaintiff's lots are taken up by the defendant's garage (27). He said that the measurements from the City monuments disturbed all the occupations on that block (27); that premises designated as Nos. 47 and 49 Lock Street completely take up lot and designated as No. 95 on the "Inness Map;" and lots 94, 93 and 92 extend North up to the present line of Central Avenue; premises No. 47 Lock Street take up 18 feet and premises No. 49 Lock Street take up 22 feet following the scheme laid down on the "Inness Map" (28); He fixed the northerly boundary line of lots Nos. 93 and 94; and he fixed the southerly side of Central Avenue; and he also fixed the southerly line of Inness Street; he measured up all buildings on the block in order to fix the garage as being over the plaintiff's lot. *Lots No. 101 and 121 on the "Inness map" corner at the same place as lots Nos. 94 and 95.*

When this witness started to make the survey from the monuments, he found that he would make every building on that block over the next lot, and from that he concluded that the monuments were put there after the buildings were built and after the property owners had located themselves with reference to a certain line (35).

Herman B. Lehlbach, another experienced surveyor testified that the only method of procedure, in order to locate the beginning point of a survey, where there are no two monuments, is to establish the line by measuring out from practical occupations. *That he found the beginning point of the plaintiff's lot on the westerly side of Lock Street, 100 feet south of Inness Street.* He used Inness Street as located by the practical occupations and the mute testimony which now exists as to where Inness Street was at the time the Inness Map was laid out. That mute testimony is testimony of

occupations along the intersecting streets. This witness says there are no monuments dividing the lines (66). He established the line of Inness Place by measuring out from the practical occupations by the streets intersecting Inness Place, the distances given by the map and by the various deeds on those intersecting streets (67). He either had charge of surveys of 47 and 49 Lock Street and 55 Lock Street and several properties surrounding on Central Avenue, west of Lock Street, on the south side of the same. As far back as 24 years ago he made a survey on the south side of Central Avenue, near Newark Street; and in 1904, 1907 and in June 1916, he surveyed the plaintiff's lot (56). He found a house situated on the front part of the lot covering a full frontage of 18 feet, bounded on the southerly side by a party wall, the house measured 18 feet from the southerly line of wall to the northerly side of the house. He found at the rear of the house it measured 18 feet from the center of the party wall, from the house which was surveyed from the one adjoining on the south. He did also measure this 18 feet. He found that the fence extending from the rear of the house to the rear of the lot were in line, the northerly one with the northerly side of the house and the southerly fence with the extension of the centre of the party wall, and that they measured 18 feet substantially in all places, and he based the survey of the property on these practical occupations as they had existed apparently for a very long time (59). When he surveyed in 1907, he found 18 feet at the rear of the plaintiff's lot; the south fence was divided and fixed at that time; but when he re-surveyed in 1916, he only found 15 feet 9 inches, the other part was occupied by a brick building extending at the rear side about 2 feet 3 inches beyond the fence as it existed (60).

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Mr. Sheppard also made two surveys of No. 45 Lock Street, the first one in 1913; he was furnished with a description which made the southerly line of the premises parallel with Inness Street; from the interpretation of the City of the line of Inness Street, he established it and measured parallel; he measured 80 feet along Lock Street, he went to a point 100 feet along Central Avenue and measured off 80 feet to parallel, fixing the southerly line 80 feet from Central Avenue; when he made his re-survey he did it just in the same manner that he made the original survey (96). The correctness of his location of the garage depends entirely upon the correctness of the northerly line of Central Avenue (99).

He paid no attention to bearings, but he measured them parallel as his description ran; he used but one monument (at Central Avenue and Dey Street) and he never endeavored from that monument to verify the practical occupations of the surrounding lots on Lock Street; he never made any survey in that locality where he found the practical occupations to correspond with this monument (103).

Mr. Kempf in 1916 surveyed a line which would be 80 feet southerly from the southerly line of Central Avenue and parallel therewith; he established that line to find out how the garage was located in relation with the southerly line of Central Avenue, at the distance of 80 feet from it; he established the southerly line of Central Avenue by a stone monument planted by the City of Newark, located in the middle of Dey Street 50 feet northerly from the southerly line of Central Avenue and he testified that at one time, there existed a similar monument in the center line of Lock Street and Central Avenue 50 feet north of the southerly line of Central Avenue; he made a mark from that monument eight o)

ten years ago on a brick building situated at the southerly corner of Lock Street and Central Avenue, 9 feet southerly from the southerly line of Central Avenue.

All witnesses admit that the established line of a street cannot be located by a single stone monument. Two are needed. This witness did not try to ascertain whether the monument distances disturbed the occupations in the vicinity (110). And the correctness of the line which he fixed depends upon the correctness of the southerly line of Central Avenue; and that in turn depends upon the correctness of the monuments he mentioned (113). 10

POINT II.

There was also ample evidence of title by a practical location of the division line between the parties. 20

Charles A. Smith has been in that section of Newark since 1887. He testified that in that year there existed a low wooden fence situated at the rear of the houses, marking the division lines of the respective buildings running back to his factory line, which ran within one hundred feet of Lock Street; his factory property adjoins all the property on Lock Street. He remembers this particular point (the northwesterly corner of the plaintiff's lots) where there was a fence post which was thrown down when defendant's garage was put up; that old post had been there prior to 1887, and the wooden fence that runs in the rear of all the properties facing on Lock Street, was nailed to this post (40). 30

The post had attached to it the fences on the plaintiff's lot and three other lots cornered at that post; the garage extends a foot and a half further south than the place where the post was (43). 40

The map put in evidence shows that the southerly line of lots on the southerly line of Inness Street was a prolongation of the northerly line of lot No. 95.

10 The fence ran from the post all the way down to the rear end of the plaintiff's house. The witness *Frazier* corroborated Mr. Smith. Mr. Lehlbach also says that there was a fence on the northerly line of plaintiff's house prolonged in a westerly direction to a point 100 feet west to the practical line of Lock Street, and that there was a cross fence designating the end of the line which ran practically on a line paralalled with 100 feet westerly from the westerly line of Lock Street (59). That fence began at the rear of the house No. 47 Lock Street, and extended to a point 100 feet west of Lock Street and beyond the same, in a direct line making the real line of the lots fronting on Central Avenue.

20 The value of such evidence was recognized in the case of *Spottiswoode vs. Morris & Essex RR. Co.* (61 N. J. L. 322-339), by Justice Depue, who in delivering the opinion of the Supreme Court says:

30 "The general doctrine of the law is that where the true location of premises conveyed by a deed is doubtful, a practical location by consent of the parties will aid in the construction of the deed, and in some instances be conclusive as to the boundaries thus fixed, although the acquiescence be for a less period than twenty years."

POINT III.

The plaintiff having shown a title against which the defendant's exclusive possession or claim would be wrongful, the plaintiff was entitled to the judgment rendered by the jury.

Alt vs. Butz, Supreme Court of New Jersey, 79 Atl. 881, holds that a verdict in ejectment involving a disputed boundary line that the jury found for plaintiffs and made the line run tapering from nothing to $3\frac{1}{2}$ inches was not so indefinite as to be insufficient to support the judgment. 10

Wilkinson vs. Lyons, in the Court of Errors and Appeals, 93 Atl. Reporter 568, an ejectment suit for a small gore of land. The deeds of the plaintiffs and defendants are from the same grantor, the conveyance over which defendant claims is the earlier. The boundary line between the two lots running the same course and description in both deeds. It runs from Midland Avenue, Montclair, to a point in the rear line of the lots, but no monument is there given, nor was any shown to have been there. From that point the defendant's rear line runs 163 feet 3 inches to Walnut Street. The defendants claim that the disputed corner must be located where it would come if the course and distance of the deeds will run from Midland Avenue; that is, 160 feet from Walnut Street. 20 30

The triangle with the base of 3 feet 3 inches, the difference between the two measurements to Walnut Street, is the land in dispute. The Judge left it to the jury to say what was, in fact, conveyed by the defendant's deeds. Judge Swayze says:

“So far as the rear length of the two deeds is concerned, both descriptions might be correct. It is only when an attempt is made to locate upon the ground the tract conveyed 40

that the inconsistency between the two lines appears. This presents a question of fact for the jury; not a question of the construction of a deed for the court."

affirming the Supreme
Essex Circuit in favor of plaintiff should be affirmed with costs.

ANTHONY R. FINELLI,
Counsel with Respondent.

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ANSWER TO POINT FOUR.

The objection to the judgment is now presented for the first time. The jury must have fully understood the issue and the court very properly left it with them to say where the real line was located.

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The judgment is according to the usual form. The verdict being general, the plaintiff through the Sheriff takes possession under his writ and is liable in trespass if he takes more land than is embraced within the boundary recovered.

The cases cited are from code states and refer particularly to proceedings special in nature for the location of a true boundary line.

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The complainant, verdict and judgment refer to established and definite courses and directions. (See charge to jury, State of case, page 143).

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New Jersey Court of Errors and Appeals

PIETRO IMBENINATO,
Plaintiff-Respondent,

vs.

MAX MENDEL,
Defendant-Appellant.

On Appeal.

10

Brief of Charles Hood, Counsel with Defendant-Appellant.

Statement of the Case.

This was an action brought by the plaintiff to recover the possession of certain land beginning on the westerly side of Lock street one hundred feet south 28 degrees west from its intersection with the southerly line of Inness street, which streets are particularly designated on a map of the property called Inness place in the City of Newark, made by Francis W. Brimley, surveyor, and filed in the office of the Register of Deeds for Essex County; thence running (1) along Lock street south 28 degrees west 18 feet in width; thence (2) extending from Lock street by lines parallel with Inness street north 62 degrees 40 minutes west 100 feet in depth, carrying said width of 18 feet along the whole of said depth.

The plaintiff also sought in said action to recover for mesne profits and damages and claimed that his right to the possession of said premises accrued on the 21st day of February, 1907. The defendant, by his answer, denied that he was in possession of the said premises or any

part thereof and that he has never claimed title to the said premises.

At the end of the plaintiff's case the defendant moved for a non-suit, which was denied by the Court and exception was duly taken by the defendant and noted as a ground for appeal (pp. 65, 79, 80).

10 At the close of the defendant's case the defendant moved for a direction of the verdict in favor of the defendant, which was denied by the Court to which ruling an exception was duly taken and noted as a ground for appeal (pp. 141-143).

The jury's verdict was in favor of the plaintiff for the recovery of possession of said premises and they assessed the plaintiff's damages at \$.06, whereupon judgment was entered pursuant to the said verdict.

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The defendant appealed from this judgment to the Supreme Court which in the November term of 1917 affirmed the judgment of the Circuit Court and from this judgment of the Supreme Court the defendant appeals.

SPECIFICATION OF POINTS.

Point 1.

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The plaintiff failed to establish a *prima facie* case and should have been non-suited.

Point 2.

The proofs established that defendant does not encroach on plaintiff's lot, and a verdict for defendant should have been directed.

Point 3.

The verdict was contrary to the weight of
40 evidence.

Point 4.

The verdict and judgment are contrary to law in that they are too indefinite.

I.

The plaintiff failed to establish a *prima facie* case, and should have been non-suited. 10

The sole question at issue is the true location of the boundary line dividing plaintiff's premises from defendant's. The burden of proving the true location of this line, and that defendant's building encroaches beyond it, is upon the plaintiff.

9 *Corp. Jur. Sec.* 296.

The plaintiff attempts to prove this in two ways: 20

(1) By establishing alleged missing monuments, *i. e.*, the southerly line of Inness street by measuring from "actual occupations" in the same block.

(2) By showing the line of a fence alleged to be a boundary fence between the two properties.

The plaintiff's proof on each of these contentions fails to establish the requisite facts. 30

(1) The description in plaintiff's deed calls for a starting point 100 feet west of the intersection of Lock street with the southerly line of Inness street, and for side lines "parallel with Inness street." Plaintiff attempted to show that the southerly line of Inness street had disappeared in the widening of the street into Central avenue, and his two surveyors testified that they determined the southerly line of Inness street from actual occupation in the same block. 40

They gave no facts regarding these occupations. They admitted that the northerly line of Inness street and the northerly line of Central avenue were "supposed to be" coincident; that Inness street was 60 feet in width; that when it was widened as Central avenue to 80 feet, the additional 20 feet was taken from the southerly side; that certain public monuments standing in Central avenue were and are 30 feet south of the northerly line of Central avenue (and hence of Inness street), but that they did not use either the southerly line of Central avenue or these monuments in measuring, but contented themselves with the deductions which they made from what they called "actual occupations."

The first of these surveyors, Acocella, testified that the distance from the southerly line of Inness street to the southerly line of Central avenue "is practically 20 feet" (p. 20); that he did not fix the line of Lock street but took it from the Inness map, and that he doesn't know whether the westerly line of Lock street now is the same as on the Inness map (p. 20); that he took this westerly line "from the lines of occupations of the buildings;" that the northerly line of Central avenue and the northerly line of Inness street are supposed to be coincident; that there are monuments in Central avenue 30 feet south of its northerly line, but he did not measure from these, but "from the old occupations on the block" (p. 22), because the measurements from the city monuments "disturb all the occupations on that block" (p. 27).

This witness first inspected the premises in August, 1916 (p. 18), (*i. e.*, after defendant's building had been erected). No proof is given of these "old occupations," as to where they

are, of what they consist, nor what the measurements are that indicate an irreconcilability with the monuments or with the southerly line of Central avenue as being 20 feet south of the southerly line of Inness street. We have nothing but the statement of the witness as to what these undisclosed occupations indicate. This is a conclusion drawn by the witness from facts not in evidence, and is therefore of no probative force. 10

The plaintiff's other surveyor, Lehlbach, used the same methods in determining the southerly line of Inness street. He did not use the monuments in Central avenue, "because they do not define the lines of Inness place (street?). They define the commissioners' idea of where Inness place (street?) should be put" (p. 67). So he "established the line of Inness place by measuring out from the practical occupations by the streets intersecting Inness place (street?) the distances given by the map and by the various deeds on those intersecting streets" (p. 67). On cross examination he admitted that he knew that Inness street was 60 feet in width; that it had been widened into Central avenue by an ordinance fixing the width at 80 feet, and that the width of Central avenue as 80 feet is recognized by "every surveyor, and all authorities" (pp. 68, 69). 20 30

This witness, like the other, gave no testimony to identify the "practical locations," the streets, distances or deeds which he assumed to exist and from which he formed his conclusion that the southerly line of Inness street could not be located or established by measuring from either the northerly or southerly line of Central avenue, or from the monuments existing on Central avenue, 30 feet south of its northerly line, designed to indicate the centre line of old Inness street. 40

Thus the plaintiff's witnesses, rejecting monuments (the stone monuments, and the two lines of Central avenue), base their testimony as to the dividing line in question upon conclusions drawn by them from facts not in evidence and not pointed out by these experts as the basis of their reasoning.

10 (2) The plaintiff offered proof of the existence of a fence between his lot and that of defendant to establish a "practical location." This consisted of the testimony of one of his surveyors, Lehlbach, and of certain other witnesses, who testified that a fence had run from the rear of plaintiff's house to the transverse fence across the rear, and had existed for a number of years. The claim is that the defendant's building encroaches over this fence line.

20 The doctrine of "practical location" is based upon an agreement, express or implied, between the adjoining owners or their predecessors in title, whereby the practical location was either expressly agreed upon or acquiesced in.

9 Corp. Jur. Secs. 192, 193, 317, 319.

Baldwin v. Shannon, 43 N. J. L. 596.

Albanesius v. Peerless Rub. Co., 75 N. J. L. 340.

30 *Alt v. Butz*, 81 N. J. L. 156.

The plaintiff failed to prove the facts from which such an agreement or acquiescence could be found. There is no proof that the parties derive title from a common source, or that any predecessor in title of the defendant agreed to or acquiesced in such fence as a boundary line. The only proof as to titles are that the plaintiff obtained title by deed from one Patonsky on February 28, 1907 (p. 11), and that the defendant obtained title by deed from a building and

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loan association on April 22, 1912. It is true that the plaintiff began an attempt to prove his own chain of title, but all that he put in evidence was a deed in 1835 to one Baldwin (p. 15), and a deed in 1836 from Baldwin to one Silvey (p. 16). Both these deeds called for a lot 40 feet front on Lock street, and 100 feet deep. Plaintiff's deed is for a lot 18 feet front and 100 feet deep. No acquiescence by adjoining owners in a fence as constituting a boundary can be predicated upon these facts; and there is no other proof in the case as to predecessors in title of either party. It may well be that the plaintiff's lot and defendant's lot were owned by one and the same individual who erected the fence for his own convenience; or that defendant's predecessors in title resided abroad and never saw or knew of the fence, or even that there was a distinct understanding between the adjoining owners—whoever they were—that the fence was not intended to indicate a boundary line.

In *Albanesius v. Peerless Rub. Co.*, 75 N. J. L. 340, the Court pointed out that "the parties derive title from a common source" and quoted from the opinion by Justice Depue in *Spottiswood v. Morris & Essex R. R. Co.*, 61 N. J. L. 322 (at p. 339), that "where the true location of premises conveyed by deed is doubtful, a practical location *by consent of the parties* will aid in the construction of the deed," etc.

"To constitute a practical location of a line, the mutual act and acquiescence of the parties is required." 9 *Corp. Jur. Sec.* 192.

The burden is on the plaintiff to prove "that the division line had been *acquiesced in* so long and *under such circumstances* that it should be

accepted as the boundary." *Keller v. Harrison*, 139 Iowa 383; 116 N. W. 327.

See also 9 *Corp. Jur. Secs.* 297, 299.

The plaintiff therefore presented no legal proof that the boundary line as claimed by him is established either by (1) measurements based on actual occupations, or by (2) acquiescence in
 10 a fence as constituting the division line. Therefore he should have been non-suited.

II.

The proofs established that defendant does not encroach on plaintiff's lot, and a verdict for defendant should have been directed.

Not only did the plaintiff's proofs fail to establish his contention as to the location of the boundary line, but the evidence shows that the
 20 defendant's building does not encroach upon the boundary line described in plaintiff's deed. These proofs are the Inness place map, Exhibit P. 2 (p. 12), referred to in plaintiff's deed; the ordinance for widening Central avenue, Exhibit D. 1, the "damage map," Exhibit D. 2, the opening map, D. 4, the testimony of Umbscheiden, the city document clerk, and of the defendant's surveyors, Shepard and Kempf. From this evidence it appears that defendant, before erecting
 30 his building ascertained the location of the boundary line by measuring from the southerly line of Inness street; and that the line as located with reference to the southerly line of Inness street is south of defendant's building. This evidence further shows that the southerly line of Inness street is easily determined (1) because the northerly line still exists and the original street was 60 feet in width, and (2) because
 40 monuments placed in 1855 in the centre of Inness street still exist.

Where the monuments called for in a deed exist or can be located, no resort to any other calls can be made, and the monuments control over any calls inconsistent therewith.

9 *Corp. Jur. Sec.* 135.

And where plaintiff alleges that a change has been made in the location of a road, which was a monument referred to in his deed, it has been held that the burden is on him to prove such change, if any, in order to deprive the call for the road of its effect as a monument. *Green v. Van Horn*, 142 App. Div. 90; 126 N. Y. S. 486. 10

There being an utter absence of proof of plaintiff's contention, and affirmative evidence of the character stated above on the part of defendant, the Court should have directed a verdict for defendant. 20

III.

The verdict was contrary to the weight of evidence.

This proposition has been demonstrated in the argument in Point I. and Point II. above and requires no further elucidation. It is submitted that there was no legal evidence to support the verdict as has been hereinbefore indicated and therefore the verdict should be set aside. 30

IV.

The verdict and judgment are contrary to law in that they are too indefinite.

The only question in litigation was the precise course of the boundary line. The course was described in the title deeds as "parallel with Inness street." The exact line depended upon the line of Inness street. If this latter 40

line was where the plaintiff's surveyor "established" it then the line runs through a portion of the defendant's building. The verdict of the jury does not establish this line, but was merely that the defendant was guilty of trespass in ejection and the judgment awards to the plaintiff possession of a tract of land describing the same in the exact language of his title deed.

10 The line in controversy is described in said deed and said judgment, as beginning on the westerly side of Lock street 100 feet south 28 degrees west from its intersection with the southerly line of Inness street and therein extending from Lock street by lines parallel with Inness street, etc. (p. 10). This does not establish the location of the line nor determine what part of the premises claimed by plaintiff is in possession of defendant. It leaves this question open, apparently to be judicially determined

20 by the sheriff when he executes a writ of possession. That this is a practical and not a chimerical objection to the verdict and judgment is readily perceived when one considers that each of plaintiff's witnesses who testified to the encroachment, Acocella, a surveyor, said the building encroached upon the line about two feet at plaintiff's rear line, and about a foot and a half at the other end of the building (p. 27).

30 Lehlbach, another surveyor, testified that it encroached two feet and three inches at the rear (p. 60). And Smith, an adjoining owner in the rear of plaintiff, said it encroached a foot and a half at plaintiff's rear line. Which of these three differing measurements is the sheriff to adopt when he executes a writ of possession?

40 "The verdict, findings, or judgment establishing a disputed boundary should be so definite that the line can be accurately run

in accordance therewith." 9 Corp. Jur. Sec. 354.

Similar judgments have been set aside as indefinite in numerous cases.

Wade v. Gelmer, 186 Ala. 524, 64 S. 611.

Wilhelm v. Bauman, 133 S. W. 292.

Campbell Banking Co. v. Hamilton, 173 S. W. 1012. 10

Balliet v. Veal, 140 Mo. 187, 41 S. W. 736.

The verdict should have either described the boundary line with *certainty* or should have determined the *quantum* of actual encroachment of defendant's building upon plaintiff's premises. Further, the jury should have found against the plaintiff as to that part of the premises described in his complaint of which there was no pretence in the proof that defendant possessed, *i. e.*, all of plaintiff's lot except the specific strip found to be encroached upon by defendant's building. 20

Such a verdict was rendered in *Alt v. Butz*, 81 N. J. L. 156, where "the Trial Court left it to the jury whether the claim (of adverse possession) was substantiated by the proof in the case. The jury found *against the claim as to a certain portion of the property which they described in their verdict.*" 30

The verdict and judgment being thus so indefinite as to the identity of the premises belonging to plaintiff determined to be in possession of the defendant, the verdict is contrary to law.

It also violates the statute. The Ejectment Act (N. J. Comp. St., p. 2063, Sec. 41) provides as follows:

"That if a verdict be found for the plaintiff or plaintiffs, or either of them for the 40

whole or a part, the jury shall, by the verdict, particularly specify such part, and judgment shall be entered thereon, that he or they recover the possession of the same, either in whole or in part, as the case may be, with costs, upon which a writ of possession may issue."

10 The verdict is therefore contrary to law.

For all of which reasons, it is submitted that the judgment of the Supreme Court affirming the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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