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NOTICE AND GROUNDS OF APPEAL.

Filed January 9, 1931.

Essex County Circuit Court

JENNIE BACHMAN, MINNIE DREYFUSS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH and ISAAC SPANGENTHAL, *Plaintiffs,* *vs.* CITY OF NEWARK, *Defendant.*	*Action at Law.* *Notice and Grounds of Appeal.*

To Frederick H. Groel, attorney for defendant:

PLEASE TAKE NOTICE that the plaintiffs appeal to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in the above-entitled cause of action upon the following grounds:

1. The Trial Court entered judgment for possession in favor of the defendant whereas it should have entered judgment in favor of the plaintiffs.

2. The Trial Court erred in that it found as a matter of law that the defendant was seized with title to the fee of the lands described in the complaint herein.

3. The Trial Court erred in that it found as a matter of law that the defendant was seized in fee simple absolute with the title to the lands described in the complaint herein.

4. The Trial Court erred in that it found that the act authorizing the purchase and condemnation of land and the erection of buildings for markets passed April 26, 1886, P. L. 1886 p. 268 contemplated the taking of a fee.

5. The Trial Court erred in that it found that the act authorizing the purchase and condemnation of land and the erection of buildings for markets passed April 26, 1886 P. L. p. 268 contemplated paying the full value of the land.

6. The Trial Court erred in its failure to find that full title and right of possession to the lands described in the complaint herein reverted to the plaintiffs upon the abandonment by the defendant of the use of the said premises for which the same were condemned.

RIKER & RIKER,
Attorneys of Plaintiffs.

Service of a copy of the within Notice and Grounds of Appeal is acknowledged this 5th day of January, 1931.

FRANK A. BOETTNER,
Attorney for Defendant.

SUMMONS.

Filed June 1, 1928.

THE STATE OF NEW JERSEY To City of Newark.

(SEAL) YOU ARE SUMMONED to answer the complaint of Jennie Bachman, Minnie Dreyfuss, Harry Spangenthal, Jessie Spangenthal Roth and Isaac Spangenthal in an action at law in the Essex County Circuit Court.

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court within twenty days after service upon you of this writ, and the annexed complaint, then the plaintiffs may proceed in the suit and judgment may be entered against you.

WITNESS, WORRALL F. MOUNTAIN, Esquire, Judge of the Essex County Circuit Court, at Newark, this 1st day of June, 1928.

JOHN H. SCOTT,
Clerk.

RIKER & RIKER,
Attorneys.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, MINNIE DREYFUSS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH and ISAAC SPANGENTHAL, *Plaintiffs,* *vs.* CITY OF NEWARK, *Defendant.*	*Action at Law.* *Complaint.*

The plaintiffs, heirs at law of Abraham Sickel deceased, all residing in the City of Newark, County of Essex and State of New Jersey, demand of the City of Newark the possession of a tract of land with the appurtenances situate in the City of Newark, County of Essex and State of New Jersey described as follows:

BEGINNING in the westerly side of Mulberry Street at the corner of a lot formerly owned by B. Benson, said corner being distant northeasterly 63.15 feet from the northwesterly corner of Mulberry Street and Commerce Street; thence along the westerly side of Mulberry Street north 40 degrees 30 minutes east 26 feet 9 inches to the corner of a lot formerly owned by Nathan Bolles; thence along the line of said lot north 59 degrees 30 minutes west 75 feet 2 inches; thence south 31 degrees 45 minutes west 24 feet 10 inches to line formerly of B. Benson; thence along his line south 58 degrees east 70 feet 10 inches to the westerly side of Mulberry Street and the place of BEGINNING.

and also the sum of $100,000. for mesne profits and damages, and the plaintiffs further say that their right to the possession of the same accrued on the 25th day of May, 1924, and that the defendant wrongfully deprives them of the possession thereof to their damage $150,000.

RIKER & RIKER,
Attorneys of Plaintiffs.

ANSWER.

Filed June 12, 1928.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, MINNIE DREYFUSS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH and ISAAC SPANGENTHAL, *Plaintiffs,* *vs.* THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Answer.*

Defendant says that:

1. It denies the truth of the matters contained in the complaint.

JEROME T. CONGLETON,
Attorney for the Defendant.

DEFENDANT'S DEMAND FOR BILL OF PARTICULARS.

Filed March 13, 1930.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, MINNIE DREYFUSS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH and ISAAC SPANGENTHAL, *Plaintiffs,* *vs.* THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Demand for Bill of Particulars.*

To Riker & Riker, attorneys of plaintiffs:

PLEASE TAKE NOTICE that the defendant demands a bill of particulars of the plaintiff's claim or title to the premises mentioned and set out in the said plaintiff's complaint.

Dated June 11, 1928.

JEROME T. CONGLETON,
Attorney of Defendant.

PLAINTIFFS' BILL OF PARTICULARS.

Filed June 30, 1928.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, MINNIE DREYFUSS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH and ISAAC SPANGENTHAL, *Plaintiffs,* *vs.* CITY OF NEWARK, *Defendant.*	*Action at Law.* *Bill of Particulars*

The following bill of particulars of the claim or title of the plaintiffs to the premises mentioned and set out in the plaintiff's complaint, is furnished pursuant to demand therefor dated June 11, 1928, and served June 12, 1928:

1. Deed dated May 11, 1880, made by S. V. C. Van Rensselaer, Sheriff of the County of Essex to Abraham Sickel, recorded in the Register's Office of Essex County in Book T. 20 of Deeds for said County at page 262, conveying the same premises described in the complaint filed herein.

2. Proceedings in the year 1888 in the matter of the condemnation of lands of Abraham Sickel for market purposes in the City of Newark instituted by virtue of an act of the Legislature of the State of New Jersey entitled "An Act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in cities of this state and other places in which market facilities are or may be required for public use and to provide therefor" passed April

22, 1886, whereby and whereunder the Mayor and Common Council of the City of Newark took possession of the tract of land mentioned in plaintiff's complaint and used the same for market purposes. On appeal of said proceedings of Abraham Sickel against the Mayor and Common Council of the City of Newark, there was rendered a verdict in favor of Abraham Sickel for $15,797.78 as recorded in the Essex County Clerk's Office in Book 31 of the Essex County Circuit Court minutes page 408.

3. The corporate title of said municipality was changed from the "Mayor & Common Council of the City of Newark" by proper corporate resolution during the year 1917 under and by virtue of an act of the Legislature of the State of New Jersey entitled "An Act Concerning Municipalities" P. L. 1917, page 319.

4. Said Abraham Sickel died thereafter leaving a last will and testament which was duly admitted to probate in Essex County, N. J. and recorded in Book R. 2 of Wills at page 477.

5. The surviving heirs at law of Abraham Sickel deceased are Jennie Bachman, daughter; Minnie Dreyfuss, daughter, and Jessie Spangenthal Roth, Harry Spangenthal and Isaac Spangenthal grandchildren by a deceased daughter.

6. On or about the 13th day of April, 1926, or theretofore or thereafter said City of Newark abandoned the property described in the complaint for the use of which it was condemned and the title to said premises thereupon reverted to the plaintiffs herein as heirs at law of Abraham Sickel deceased or as devisees under his last will and testament.

RIKER & RIKER,
Attorneys of Plaintiffs.

PLAINTIFFS' DEMAND FOR BILL OF PARTICULARS.

Filed July 7, 1928.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, MINNIE DREYFUSS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH and ISAAC SPANGENTHAL, *Plaintiffs,* *vs.* CITY OF NEWARK, *Defendant.*	*Action at Law.* *Demand for Bill of Particulars.*

To: Jerome T. Congleton, Esquire, attorney for defendant:

PLEASE TAKE NOTICE that the plaintiffs demand a bill of particulars of the defendant's claim or title to premises mentioned and set forth in the plaintiff's complaint.

RIKER & RIKER,
Attorneys of Plaintiffs.

Dated June 15, 1928.

DEFENDANT'S BILL OF PARTICULARS.

Filed March 13, 1930.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, MINNIE DREYFUSS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH and ISAAC SPANGENTHAL, *Plaintiffs,* *vs.* THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Bill of Particulars.*

To: Riker & Riker, Esquires, attorneys for plaintiffs, or: Whom it May Concern:

The following is the bill of particulars of the defendant's claim to the title to the premises mentioned in the plaintiff's bill of complaint.

The City of Newark acquired title in fee simple to the premises described in the plaintiff's complant by condemnation proceedings instituted by virtue of an Act entitled: "An Act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in the cities of this state and other places in which market facilities are or may be required for public use, and to provide therefor," (Chapter CXCI, P. L. 1886, page 268).

An award by the Condemnation Commissioners appointed by virtue of the said Act, was made on October 5, 1888, and payment of said award was made to Abraham Sickel who was the owner

of the premises in question at the time of condemnation.

Dated June 30, 1928.

JEROME T. CONGLETON,
Attorney for Defendant.

STATEMENT OF RIGHT IN CONTROVERSY AND AGREED STATEMENT OF FACTS.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, MINNIE DREYFUSS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH and ISAAC SPANGENTHAL, *Plaintiffs,* *vs.* THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Statement of Right in Controversy and Agreed Statement of Facts.*

IT IS AGREED BETWEEN THE PARTIES HERETO, by their respective attorneys that the following shall constitute a statement of the right in controversy and agreed statement of facts, and that the said cause of action be submitted to the Honorable William A. Smith, Judge of the Essex County Circuit Court, who shall hear and determine the case, and that judgment of the Court shall be entered upon his findings.

STATEMENT OF RIGHT IN CONTROVERSY.

The plaintiffs as heirs at law of and devisees under the will of Abraham Sickel, deceased, claim to be the owners in fee simple of the lands and premises hereinafter described and entitled to the possession thereof. The defendant, The City of Newark, claims to be the owner in fee simple of said premises by reason of the condemnation proceedings hereinafter referred to and to be entitled to use said premises for market purposes or for any other public purpose.

AGREED STATEMENT OF FACTS.

1. Abraham Sickel acquired title by deed from S. B. C. Van Rensselaer, Sheriff of the County of Essex, recorded in the Register's Office of Essex County, in Book 220 of Deeds, at page 262, to premises in the City of Newark, County of Essex and State of New Jersey, which premises are marked "A" on the map hereto annexed and made a part hereof and more particularly described as follows:

> Beginning in the westerly side of Mulberry Street at the corner of a lot formerly owned by B. Benson, said corner being distant northeasterly 63.15 feet from the northwesterly corner of Mulberry Street and Commerce Street; thence along the westerly side of Mulberry Street north 40 degrees 30 minutes east 26 feet 9 inches to the corner of a lot formerly owned by Nathan Bolles; thence along the line of said lot north 59 degrees 30 minutes west 75 feet 2 inches; thence south 31 degrees 45 minutes west 24 feet 10 inches to line formerly of B. Benson;

thence along his line south 58 degrees east 70 feet 10 inches to the westerly line of Mulberry Street and the place of BEGINNING.

2. In the year 1883, the Legislature of the State of New Jersey passed an act entitled:

"An Act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in the cities of this State and other places in which facilities are or may be required for public use, and to provide therefor," passed April 26, 1886, General Public Laws 1886, page 268.

3. Pursuant to the provisions of said Act, the Common Council of the City of Newark in or about 1887 appointed Commissioners to purchase or condemn the said lands, who entered into negotiations with Abraham Sickel, the owner thereof, for the purchase of the said lands and offered him the sum of $12,000, but an agreement for the purchase and sale thereof was not reached. In the year 1888 a petition for the appointment of condemnation Commissioners was filed in the Circuit Court of the County of Essex and thereafter due and legal notice was given to Abraham Sickel as the owner that the City would apply for an order appointing condemnation Commissioners in accordance with said petition. On or about July 7, 1888, the said condemnation Commissioners filed their report by which it appeared that they awarded to the said Abraham Sickel the sum of $14,531.45.

4. Thereafter said Abraham Sickel appealed to the Essex County Circuit Court from the aforesaid award of the Commissioners and after a hearing thereon before the said Circuit Court an award was made to said Abraham Sickel of

the sum of $15,797.98, which was greater than the award of the condemnation Commissioners by the sum of $1,266.53. The City of Newark paid to said Abraham Sickel and he received the entire amount awarded him by the Circuit Court of the County of Essex.

5. The corporate title of said municipality, by proper legislation, was changed from "The Mayor and Common Council of the City of Newark" to "The City of Newark."

6. The City of Newark received no deed for said premises from said Abraham Sickel, his heirs or divisees, but asquired its title to the same by the aforesaid condemnation proceeding (the plaintiffs do not hereby admit that the City of Newark acquired a title in fee simple or any other title), and entered into and upon the above-described premises and used the same together with the adjoining premises for market purposes.

7. In or about the month of February, 1925, or shortly thereafter the City of Newark opened a new market place on premises to the east of Mulberry street, and disconnected from the premises in question, which new market place is a permanent structure built on lands acquired by the City of Newark for that purpose, is of the same character as the market that was conducted upon the premises in question and is now and has ever since, about February, 1925, been conducted as such market.

8. The old market place as conducted prior to February 1925 comprised property as shown on map hereto annexed marked A, B, C, D, and F and the adjacent public streets Mulberry, Commerce and South Canal streets, which were used

for market purposes in connection therewith on market days. All the buildings and structures comprising the old market buildings on the old market place were completely demolished and the old market place has not been used for market purposes since about February, 1925. Subsequently to the establishment of the new market place the City of Newark entered into a lease for fifty years with the Lefcourt Company embracing property marked B, on the map hereto annexed. The property in question in this suit is marked A and the properties marked C and D are involved in similar suits. The Lefcourt Company is now erecting on the westerly property marked B a modern steel and brick office building of about thirty-five stories in height.

9. On or about the first day of June, 1926, the City of Newark adopted an ordinance entitled "An Ordinance to provide for the opening of Mulberry Court from the westerly side of Mulberry street was about 75 feet," which ordinance provided that Mulberry Court shall be opened as a public street or highway, a copy of which ordinance is hereto annexed and made a part hereof. The premises described in paragraph 1 of the stipulation and marked A on the map hereto annexed are the same premises described in the ordinance.

10. The Commissioners of Assessments for local Improvements of the City of Newark made no award to the plaintiffs for damages and benefits caused by the taking of said lands under the said ordinance, alleging in their report that "ownership of the property in question is found to be in the City of Newark," and certified and reported the same to the Circuit Court of the

County of Essex. Judge Mountain to whom the said report was referred, has taken no action to confirm the said report or to return the same for revision, pending the determination of the question of title in this proceeding.

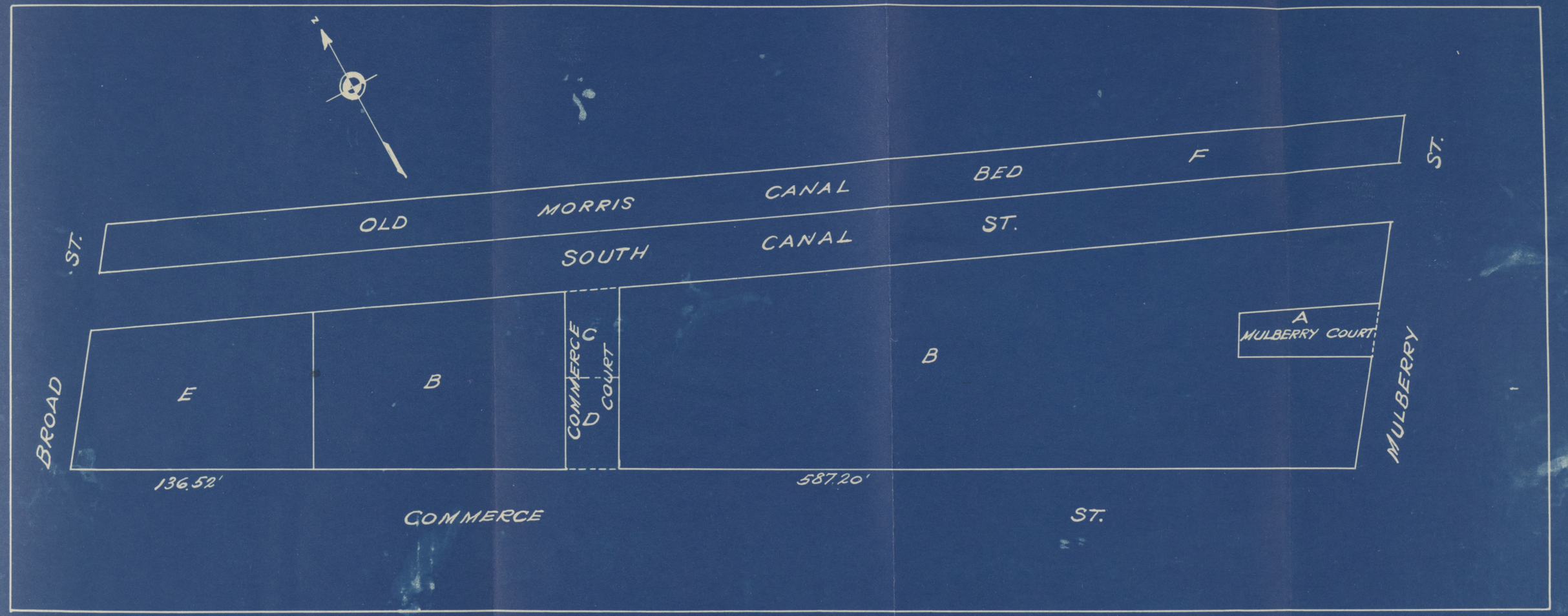
11. Abraham Sickel died on or about the 12th day of October, 1893, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of Essex and recorded in Book R. 2 of Wills at page 477, of which a true copy is hereto annexed. The residuary beneficiaries therein named are the plaintiffs Jennie Bachman and Minnie Dreyfuss.

12. The only surviving heirs at law of Abraham Sickel deceased are Jennie Bachman and Minnie Dreyfuss, daughters, and Jessie Spangenthal Roth, Harry Spangenthall and Isaac Spangenthal, grandchildren by a deceased daughter.

13. The defendant has no knowledge of the facts stated in paragraphs 1, 11 and 12, and therefore neither admits or denies the same except that it admits such facts for the purpose of the determination of the issues in this suit.

RIKER & RIKER,
Attorneys of Plaintiffs.

FRANK A. BOETTNER,
Attorney of Defendant.


N
OLD MORRIS CANAL BED
F
ST.
ST.
SOUTH CANAL ST.
BROAD
E
B
COMMERCE
C
D
COURT
B
A
MULBERRY COURT
MULBERRY
136.52'
587.20'
COMMERCE ST.

Ordinance.

AN ORDINANCE to provide for the opening of Mulberry court, from the westerly side of Mulberry Street westerly about 75 feet. The Board of Commissioners of the City of Newark do ordain: Section 1. That Mulberry court, from the westerly side of Mulberry street westerly about 75 feet, shall be opened as a public street or highway as follows:

BEGINNING in the westerly side of Mulberry Street at the corner of a lot formerly owned by B. Benson, said corner being distant northeasterly 63.15 feet from the northwesterly corner of Mulberry street and Commerce street; thence along the westerly side of Mulberry street north 40 degrees 30 minutes east 26 feet 9 inches to the corner of a lot formerly owned by Nathan Bolles; thence along the line of said lot north 59 degrees 30 minutes west 75 feet 2 inches; thence south 31 degrees 45 minutes west 24 feet 10 inches to line formerly of B. Benson; thence along his line south 58 degrees east 70 feet 10 inches to the westerly side of Mulberry street and the place of beginning.

All as shown on a map prepared under the direction of this Board, which map is hereto attached and made a part hereof and a copy of which map also is on file in the office of the Chief Engineer, Department of Public Affairs, known and designated as No. 1253-O, dated May 10, 1926.

Under and by virtue of the provisions of an act entitled, "An act concerning municipalities," approved March 27, 1917 (P. L. 1917-319), and the supplements thereto and amendments thereof.

Section 2. That said improvement shall be made as a general improvement and the cost thereof to be assessed against the city at large.

Ordinance.

Section 3. That the sum of $500 is hereby appropriated to pay the cost of said improvement, and for the purpose of meeting said appropriation and temporarily financing said improvement temporary bonds or notes shall be issued from time to time in an amount not to exceed $500. under and by virtue of the provisions of an act entitled "An act to authorize and regulate the issuance of bonds and other obligations and the incurring of indebtedness by county, city, borough, village, town, township or any municipality governed by an improvement commission," approved March 22, 1916 (P. L. 1916-525), and the supplements thereto and amendments thereof, which bonds or notes shall bear interest at a rate not to exceed six per centum per annum. All other matters in respect to such temporary bonds or notes shall be determined by the Director of Revenue and Finance, who is hereby authorized to execute and issue said bonds or notes.

Section 4. That this ordinance shall take effect immediately and all ordinances or parts of ordinances inconsistent with the provisions of this ordinance be and the same are hereby repealed.

Public notice is hereby given that at a regular meeting of the Board of Commissioners of the City of Newark, held on May 11, 1926, the above ordinance was introduced and passed on first reading, and that said ordinance will be taken up for further consideration for final passage at a meeting of the Board of Commissioners to be held at its meeting room, second floor, City Hall, Newark, New Jersey, on Tuesday, June 1, 1926, at 11 o'clock A. M. (daylight saving time), or as soon thereafter as said matter can be reached,

at which time and place all persons whose lands may be affected or who may be interested therein will be given an opportunity to be heard concerning the same.

Dated May 12, 1926

W. J. EGAN
City Clerk

SICKEL
ABRAHAM

Last Will and testament of Abraham Sickel of Newark, New Jersey, I, Abraham Sickel of the City of Newark, in the County of Essex and State of New Jersey, being of sound mind and disposing mind, memory and understanding, do make, publish and declare the following as and for my last will and testament.

First: I order and direct that all my just debts and funeral expenses be paid and satisfied as soon after my decease as conviniently may be.

Second: I give and bequeath to my wife Yette, the proceeds of four certain like Insurance Policies on my life, to wit, one in New York Life Insurance Company; one in Free Sons Lodge Insurance Company of Newark; one in the Hebrew Lodge Insurance Company No. 5 of New York, and the other in Humbold Lodge F. & A. M. of New York for her own use and benefit. I also give to my said wife Yette, during her natural life, the free use and occupancy of the second floor of my house known as Number One hundred and nineteen Market Street in said City of Newark, together with the use (in common with the tenants of said house) of the passages thereto, and of the yard thereto belonging, together with the use of all the furni-

ture and household articles contained in said house during her life. I also give to her my said wife, out of the rents of said premises number one hundred and nineteen Market Street, the sum of Six Hundred Dollars per annum to be paid her by my executors hereinafter named in semi-annual payments on the Fifteenth day of April and October of each year during her life. The foregoing provisions for my said wife being made and are in lieu of dower.

THIRD: I give and devise to my executors hereinafter named and the survivors or survivor of them the aforesaid premises number one Hundred and Nineteen Market Street, in trust, (subject to the provision hereintofore made for my said wife) to rent said premises and to receive the rents and profits thereof, and after the payment of all taxes, assessments, insurance and repairs to pay over the same as follows: One-half of said income unto my daughter Jenny, wife of Edwin G. Bachman, and the other half to my daughter Minnie in semi-annual payments on the fifteenth day of April & October in each year during the term of their natural lives, and upon the death of my said daughters Jenny and Minnie, then in trust to pay over and divide the one-half part of the net income of said premises unto all and every child and children of my said daughter Jenny, and one-half part to all and every child and children of my said daughter Minnie, and the issue of any of their children who may then be deceased in equal parts and shares in semi-annual payments on the dates aforesaid until the youngest surviving child of my said daughters Jenny and Minnie, if more than one, shall take and among themselves equally divide their parent's share, pro-

vided however, that should my son-in-law Edwin G. Bachman survive my said daughter Jenny then in that case I authorize and empower my said executors and the survivors and survivor of them to pay over to him the share or shares of such of the children of my said daughter Jenny as may be in their minority until they respectively attain the age of twenty-one years, to be by him during said period applied to the support, maintenance and education of such minor child or children, providing also however, that should my daughter Minnie leave a husband her surviving, then in that case I authorize and empower my said executors and the survivors or survivor of them to pay over to such surviving husband the share or shares of the income of such of the children of my said daughter Minnie as may be in their minority until they respectively attain the age of twenty one years to be by him applied to the support, maintenance and education of such minor child or children. Upon the arrival of the youngest surviving child of my said daughters Jenny and Minnie at the age of twenty two x years then the above mentioned portion of said Trust estate (subject to the provisions hereinbefore made for my said wife) shall vest absolutely in and I do give and devise the same absolutely unto all and every child and children of my said daughter Jenny and Minnie who may then be living, one half to the children of my daughter Jenny, and one half to the children of my daughter Minnie and to the issue of any child or children of my said daughters who may then be deceased in equal parts and shares so however that the issue of any deceased child of my said daughters, if more than one, shall take and among themselves

divide the part and share to which his or her deceased parent would have been entitled, had he, she or they survived my said daughters, provided, however, that no division of the aforesaid trust estate shall be made during the lifetime of my said wife, and that the said premises number One Hundred and Nineteen Market Street shall not be sold or any way disposed of or any share therein sold or disposed of during the lifetime of my said daughters, Jenny and Minnie, provided further that for the purpose of making a division of the corpus of the aforesaid trust estate at any time hereafter when the persons interested therein shall be entitled to receive their share absolutely, then in that event I authorize and empower my said executors and the survivors or survivor of them to bargain, sell and dispose of the said trust premises at either public or private sale and to grant and convey the same to the purchaser or purchasers thereof in fee, free from all trust herein contained respecting the same.

FOURTH: I give and devise to my executors hereinafter named and the survivors or survivor of them the house and lot known and designated as number Four Hundred and Fifty One Broad Street, and the house and lot known as number Seventy two North Canal Street in the City of Newark aforesaid in trust to rent said premises and to receive the rents and profits thereof and after the payment of all taxes, assessments, insurance and repairs to pay over the balance of said rent unto the three children of my deceased daughter Bertha Spangenthal, namely, Herman, Isaac and Jessie, or such of them as may then be living and the issue of any of them who may then be deceased in equal parts

and shares in semi-annual payments on the fifteenth day of April and October in each year until the youngest surviving child of said three children shall have attained the age of twenty one years, and so, however, that the issue of any of said three children who may then be deceased shall take and among themselves equally divide the part and share to which his, or her parent should have been entitled in said net income, provided, however, that should my son-in-law Abraham Spangenthal be living at the time of my death, then in that case and upon condition that he give a bond to be approved of by the Orphans Court of Essex County in double the amount of share or shares of his said three children. I authorize and empower my said executors and the survivors or survivor of them to pay over to him the share or shares of such of said three children as shall be in their minority until they respectively attain the age of twenty-one years to be by him during the said period applied to the support, maintenance and education of such minor child or children. But when such child or children shall respectively attain the age of twenty-one years then his or her share of said net income shall be paid by my said executors or the survivors or survivor of them directly to said child or children upon attaining the age of *of* twenty-one years, and upon the arrival of the youngest surviving child of my deceased daughter Bertha at the age of twenty four years then the said trust estate shall vest absolutely in such of said three children of my deceased daughter Bertha as may then be living and the issue of any of them who may then be deceased in equal parts and shares, so however, that the issue of any deceased child, if more than one,

shall take and among themselves equally divide the part and share of his, her or their deceased parent had such parent been then living. In the event of the death of any of the aforesaid children of my said daughter Bertha without issue before the termination of the trust aforesaid then the share of such one or more so dying in said net income shall be paid over to the same persons as are entitled to the residue of said net income and in the same shares and proportions, in the event of the death without issue of all the aforesaid children of my said daughter Bertha before the youngest survivor of them attains the age of twenty-four years, then and in that case the said trust estate and premises so instructed for the children of my said daughter Bertha shall fall into and become a part of my residuary estate.

FIFTH: I give and bequeath to my executors hereinafter named and the survivors or survivor of them the sum of Five Thousand dollars in trust nevertheless for the children of my deceased daughter Bertha Spangenthal the said sum of money to be invested by my said executors in first mortgage upon Real Estate in double value of the amount so invested, the income thereof to be paid to the children of my said deceased daughter Bertha to be used by my said executors for the support and maintenance of the children of my deceased daughter Bertha until each reaches the age of twenty-one years, at which time such share of income is to be paid to him or her direct upon reaching the age of twenty-one years, and when the youngest reaches the age of twenty-four years then said sum of Five Thousand Dollars is to be divided equally between said children or their issue in the same

manner as is set forth in the preceding paragraph Number four.

SIXTH: Whereas I have already advanced to each of my daughters Bertha and Jenny the sum of Thirty-five Hundred Dollars in cash or its equivalent now I do hereby give and bequeath the like sum of Thirty-five Hundred Dollars to my said daughter Minnie.

SEVENTH: Upon the death of my said wife Yette, the furniture and articles of my said household number One Hundred and Nineteen Market Street shall be equally divided between my two daughters Jenny and Minnie or their legal representatives.

EIGHTH: I give and bequeath to the Jewish Orphan Asylum of Newark, New Jersey the sum of Two Hundred Dollars and to the German Hospital of Newark, New Jersey the sum of One Hundred Dollars.

NINTH: If at the time of my decease there should be any mortgage or incumbrance existing upon the above devised premises Number One Hundred and Nineteen Market Street and Four Hundred and Sixty-one Broad Street and Twenty two North Canal Street, I order the same to be paid and discharged by the executors out of the residue of my estate.

TENTH: If my residuary estate should be insufficient to pay off the mortgage and incumbrances mentioned in the last preceding clause of this will and the aforesaid legacies, then I order and direct my executors to collect and apply the net rents of Number One Hundred and Nineteen Market Street, Four Hundred and Fifty-One Broad Street and Twenty two North Canal Street (excepting the Six Hundred Dollars bequeathed to my said wife) to the payment

of said legacies, mortgages and incumbrances until the same are fully paid and satisfied.

ELEVENTH: All the rest residue and remainder of estate real and personal, whatsoever and wheresoever I give, devise and bequeath unto my daughters Jenny and Minnie and to their heirs forever share and share alike.

TWELFTH: In case the house and premises Number Twenty two North Canal Street heretofore devised to my Executors in trust for the children of my deceased daughter Bertha should not pay for itself or it should prove burdensome to my executors to collect the rents I hereby authorize my said executors to sell and dispose of the same and give a valid deed therefore and investing the proceeds in first mortgage upon real estate double the value of the investment and pay the same to the children of my deceased daughter Bertha as mentioned in clause number four above set forth.

LASTLY: I nominate and appoint my said wife Yette and my friend Joseph Goetz, residing at number Three Hundred and twenty seven Washington Street and Aaron Meyer residing at number Thirty nine Clinton Street in the said City of Newark, executors of this my last Will and Testament and for the purpose of effecting the division of my residuary estate, I authorize direct and empower my executors hereinbefore named and the survivors or survivor of them to sell and dispose of all of said residuary estate real and personal either at public or private sale, and to grant, convey, assign and transfer the same unto the purchaser or purchasers thereof,

In Witness Whereof I have hereunto set my hand and seal this thirty first day of August

in the year of our Lord One Thousand Eight Hundred and Ninety Three

Abraham Sickel (L. S.)

Signed, Sealed, Published and declared by Abraham Sickel the testator above named as and for his last will and testament in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Adolphus Kuhue 15 Summer Ave Newark N. J.

John J. Hubbell 25 East *Kiney* St Newark N. J.

DECISION.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, *Plaintiff,*		*Action*
vs.		*at Law.*
CITY OF NEWARK, *Defendant.*		*Decision.*

Riker & Riker, attorney for plaintiff.

Frederick H. Groel, attorney for defendant.

Action in ejectment. Heard by the Court without a jury on an agreed statement of facts.

SMITH, *J.:* These are actions of ejectment brought to recover possession of land from the City of Newark which was formerly used as part of the City Market.

The City's title was acquired by condemnation under an act authorizing the purchase and condemnation of land and the erection of buildings for markets, passed April 26, 1886, P. L. 1886, p. 268. 1 Comp. Stat. 866. The plaintiffs are the successors in title to those from whom the land was taken by condemnation. No deeds were delivered upon the payment of the award. The city demolished the market and has laid out a public street over the property taken by condemnation, and it is the contention of the plaintiffs that only an easement was taken under the condemnation proceedings, and therefore under the principle of abandonment of use of an easement, the title to the property condemned reverts to the successors in title of those from whom the

property was taken by condemnation. It is the contention of the defendant that the title acquired by the condemnation pursuant to the statute was a fee simple title and that there can be no reversion upon the change of use of the property.

The determination of the question is purely one of construction of the statute under which the condemnation was had. That the legislature may authorize the taking of a fee when condemning for public use, cannot be disputed. Therefore, as I have said, the question is one of construction of the statute.

While it may be true that the construction of statutes authorizing the taking of private property for public use should be strictly construed as against the taking power, this is merely a rule of construction where a doubt is presented as to how the statute should be construed. The particular statute in question contemplates the paying of the full value of the land, and the use for which it is taken is a use which pre-empts the entire use of the property as against the party from whom it is taken. The words of the statute contemplate, it seems to me, the taking of a fee.

The taking of private property for street use or for rights of way of various kinds, implies that in so far as the owner does not interfere with such rights taken, he may use the property. But certainly there could be no implication that where property was taken to erect a building on it for a market, there could be withheld any user by the person from whom the property was taken.

The reference in the statute that the property may be taken for the specific use designated, is

a limitation upon the power of the municipality to condemn. In other words, if the City attempted to condemn under the statute in question for the purpose of using the property for some other municipal use, it would be a good ground to defeat the proposed condemnation. But the City once having condemned a fee for one public use, it cannot be claimed that it should not be used for another public use.

The City having taken a fee to the property condemned, the plaintiffs have no interest therein, and there must therefore be a judgment in favor of the defendant.

My construction of the statute does away with the necessity for deciding the question of the abandonment of the use for the purposes for which the property was condemned. The City having taken proceedings to lay out a public street over this particular property, the plaintiffs would not be entitled to possession of the land as against the municipal proceedings to take the property for street purposes. If it is desirable that I find as a fact the question of whether or not the use for which the property was condemned was abandoned, I will find as a fact from the agreed statement of facts that the use of the property for market purposes has been abandoned; the fact that the City has already passed an ordinance laying out a street over the property in question would be an abandonment.

.....

Judge.

October 9, 1930.

JUDGMENT.

Filed November 19, 1930.

ESSEX COUNTY CIRCUIT COURT.

JENNIE BACHMAN, *Plaintiff,*	*Action at Law.*
vs.	*In Ejectment.*
THE CITY OF NEWARK, *Defendant.*	*Judgment.*

The summons in this cause having been returned duly served with a complaint attached and with the statutory notice to file an answer therein within the time required by law; and defendant having filed an answer within the time limited by law for that purpose; and the finding being a matter of law, title to the fee being in the defendant, and the facts as stated in the agreed state of facts upon which the cause was submitted; and judgment having been rendered in favor of the defendant;

IT IS, on this 19th day of November, 1930, on motion of Frederick H. Groel, attorney of defendant,

ORDERED, that judgment final be entered in favor of the defendant and against the plaintiff for possession of the lands described in said complaint; and,

IT IS FURTHER ORDERED, that defendant recover of plaintiff the costs of this suit to be taxed.

WILLIAM A. SMITH,
Judge.

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

New Jersey Court of Errors and Appeals

JOHN L. CARROLL and HERMAN BORNEMANN, JR., Executors and Trustees of the Last Will and Testament of Christian R. Wolters, Sr., and MARY ELIZABETH CARROLL, IRENE QUACKENBOS, and CELIA A. WOLTERS, heirs at law of Christian R. Wolters, Sr., deceased, *Plaintiffs-Appellants,* *vs.* THE CITY OF NEWARK, *Defendant-Respondent.*	*Action at Law.* *In Ejectment.* *On Appeal from Essex County Circuit Court.*
JENNIE BACHMAN, MINNIE DREYFUS, HARRY SPANGENTHAL, JESSIE SPANGENTHAL ROTH, and ISAAC SPANGENTHAL, *Plaintiffs-Appellants,* *vs.* THE CITY OF NEWARK, *Defendant-Respondent.*	*Action at Law.* *In Ejectment.* *On Appeal from Essex County Circuit Court.*

BRIEF FOR THE DEFENDANT, THE CITY OF NEWARK.

Statement.

Because both of these cases involve lands that were condemned under the same statute, at approximately the same time, and involve the same questions of law, for the benefit of Court and

counsel, the City has combined its briefs in these cases.

Facts.

The facts in the Statement of the Right of Controversy set forth the situation sufficiently, so that the City will not burden the Court with any repetition of the same.

Question in Controversy.

The only question involved in these cases is what interest the City acquired by virtue of the condemnation proceedings instituted in 1888, pursuant to the provisions of an Act entitled:

> "An Act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in the cities of this state and other places in which market facilities are or may be required for public use, and to provide therefor," passed April 26, 1886, General Public Laws, 1886, page 268.

The plaintiffs contend that the City acquired either an easement or a base fee. The City denies that it obtained either of these and insists that what was obtained under said condemnation was an absolute fee simple. If the Court does not agree with the City in this contention, then the City insists that it can still devote the lands in question to its present use, even though it may only possess a qualified estate.

I. By virtue of the condemnation proceedings of 1888, the City of Newark acquired an estate in fee simple absolute, the title to which is not subject to any right of reversion, nor to being divested.

1.

The Legislature may authorize the condemnation of lands by Municipalities and determine the estate or interest that shall be taken.

Such interest may be a fee simple absolute, or any lesser estate. In Lewis' Eminent Domain, Vol. 2 (3rd Ed.), Section 448, the learned author said:

> "In the absence of any constitutional restraint, it rests with the legislature to say what interest or estate in lands shall be taken for public use. The whole matter thus being in the discretion of the legislature, it may authorize a fee to be taken and necessarily may authorize any lesser estate or interest to be taken, according to its views of the requirements of the grantee and the demands of the public good. * * * The estate which may be taken is not controlled by the use, but a fee may be taken, though the use is not to be permanent."

And Justice Depue of our own Court of Errors and Appeals outlined the jurisdiction of the Legislature in the case of *United States Pipe Line Co.* v. *D., L. & W. R. R. Co.*, 62 N. J. Law, page 266, in the following manner:

> "It is within the power of the legislature, in authorizing land to be condemned for a public use which may be permanent, to determine what estate therein shall be taken and to authorize the taking of a fee or any less estate in its discretion. Where a statute authorizes the taking of a fee it cannot be held invalid or that an easement only was acquired thereunder, on the ground

> that an easement only was required to accomplish the purpose the legislature had in view. That is a legislative and not a judicial question."

And *Justice Dixon, in McEwan* v. *Pennsylvania Railroad Co.,* 72 N. J. Law 419, on page 420, concurred in this when he said:

> "The claim thus made by the prosecutor renders the reference in the statute to rights and easements practically meaningless, for it has never been questioned that under the power to condemn land all outstanding interests in the land could be taken."

2.

It is not necessary that the statute expressly specify that a fee simple interest shall be taken in order that such interest shall be acquired. Technical words are not necessary. Any language which sufficiently implies that the whole interest shall be taken will authorize the taking of a fee simple.

McQuillan, in his work of Municipal Corporations, Volume 4, Section 1520, page 3168, says:

> "No precise words in a statute are necessary to authorize the condemnation of a fee, and it is not necessary that the authority to take a fee be given in express terms."

In *Driscoll* v. *City of New Haven,* 52 Atl. 618, in commenting upon a case somewhat similar to our own, Justice Prentise delivered the following opinion:

> "The plaintiff contends that the City owns nothing which can be the subject of a sale to a private individual. The rights of the city having been acquired solely by condemnation for a public park, it is said that it has only an easement in the land, to use it for park purposes, and therefore

> nothing which can pass by conveyance. This suggestion is one which might be thought to more directly concern the proposed purchaser for consideration than the plaintiff taxpayer, but we have no hesitation in saying that it is not well made. It is well settled that the state has the power to determine the estate or quantity of interest which shall be taken by condemnation proceedings, and may authorize the taking of a fee, as well as an easement only. Heyward *v.* Mayor, etc., 7 N. Y. 214; Commissioners *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Dingley *v.* City of Boston, 100 Mass. 544; Waterworks Co. *v.* Burkhart, 41 Ind. 364; Railroad Co. *v.* Davis, 2 Dev. & B. 451. *It is not necessary that the authority to take a fee be given in express terms, or that exact or technical language should be used in the enabling act, in order that the fee or the whole title of the owner pass by the condemnation proceedings.*"

In the case of *New York Railroad Co.* v. *Trimmer*, 53 N. J. Law, page 1, on page 2, in discussing the rights of a railroad company in lands acquired by condemnation under the General Railroad Act, which did not provide any express language for the acquisition of a fee, but merely said that upon payment or tender of the amount awarded,

> "the company is empowered to enter upon and take possession of the said lands and materials for the purposes aforesaid,"

and that said payment or tender shall be considered

> "plenary evidence of the right of any company incorporated under this act to have, hold, use, occupy, possess and enjoy the said lands or materials."

Chief Justice Beasley said:

> "There seems to be no reason why this language as it stands in the statute is to

> be interpreted differently from what it would if it were found in a deed from a land owner to the company and in this latter event it is not probable that a doubt would arise in the mind of anyone as to the company's right to immediately enter upon the lands thus condemned and to hold them in exclusive possession for the use of its road."

In *Dingley* v. *City of Boston,* 100 Mass. 544, it was held that under a statute which permitted the City to "purchase or otherwise take" lands, a fee simple interest was acquired, and to the same effect is the case of *Page* v. *O'Toole,* 144 Mass. 303, where the statute provided that title to all lands so taken shall vest in said city or town, and Judge Holmes held that the town acquired a fee simple title. Perhaps the best statement of the law on this particular point will be found in the case of *City of Newton* v. *Perry,* 163 Mass. 319, 39 Northeastern 1032, where Justice Holmes, then acting as Judge of the Supreme Court of Massachusetts, in his customary clear and succinct manner, stated the principles covering the question in the following manner:

> "There are no sacramental words which must be used in a statutory power to take and hold lands in order to give a right to take the lands in fee. Any language in the statute which makes its meaning clear is sufficient, and a very little more than 'take and hold' has been held enough."

3.

Where the statute authorizes the taking of the fee, it cannot be held invalid or that an easement only was acquired to accomplish the purpose the Legislature had in view.

This statement must be quite obvious from the cases that have already been cited, and in fact appears in the actual statement of the law in this State in *United States Pipe Line Co.* v. *D., L. & W. R. R. Co.,* 62 Law, page 266, cited on page 1 of the brief. The same language is found in the case of *Sweet* v. *Buffalo,* 79 N. Y. 300, where the Court said:

> "When the statute authorized the taking of a fee it cannot be held invalid, or that an easement only was acquired by proceedings thereunder, on the ground that in the judgment of the court the taking of an easement only would accomplish the public purpose which the Legislature had in view."

4.

The character of the use and occupation by the municipality condemning the land is an important consideration in determining the quantum of the estate acquired by condemnation. Where the use by the municipality is necessarily exclusive and inconsistent with a remaining private ownership, the municipality acquires an estate in fee simple.

In *Driscoll* v. *City of New Haven,* 52 Atl. 618, the defendant municipality was authorized by its charter to take by the right of eminent domain, any property rights which might be needed for park purposes. Discussing the factors which determine the nature of the interest acquired by condemnation, the Court said on page 620:

> "In the absence of express and precise provisions, the intention of the act and the

> construction to be put upon its terms may be gathered from its general scope and tenor, and the nature of the public use for which the condemnation is authorized. If the legislative intention to vest the fee is thus made clear, and this intention is consistent with the language employed, effect will be given to the intention. *This is especially true where a remaining private ownership is inconsistent with the use for which the land is taken, and where the purposes of the condemnation will not be satisfied by the taking of a lesser estate or easement.*"

The Court then found that the uses for which a public park was required were inconsistent with private ownership and concluded that a fee title interest was obtained.

The same principle is stated by McQuillan, Sec. 1525, in his treatise on Municipal Corporations, in the following language:

> "Where a municipality condemns land for park purposes, the necessities of the case require that it take a fee."

5.

The expression of a purpose for which the land is taken, does not limit the nature or the extent of the estate acquired.

It is the law of New Jersey that where land is condemned without qualification, the fee itself carrying with it all appurtenances goes to the party acquiring title under the proceedings for that purpose as in *Philadelphia Trust &c.* v. *Merchantville*, 74 Eq. 330.

Now we must inquire as to the effect of a provision in the statute that land may be condemned "for a certain purpose." Is the estate which may be acquired limited by this language?

The law on this point is definitely settled that these words fail to limit the nature or the extent of the estate acquired or to create any right of reverter in the former owner.

This principle was applied to constructions of such clauses in deeds. In *Rawson* v. *Uxbridge*, 7 Allen, 125, Bigelow, *C. J.*, said:

> "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended, the granted premises shall be used, where such purpose will not inure especially to the benefit of the grantor and his assigns, but is in its nature general and public and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

And in *Board of Commissioners of Mahoning County* v. *Young*, 59 Fed. 96. Judge Lurton said, on page 105:

> "The minuteness of direction concerning the administration of property conveyed to a public use is insufficient to take the case out of the rule, supported by an overwhelming weight of authority, that the mere expression of a purpose or particular use to which the property is to be appropriated will not make the estate a conditional one."

Today it finds application to titles acquired under condemnation proceedings as well.

In *Currie* v. *New York Transit Co. and National Docks R. R. Co.*, the Court commented as follows:

> "Where land is held by a railroad company under a deed containing the words of this statute, it can hardly be doubted that the conveyance, having been made in consideration of *the payment of the full value*

> *of the land, operates to strip, the grantor of all present estate, right, title and interest in the land, and to vest the same in the company* so long at least as its corporate title continues to exist and so long as it continues to devote the land to the uses which its charter prescribed, 'and there seems no reason (to quote the language of Chief Justice Beasley in New York, Susquehanna and Western Railroad Co. *v.* Trimmer, *supra*) why this language, as it stands in this statute, is to be interpreted differently from what it would if it were found in a deed from the landowner to the company.'
>
> "It is contended that, because the right of the company to enter and take possession of the land, after payment of the award, is given by the statute 'for the purposes aforesaid,' the landowner still retains such an interest in the land as will enable him to restrain an unauthorized use of it by the company. *But the words quoted do not operate to restrict the quantity of the interest which passes to the company by virtue of the condemnation proceedings or to reserve to the landowner any rights in the land taken.*"

In *Binder* v. *County Board of Education*, 55 W. 2d, 903, the County Board of Education, pursuant to the provisions of the condemnation statute, obtained a commissioner's deed which purported to convey the land to the plaintiff "for school purposes." The Court held that it was the intention of the Legislature that the School Board should acquire a fee simple title and that the insertion of the words "for school purposes" did not limit the nature of the estate taken or create any right of reverter in the former owner.

And in *T. W. Phillips Gas & Oil Co.* v. *Lingenfelter*, 105 Atl. 888, it was held that where a school district acquired property by deed which contained the provision "for school purposes only," such words were purely superfluous and

did not have the effect of limiting the estate acquired by the deed.

In *Pifer* v. *Board of Education*, 159 N. E. 99, *supra*, the Court said:

> "the fact that the application for the appropriation stated the reason for appropriating the property, to wit, for playgrounds and all other uses for public school purposes, did not thereby limit the estate acquired by the board to that purpose."

6.

Applying these principles to the present case, it is apparent that the City of Newark acquired an estate in fee simple absolute in the lands constituting the subject matter of this suit.

(a) *The language of the statute implies an absolute fee.*

Chief Justice Gummere said in the Curry case, 66 Eq. 516:

> "The quantity of interest which a * * * corporation obtains in land taken by it under the power of eminent domain is that which the statute conferring the power authorizes it to acquire."

This being so, it is necessary for us to consider the exact language used in the present statute to determine what interest is acquired by the City.

P. L. 1886, authorized the purchase and condemnation of land *and the erection of buildings* for market purposes. Upon examination of the terminology of this statute it is submitted the Legislature intended to authorize the acquisition of a fee interest. Section 1 provided for the appointment of commissioners to "*purchase* the land desired." Section 2 provided that in case

the price demanded by the owner was *"more than a fair equivalent,"* the municipal council might order the condemnation thereof. Section 4 provided for the appointment of commissioners to make an appraisement of the *"value of the lands."* Section 5 provided that these commissioners should proceed to "estimate and determine the *fair value of the lands* and *real estate so to be taken;"* and immediately upon the payment to said owner of the amount of said *"said valuation,"* the *"title to and the right of possession* of said property" should immediately become vested in such city. Section 6 provided that *"all titles"* should be in the name of the city in which the lands were purchased. Such terms as "purchase," 'fair value of land," "valuation," "title to and right of possession," do not contemplate a mere easement or other minor interest in land. Obviously these terms mean the whole interest in land or what is technically known as a fee simple title.

This statute contemplated the erection of buildings and as a matter of fact on some of the property buildings were erected at one time. Certainly a statute authorizing the acquisition of title to lands for the erection of buildings would mean an absolute fee title.

Counsel for the plaintiffs in their brief make the flat statement that the law is well settled that the word "title" in the statute under construction does not indicate that the legislative intent was to give the condemnor a fee interest. In support of this point they cite the case of *Campfield* v. *Johnson,* 21 L. 83, but the case is no authority at all for their proposition. To begin with the case was one involving the law of common law pleading and the interpretation of the word "title" was of very secondary consequence.

What the Court was interpreting was a statute which conferred jurisdiction upon a justice's court. The statute declared that the jurisdiction of the justice shall not extend "to any action wherein the title to any lands, tenements, hereditaments or other real estate shall or may in anywise come in question." Naturally, the Court in interpreting this statute would be compelled to interpret it in such a manner as to exclude from the jurisdiction of the justice's court any sections which were in the nature of actions in ejectment. The action of ejectment, which is an action brought for the purpose of determining the title to real property, was one that has always been strictly confined to the courts of law. Even today in our own practice equity will never assume jurisdiction in matters of this kind. Likewise, the Court interpreting a statute conferring jurisdiction upon a small cause court such as a justice's court would not interpret it in such a manner as to confer upon such court the right to determine the matters that were properly the subject for an action in ejectment.

In "Words and Phrases Judicially Determined," Vol. 8, p. 6980, under the heading "Title to Property," and the subheading "Estate in Fee" we find the following:

> "The word 'title' when used in reference to title to real estate implies an estate in fee. Nothing short thereof is a complete title." *Gillespie* v. *Broas* (N. Y.), 23 Barb. 370, 381.

In the case of *U. S.* v. *Hunter,* 21 Fed. 615, 617, the Court pointed out a very interesting distinction in a Federal statute which is apropos of our own situation. On page 617 we find the following:

> * * * "the title or purchase of any lands." Does this include a mere lease for

> grazing purposes? I think not. "A leasehold interest may be considered, for some purposes, a title, and sometimes the word 'title' is used in a general sense so as to include any title or interest, and thus a mere leasehold interest; but here it is the title, and this, in common acceptance, means the full and absolute title; for when we speak of a man as having title to certain lands, the ordinary understanding is that he is the owner of the fee and not that he is a mere lessee * * *."

In the case at bar the statute does not use the expression *a* "title" but *the* "title" which, would seem to indicate that the Legislature intended to confer upon the city power to acquire an absolute interest.

b. *The decisions in New Jersey in a case like the one at bar, sustain the finding of an absolute fee.*

Counsel for plaintiff states that the decisions of the courts of this state are uniform in holding that unless an absolute fee simple title is expressly granted in the statute or condition, the utmost the condemning corporation can obtain is a conditional base or terminable fee. It is submitted that such is not the uniform holding in this state; that there are decisions to the contrary. The Curry case, 66 Eq. 313, contains statements which do not bear out plaintiff's contention. Such language as the following is indicative of this:

> "Where land is held by a railroad company under a deed containing the words of this statute, it can hardly be doubted that the conveyance, having been made in consideration of the payment of the full value of the land, *operates to strip the grantor of all present estate, right, title and interest in the land, and to vest the same in the company.* * * *

> It is contended that because the right of the company to enter and take possession of the land after payment of the award is given by the statute 'for the purposes aforesaid' the landowner still retains such an interest in the land as will enable him to restrain an unauthorized use of it by the company. But the words quoted do not operate to restrict the quantity of the interest which passes to the company by virtue of the condemnation proceeding, or to reserve to the landowner any rights in the lands taken. * * *
>
> Nor does the fact that, while in possession and so using the land, the company subjects it to an additional and unauthorized use operate to divest it, to any extent, of the estate which it has acquired therein. McKelway *v.* Seymour, 5 Dutch. 321."

What can the Court mean by such expressions as "strip the grantor of all present estate, right, title and interest in the land"? The subjecting of the property to additional and unauthorized use does not "operate to divest it to any extent of the estate which it has acquired therein." The concluding paragraph of the case on page 319 which says:

> "It may be that the state, acting through the attorney-general, may restrain the unauthorized use by a railroad company of lands acquired by it under its charter powers. This, however, is a question not involved in the case and therefore one not now requiring consideration,"

does not indicate at all that the estate which the railroad company has acquired is less than an absolute fee but that the usual limitation is placed upon the ultra vires act of this corporation the same as upon the acts of any other corporation. The title is not affected thereby but the corporation's conduct is subject to censure by the attorney-general's office.

There is one phrase, however, in this case which appears in other cases in this state that is of very great importance and should not be considered lightly. Perhaps that is the reason that it has been repeated in the decisions of this state on different occasions. Chief Justice Gummere said on page 318:

> "* * * and there seems no reason (to quote the language of Chief Justice Beasley in New York, &c. *v.* Trimmer, *supra*) why this language as it stands in this statute is to be interpreted differently from what it would if it were found in a deed from the landowner to the company."

There are any number of decisions in New Jersey upon the interpretation of deeds containing phrases similar to those contained in the condemnation statutes. A case in this state which comes as close to the case at bar as any which counsel for the City has been able to find is *Bd. of Education* v. *Brophy,* 106 Atl. 32. There a bill was filed in the Court of Chancery to quiet title to certain lands which had been conveyed to a school district by a deed containing the following condition:

> "Which said premises are hereby conveyed to and for the purpose of having erected thereon a district schoolhouse" and (immediately following the conclusion of the covenant of warranty) "to and for the use of having erected thereon and maintained for the use of said district a schoolhouse and for playground for the scholars of said district and for no other purpose whatsoever."

The premises had ceased to be used for school purposes for about six years and in determining whether the words in the deed were to be regarded as a condition subsequent or not Vice-Chancellor Lewis said:

> "Conditions subsequent are always construed strictly and will never work a for-

feiture unless they are clearly expressed in unequivocal terms or necessarily implied." *Southwick* v. *N. Y. Christian Miss. Society*, 151 App. Div. 116, 135 N. Y. Supp. 392.

"It is not less the dictate of reason and justice than of sound law that courts should require the violation of a condition which involves a forfeiture to be clearly established. Conditions when they tend to defeat estates are stricti juris and to be construed strictly." 1 Shep. Touch. 133, §8, Roll. Rep. 70.

"Conditions subsequent especially when relied upon to work a forfeiture, must be created by express terms of clear implication, and are strictly construed. Wash. on Real Prop. 447; 4 Kent's Com. 430; Southard *v.* Central R. R. Co., 2 Dutch. 13, 20. If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction. 4 Kent's Com. 132. And words in a deed, not in form either a covenant or a condition, will be construed as a covenant rather than a condition." *Woodruff* v. *Woodruff*, 44 N. J. Eq. 353, 16 Atl. 6, 1 L. R. A. 380.

After considering all of the facts in the case the conclusion reached by the Court was as follows:

"I am inclined to the view that the original grant to the school district *is a grant in fee simple without condition or limitation; the grantor merely expressing the purpose which it was his desire or wish that the property should be used for.*

"If the issue were before me, I would be inclined to hold that the *grantee took an unconditional fee,* and that the school district could *dispose* of the land and buildings as it saw fit * * *."

So that if we are to construe the language used by the Court in these statutes in the same way as if it were found in a deed from the landowner to

the company our construction, as is evident from this case, would lead us to the conclusion that an absolute fee was obtained.

c. *The nature of the use and occupation of the property determines the intent of the Legislature.*

In determining the intent of the Legislature in statutes of this nature, the distinction has frequently been made upon the basis of the character of the use and occupation to be made of the property by the condemning corporations.

Where lands were taken for an almshouse it was held in New York, in *Heywood* v. *Mayor,* 7 N. Y. 314, that the City acquired a fee, and that the lands could be sold for private use when the almshouse was removed. A similar result was reached in the Park Commissioner's case, 45 N. Y. 234, where the Court allowed the sale of park lands which were no longer needed for the purpose for which they were condemned. In *Hellen* v. *City of Medford,* 73 N. E. 1020, it was held that the fee simple was taken "leaving not even the possibility of reverter in the former owner," the Court justified its conclusion by saying:

> "The idea seems to be that in some cases the public purpose cannot be fully accomplished without appropriating the complete title,"

and so it has been held where lands were condemned for park purposes, that the City acquired a fee simple title. Such a title must necessarily be acquired because "use and occupation" by the City would be "inconsistent with every other form of legal title."

The physical entry and appropriation of the land, the use to which the same is put, the erection perhaps of public buildings thereon, cannot be accomplished by the City in the fullest sense of the word unless the land were condemned in fee simple. Its use and occupation would have been inconsistent with any other form of legal title.

Counsel for Jennie Bachman in his brief, page 16, argues that for the Legislature to authorize the taking of a greater estate than was necessary for the purposes to be achieved, would be unconstitutional, in spite of the language in the case of *Currie* v. *N. Y. Transit Co., supra,* that—

> "The Legislature may authorize the taking of a fee or any less estate in its discretion."

For the sake of argument, let us admit for the moment that such is the law and apply the principle to the case at bar. The statute contemplates the "condemnation of land and the erection of buildings." (I quote from the title of the act itself.) Is it reasonable to say that where a city is condemning lands for the erection of permanent market buildings that may stand for centuries that it would be unconstitutional for the City to acquire by condemnation the absolute fee to the land? This is not the case of a State Highway Commission condemning lands for a road that may be changed in a few years. It is the acquisition of lands for a permanent substantial and lasting municipal improvement. As Judge Smith, in his opinion in this case said:

> "The taking of private property for street use or for rights of way of various kinds, implies that in so far as the owner does not interfere with such rights taken, he may use the property. But certainly there could be no implication that where property was taken to erect a building on it for a market, there

could be withheld any user by the person from whom the property was taken.

"The reference in the statute that the property may be taken for the specific use designated, is a limitation upon the power of the municipality to condemn. In other words, if the city attempted to condemn under the statute in question for the purpose of using the property for some other municipal use, it would be a good ground to defeat the proposed condemnation. But the city once having condemned a fee for one public use, it cannot be claimed that it should not be used for another public use.

"The city having taken a fee to the property condemned, the plaintiffs have no interest therein, and there must therefore be a judgment in favor of the defendant."

It is not necessary that the statute expressly use the language "fee simple absolute" in order that such a power be conferred upon the City for condemnation purposes if the use to which the premises are to be put requires such a title. For, as the Court said in *Keatley* v. *Sommers Co. Ct.*, 73 S. E. 706:

> "It must be admitted that the county court is a municipal corporation created solely for governmental purposes and is invested with only such power and authority as is conferred upon it by statute. But authority may be conferred as well by intendment as by express language. If a statute expressly confers power to do a certain thing, and omits to mention authority to do other things which are necessary to the proper and complete exercise of the power expressly given such additional power as may be necessary and reasonable for the accomplishment of the purpose expressed is clearly to be implied. This is a familiar rule of construction."

Ample authority has already been submitted in paragraph 5 to negative the possible conten-

tion that the use of the words "for market purposes" in the statute under which the land was condemned have the effect of limiting the nature or extent of the estate acquired.

Therefore, since the Legislature authorized the condemnation of an estate in fee simple, since the taking of a fee simple estate was essential to the full accomplishment of the public purposes for which the land was condemned and since the use of the words "for market purposes" did not limit the estate taken the City of Newark acquired an estate in fee simple in the lands forming the subject matter of this suit.

7.

Where a fee simple absolute title is acquired by condemnation, the City may devote the land to any purposes free from the intervention of any power of reversion.

Lewis, on "Eminent Domain" comments on this topic, sec. 861, page 1488, as follows:

> "But where a fee simple is taken, the weight of authority is that there is no reversion, but, when the particular use ceases, the property may be disposed of for either public or private use."

And McQuillan, in his work on Municipal Corporations, says, in section 1524:

> "In the absence of a statute to the contrary, if the municipality acquired by condemnation proceedings a fee simple absolute, the property does not revert to the owner in case the use thereof for public purposes is discontinued."

And Dillon, in his work on Municipal Corporations, says, in section 590:

> "Where the state has taken a fee simple or authorized the taking thereof and com-

pensated the owner therefor, the subsequent abandonment of the use will not reinvest the owner with the title."

This principle is so elementary that further authority seems unnecessary. However, the following cases are helpful:

Heywood v. *Mayor,* 7 N. Y. 314;
Brooklyn Park Comm. v. *Armstrong,* 45 N. Y. 234;
In re Waterfront, 190 N. Y. 350, N. E. 299;
Strock v. *East Orange,* 80 N. J. L. 619,

where the Court said:

"But when the land has been acquired for public use, as for a park, by condemnation and payment to the owner of its full value, or by sale or purchase, it seems to be competent for the legislature to authorize a municipality so requiring it to use it for other purposes."

II. If the Court is of the opinion that the City did not acquire an absolute fee simple, the City can still devote the land to its present use even though it may only possess a qualified fee.

1.

The plaintiffs allege in their briefs that upon abandonment of the purpose for which the lands were authorized to be taken, they revert to the original owner. In other words, they insist that there was an abandonment, and that only upon abandonment would the lands revert to the original owner.

Although the plaintiffs say that the City abandoned its use of said premises as a market place, the Stipulation of Facts nowhere contains any statement that the City abandoned the premises,

and the City specifically denies that there was any abandonment. It is true that the Stipulation in paragraph 7 says that the City opened a new market place of the same character as the market conducted on these premises, and that the old market has not been used since February, 1925, and that the Lefcourt Building has been erected on the property adjoining, but even this does not constitute an abandonment. There is nothing to prevent the City from using the premises at some subsequent date for market purposes, should it so desire, and even if the City ceased to use the premises for market purposes for twenty (20) years, that in itself does not constitute an abandonment. As the Court said in the *Raritan Power Co.* v. *Vighto*, 21 Equity 463, on page 480:

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

The case of *Board of Education* v. *Brophy,* 106 Atl. p. 32, which has been discussed in a previous part of the brief, illustrates how slow the courts are to find an abandonment in a case like the one at bar. The case was decided in 1919, the evidence showed that at the end of the school year 1913, the Board of Education ordered a carpenter to close up and fasten the windows and doors of the schoolhouse; that since that date the building had remained in the same condition, with the exception of deterioration caused by time and weather. No money had been expended for repairing, painting or cleaning. Be-

sides, that the Board had erected a new and commodious school house about 1,500 yards from the *locus in quo* and children who were wont to attend the old school before it was closed in 1913 had since been attending the new school. The new school was ample in size for all the children living in that part of the borough and likely to remain so for a considerable period of time. Even some of the desks of the old school had been removed to another school. On the strength of this evidence defendant contended—"There was in fact and in law an abandonment of the schoolhouse for the use of a school; that such abandonment operated as a reverter of title to the defendant; that the complainant never acquired title to the premises."

However, Vice-Chancellor Lewis, after considering all the evidence, said:

> "Circumstances might arise at any time which would induce the present board of education to utilize the building and grounds actively for school purposes; or a succeeding board, with different policies, and perhaps under changed conditions, might put it in active operation.
>
> I am therefore of the opinion that so far as the present suit is concerned the defendants have failed to show that there has been a forfeiture through non-user, even though I should hold the estate of the school district to be subject to a condition subsequent, which I am not called upon now to decide, and to that extent complainant's title should be quieted."

Certainly the evidence in the above case in favor of the argument of abandonment was as strong as any evidence that could be collected by the plaintiff in the case at bar, yet Vice-Chancellor Lewis was not of the opinion that an abandonment had occurred.

2.

If the Court were to hold that the property was condemned solely for market purposes, the use to which the lands are now put is not such a change as to establish a reversion in the plaintiff.

Counsels for the plaintiff have cited the case of *State* v. *Laverack,* 34 N. J. Law 201. At first blush it would seem to indicate on reading of that case, that land acquired for one purpose cannot be devoted to any other use, except the extremely narrow one for which it was condemned. An examination of the case does not disclose that to be the real holding. The case arose upon an appeal from a conviction for an assault and battery, which occurred as the result of the sale of farm produce from a farm wagon placed close to the curb in a street in front of the defendant's property. The City ordinances permitted the use of the street as a public market for the sale of country produce. The City in this case had merely an easement in the street, and under these circumstances the Court thought that the appropriation by the City of the land of the defendant to the purpose of a market was an additional burden upon the landowner because the market was an obstruction to the highway. In reaching this conclusion the Court discussed very thoroughly the principle of compensation for additional burdens, but did not deny that land acquired by the public for one purpose could not be devoted to other and additional uses, provided there was no additional burden placed upon the adjoining property. This principle was applied in the case of *Hitchman* v. *Paterson Horse Railroad Co.,* 2 C. E. Green 76, where the Court decided that the establishment of a horse railway in the high-

way was not an additional burden upon the adjoining landowners of the highway, but a legitimate use of the same. Although that use of the highway for horse cars was somewhat different from that produced by the ordinary vehicles, the rights of the landowner were not affected, and it did not interfere with the use of his property any more than the ordinary use of the highway. Comparing the horse car case with the Laverack case, the Court said where an additional easement is created, such as the holding of a market in the street, then the adjoining landowner is entitled to compensation, but if no additional easement is created, no greater burden is placed upon the adjoining landowner, and the use of the premises is merely, "a new mode of its legitimate and ordinary use," then such use would be a perfectly proper one. In the words of *Carter* v. *Wright,* 3 Dutcher 76,

> "the judicial validation of the change of the public highway into a turnpike cannot operate in favor of the prosecution in the present case, inasmuch as it is expressly placed on the principle that such a change imposed no new burden on the landowner, and that nothing was therefore taken from him."

In applying this principle to market cases, Chief Justice Beasley in *State* v. *Laverack* on page 205, said:

> "Land taken and applied for the ordinary purposes of a street would often be an improvement of the chosen property; an appropriation of it to the uses of a market would perhaps as often be destructive to one-half of the value of such property. *Compensation for land, therefore, to be used as a highway, might, and many times would be totally inadequate compensation, if such*

land is to be used as a public market place."

In other words, the Court was of the opinion that if an easement is acquired by the City for the holding of a public market, that the compensation paid for it would be substantially greater than that paid for street purposes, so that if the City in the case at bar acquired by condemnation only an easement for market purposes, in restricting the use of the land now to street purposes no greater burden is placed upon the landowner, but on the contrary benefits are conferred upon him.

There is one point, however, that must not be overlooked in this entire discussion. The case of *State* v. *Laverack* is based upon the theory that the municipality acquired the lowest form of an estate in land that could be acquired for these purposes, namely, an easement, and the only reason that objection can be raised under the principles of that case to the change of use of the property, is because the adjoining landowner is harmed by the placing of an additional burden upon his premises.

The case of *State* v. *Laverack* is one where the landowner owns to the center of the street. His adjoining property, in which he has an absolute fee simple interest, is harmed thereby. In the case at bar we have no adjoining landowners. The City when it acquired the property took everything. There was no dominant and servient relationship of estates. There can be no easement in the case at bar. When counsel for the plaintiff-appellant John L. Carroll *et als.* contends in his brief that the City of Newark took an easement in the property acquired under the condemnation proceedings, he appears to be un-

familiar with the true nature of an easement, and of what it consists, because in the instant case it is legally impossible for an easement to have arisen. Bouvier, in his law dictionary, on page 967, under the title "Easement" defines it as follows:

> "A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner, 2 Washb. R. P. 25; *Clark* v. *Glidden*, 60 Vt. 702, 15 Atl. 358.
>
> A privilege which the owner of one adjacent tenement hath of another, existing in respect of their several tenancies, by which that owner against whose tenements the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists.
>
> Although the terms are sometimes used as if convertible, properly speaking easement refers to the right enjoyed by one and servitude the burden imposed upon the other."

All that the plaintiff's ancestors possessed has been acquired by the City and under these circumstances there can be no easement. Chief Justice Beasley recognized this fact many years ago in the case of condemnation by the *New York Railroad Company* v. *Trimmer*, 53 N. J. L. 2, when he said:

> "There can be no doubt that the rule that ejectment is not the appropriate remedy when the enjoyment of an easement is the subject of suit, has been often stated, and is in no wise questionable. *But the interest in the lands now in question is not an easement. In cases of easements there must be not only a servient tenement but also a dominant one, and which latter constituent is entirely lacking in the present instance. A right of way, to constitute an easement, must be beneficial*

to other land not owned by the proprietor of the premises burthened."

Therefore, even if by any stretch of the imagination it could be argued that an additional burden was placed upon the land acquired, there being no adjoining property owners involved there can be no injury.

The principle as fully developed by the Chief Justice in *State* v. *Laverack* was adopted by Attorney-General Thomas F. McCran in an opinion submitted by him, pursuant to a resolution adopted by the New Jersey State Senate January 24, 1921, in reference to the abandonment of the Morris Canal and Appointment of Commissioners. One of the questions submitted to him by the Senate was as follows:

> "Q 5. The title to about three-fifths of the land owned by the Morris Canal and Banking Company is said to have been acquired either by reversionary deeds containing clauses that the deeds were given for canal purposes or for use as a canal, or were acquired by condemnation for use as a canal. If the State should acquire the lands in 1924, pursuant to the provisions of the original charter and abandon the canal for canal purposes but utilize it for some other noble purposes, such as the operation of an electric line, would the owners of the reversion in the lands; that is to say, the heirs of the original owners, have any rights in the lands? If so, could the Legislature provide for the cutting off of such rights by condemnation?"

His answer to this question was as follows:

> "A 5. The statute authorized the Canal Company to acquire the necessary property for the carrying on of the business. The company acquired where the grant was without limitation what amounted to a fee for the time limited in the statute so long

as used for such purpose. It is impossible to define the respective rights of the parties should the canal property be abandoned for public purposes when the property shall be taken over by the State unless an examination shall be made of the deeds of conveyance. Most of the conveyances where there was no conveyance in fee would, probably, be construed to contain clauses indicating a condition subsequent vesting in the grantee and the State taking under it. The words 'creating such condition' when indicated within the limitations of a proper construction, are such phrases as 'on condition,' 'providing,' 'so that,' 'so as,' or 'if it happen,' 'as long as.' If the deeds do not indicate the intention to limit the Canal Company by a condition, but use words importing another intention and the State should abandon the canal for canal purposes, it would not, in my opinion, operate to cause the property to revert to the original owners or their heirs, nor would this occur if, as suggested in the question, the property is to be utilized as a public highway, such as an electric line, even if such a condition has been expressed by the original grantors.

Section 25 of the act provides that the canal when completed shall forever thereafter be esteemed a public highway, free for the transportation of any goods, commodities or produce whatsoever. A case somewhat similar was that of the LANCASTER LATERAL CANAL COMPANY IN OHIO, incorporated in 1826, which was ultimately taken over by the State and the property leased to a railroad company. This action was upheld by the highest courts of that State and the Supreme Court of the United States, and it was there held that the property was taken by a title for the uses and purposes of the canal, but that the State by leasing the land for purposes of a railroad did not extinguish the original easement, but that the railroad took the property subject to the duty of making compensation to the owner of the free-

hold where there had been limited conveyances for the purpose to the extent of the value of the additional burden imposed upon the land and such damages as might result from the new use.

My answer is, therefore, that notwithstanding a condition subsequent may be found to exist in some of the deeds of conveyance to the Canal Company, though under the rule the land may revert to the reversioner, nevertheless, if the land is continued for the use of a public highway for the transportation of goods, etc., then the rights of the reversioner consist only in receiving compensation for the additional burden placed upon the land by the change of its use and such damage as might also result therefrom, if any."

The same ruling was adopted in the State of Massachusetts upon the change of use of canal property in that State. *Chase* v. *Sutton Mfg. Co.*, 58 Mass., on page 168.

To like effect is the case of *Strock* v. *East Orange*, 77 Atl. Rep. 1031. The defendant municipality was authorized by the Playground Act, as amended in 1908, to acquire a playground by rental, purchase or condemnation. By a supplement to that act passed in 1908, the municipalities were permitted to use these grounds in a limited manner for exhibition and games. Discussing the legality of the municipality using the land for other than playground purposes, the Court said on page 624:

"But when land has been acquired for public use, as for a park, by condemnation and payment to the owner of its full value or by sale or purchase, it seems to be competent for the legislature to authorize the municipality so requiring it to use it for other purposes."

The entire situation is very clearly summed up by Nichols, in his book on The Law of Eminent Domain, where he says, in paragraph 203, page 618:

> "It sometimes becomes expedient to abandon the original use and to substitute a different one. The owner of the fee, who has received compensation for a perpetual easement in the land, is in no position to require that the public use continue precisely the same, or that it be operated by the same public agent. If the new use is no more onerous than the old, and is substituted for it by the same act which discontinues the old, he is not entitled to any compensation for a change which did not in fact cause damage; if it is more onerous, he is entitled to recover compensation for the increase in the burden only; provided, in both instances that the two uses are of the same general nature. Applying these principles, the owner of the fee is not entitled to recover at all if a turnpike is changed to a public highway, or a public highway to a turnpike, * * *. A city street is no greater burden than a country road, or an alley, and a change from a street to a parkway does not entitle the owner of the fee to compensation. It has been held that a railroad is no greater burden than a canal. * * * When a railroad location or a canal is laid out as a public highway, no damage is done. In all the above cases the new use is of the same general nature as the old—public travel."

Apply the reasoning of the above authorities to the present case—it is quite apparent that the new use to which the old Farmers' Market, with its carts and horses, is now being put to, is of the same general character and no additional burden, under the case of State *v.* Laverack. Accordingly, there is no abandonment or right of the plaintiffs to an action of ejectment or to an action for money damages, which would be the proper remedy in a situation of this kind.

III. The rule of strict construction should not be applied in this case.

Counsel for the plaintiff in his brief makes a great point of the proposition that statutes conferring the power of condemning property should be strictly construed. A number of cases are cited to establish this point, but there is one fact that must not be overlooked in his case. Almost all of the cases cited by counsel are cases not involving a municipality, which is a public corporation, but public utilities, which are private corporations performing public functions, subject to state or federal regulations.

Taylor *v.* The New York and Long Branch Railroad Company;

De Camp *v.* Hibernia Mine Railroad Company, 47 Law 43;

New York, Susquehanna & Western Railroad Company *v.* Trimmer (*supra*);

Curry *v.* New York Transit Company;

Pennsylvania Railroad Company *v.* Breckenridge;

New Jersey Zinc & Ointment Company *v.* Morris Canal;

National Docks Railroad Company *v.* United New Jersey Railroad Company,

are all cases of this nature. This fact should be borne in mind in consideration of all the cases cited by counsel in this matter.

Certainly the attitude of the Court in construing a statute conferring the power of eminent domain upon a private corporation would be quite different than that applying to a public corporation like the City. One is a private corporation engaged for profit, the other a public corporation created for the common good of the citizens at large. Public opinion, many times, has shown it-

self to be hostile toward railroad companies, water companies, public service corporations, and other utilities of that nature. . Naturally, the Court would be very slow in construing the statutes relating to corporations of this kind by giving these corporations more general powers. The case of a municipality is entirely different. It exercises the power of condemnation in the interest of the people for the common good, and its use of public property is directed in the interest of the public weal. For this court to interpret the statute in the narrow spirit of the days of common law pleading would work a tremendous hardship upon the taxpayers of the City of Newark.

Judge Smith, who decided this case in the Circuit Court, had this to say in his opinion as to the rule of strict construction in the case at bar:

> "While it may be true that the construction of statutes authorizing the taking of private property for public use should be strictly construed as against the taking power, this is merely a rule of construction where a doubt is presented as to how the statute should be construed. The particular statute in question contemplates the paying of the full value of the land, and the use for which it is taken is a use which preempts the entire use of the property as against the party from whom it is taken. The words of the statute contemplate, it seems to me, the taking of a fee."

There is one case upon which the plaintiffs lay particular stress, and which at first blush appears to be a case supporting plaintiff's position. Its title: "*Slingerland* v. *Newark*," 54 Law 62, would lead one to believe that this is somewhat different than the railroad and pipe line cases, but an examination of the case indicates that it should not be regarded in any different light than those already mention. The power of eminent

domain which the city was using in this case was invoked in aide of a private company, the celebrated East Jersey Water Company, which was to supply water to the city and whose works the city had a right to purchase. Here again is a case in which a private corporation is either directly or indirectly involved, and is not a case where the City is condemning lands entirely for its own use. It was because of this fact that the City did not seek to obtain a fee interest, and purposely did not define or seek to describe the interest which it wished to acquire. (See last paragraph of case, p. 69.) Under the circumstances, the acquisition of an absolute fee in this case by the City would be subject to the very poignant criticism that such an interest was inconsistent with the purposes for which the lands were to be used. Certainly, this case is not at all similar to the case at bar, where the City was operating its own public market and was acquiring land for its own purposes and not that of any private corporation or individual.

Finally, the case did not involve a question similar to the one in the case at bar. It was an opinion delivered upon the granting of a writ of certiorari, bringing under review certain proceedings taken by the Mayor and Common Council of the City of Newark to condemn lands for the purpose of laying down and constructing pipe lines, so that the question involved in the case was "whether the City is endeavoring to apply the power of eminent domain for a lawful public use" (p. 65). In short, it was a review of the legality of certain condemnation proceedings, and the extent of the City's power to condemn under a particular statute. Thus, all the discussion in the case relative to the disposition of the property should the land be abandoned for public use

is mere *obiter dictum,* and not involved at all in the question at issue. This same argument applies with equal force to some of the other cases cited by counsel for the plaintiffs, as stated by the Chief Justice himself in the case of *Curry* v. *N. Y. Transit Co.,* 66 Equity 316, where he said:

> "Notwithstanding that three of the decisions referred to are those of this court, the question presented by this appeal is not one to which the doctrine of *stare decisis* is applicable, for the reason that the expression of view as to what interest in the land was acquired by a corporation by the exercise of the power of eminent domain was, in each of these cases, entirely *obiter.*"

Counsel for Jennie Bachman in his brief, page 4, says that the assumption of Judge Smith that Abraham Sickel, the owner of the land in 1888, received the full value of the land, is not justified. The fact that Sickel was offered $12,000 for all of his land and finally was awarded $15,797.98, almost one-third more than the original offer, is fairly good evidence that he received full value. But counsel for Bachman says that land may have been worth $20,000 and that the jury might have allowed the lower figure because they had in mind that some day the property would revert to Sickel or his heirs. Such an assumption is pure speculation and not justified on any basis whatsoever. To begin with the statute specifically provides, section 5, that there shall be a "trial by jury to assess the value of said property," and that the "verdict rendered therein shall be conclusive upon all parties as to the said valuation and damages." There is absolutely nothing in the statute to warrant the jury in ever considering the possibility of a reverter in reaching their award. It is more likely that if the jury had not awarded the full

value of the land, Sickel himself would have moved to set the verdict aside because the possibilities were mighty slim that land which was condemned for market purposes and on which buildings might be erected would ever revert to the owners or their heirs. Judge Smith's assumption that Sickel received full value for the land in 1888 is a very proper one, based on a reasonable and sensible interpretation of the Statement of Facts.

In conclusion, counsel for the City of Newark wishes to bring to the Court's attention, one fact which needs no citation of law to establish the justice of the City's claim. All of his land was taken. There is no dominant tenement, no property of the plaintiff's own that would be burdened by the change that the city has made. Plaintiff stands in the same position in 1930 as he did in 1888 or 1889, when the lands were acquired. During all this period of time, the property in this vicinity has been increasing in value. The City has been developing with rapid strides. The plaintiff has done nothing to increase the value of this property during this long period. To suddenly and gratuitously present the heirs of the owner with a windfall, and to have them succeed to the harvest to which the public is properly entitled, would indeed work a great injustice. The weight of authority has recognized the harshness of any reversion in cases of this character, and as a general rule has adopted the view that an absolute fee simple title has been acquired in cases of this nature, or else that the property may be devoted to slightly different uses, so long as no great burden is imposed.

What the plaintiff is seeking in this case is that the Court should find in these condemnation pro-

ceedings a condition subsequent which would defeat the rights of the public. Conditions subsequent have always been looked upon with disfavor especially when they are sought to be created for the purpose of defeating the public interest.

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New Jersey Court of Errors and Appeals

JENNIE BACHMAN, *et als.*, *Plaintiffs-Appellants*, *vs.* CITY OF NEWARK, *Defendant-Respondent.*	*Action at Law.* *On Appeal.*

APPELLANTS' BRIEF.

Statement of Case.

This is an appeal in an ejectment suit from a judgment entered in favor of the defendant upon the decision of the Honorable William A. Smith, Circuit Court Judge, to whom the case was submitted without a jury upon an agreed statement of facts.

The appellants are the record owners of the lands and premises described in the complaint. The respondent claims to be the owner thereof and entitled to possession by reason of the condemnation of the same lands and premises in the year 1888 under the provisions of Chapter CXCI of the Laws of 1886, page 268, which was an act entitled "An Act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in the cities of this state and other places in which market facilities are or may be required for public use and to provide therefor."

The appellants contend that the respondent acquired through such condemnation only a fee simple determinable, that the use of the said premises for market purposes has been abandoned and that accordingly the full title has re-

verted to them as the heirs at law or devisees of the former owner.

GROUNDS OF APPEAL.

The grounds of appeal may be argued under the following points:

POINT 1.

The use of the land for market purposes has been abandoned.

POINT 2.

There is no evidence that the former owner received the full value of the land in the condemnation.

POINT 3.

Where a statute authorizing condemnation does not specifically state the quantum of title to be taken, that title only is acquired which is necessary for the purpose for which the condemnation is authorized.

POINT 4.

The Market Act of 1886 does not specifically define the quantum of title to be taken and therefore only a fee simple determinable was acquired.

POINT 5.

If the city acquired only a fee simple determinable the land reverted to the former owner or his heirs or devisees upon abandonment of the use of the property for market purposes and the City has no right to use the land for a different purpose without making compensation therefor.

ARGUMENT.

POINT 1.

The use of the land for market purposes has been abandoned.

The plaintiffs' right to possession of the premises in question is necessarily dependent upon the fact of the abandonment by the City of the use of the property for market purposes. In the decision below (Record, p. 31) it was found that the use of the property for market purposes had been abandoned.

The agreed state of facts shows that in February, 1925, the use of the property as a public market place was discontinued and that the property has not since been used for such purpose (Record, p. 50). Paragraphs 7 and 8 of the agreed state of facts (Record, pp. 14-15) show that a new and similar market was established on different property at about the same time and has ever since been conducted as such market, that the buildings and structures on the old market place were completely demolished and that a large portion of the old property formerly used for market purposes has been leased to the Lefcourt Company for fifty years upon a part of which there is now erected a modern office building thirty-five stories in height.

The abandonment consists of the discontinuance of the use together with an intention of not using the premises again for that purpose. The fact of discontinuance of the use is admitted and it appears clearly from the action of the City with regard to the premises constituting the old market place that there is no intention of again using such premises for market purposes. It is through actions that intentions can best be shown

and the City cannot well deny its intention to abandon the use of the old market premises for market purposes when consideration is given to the manner in which it has treated the old market place.

Furthermore as appears in paragraph 9 of this agreed statement of facts the City in June, 1926, adopted an ordinance whereby the premises in question here were to be opened as a public street or highway. That of itself is an expression of the City's intention not to use the property hereafter for market purposes.

In the case of *State* v. *Lavereck*, 34 N. J. Law, page 201, at page 205, Chief Justice Beasley stated:

> "I regard then, a right to hold a market in a street as an easement additional to and in a measure inconsistent with its ordinary use as a highway."

POINT 2.

There is no evidence that the former owner received the full value of the land in the condemnation.

The decision below assumes that Abraham Sickel the owner of the land in 1888 received from the City of Newark an award which represented the full value of the land. There is absolutely nothing in the agreed statement of facts to justify any such assumption.

Paragraphs 3 and 4 of the agreed statement of facts (Record, p. 13) show that the City offered to purchase the land for $12,000 but the offer was refused, that the Condemnation Commissioners made an award of $14,531.45; and that on appeal to the Circuit Court an award was made of $15,797.98 which was duly paid.

There is no statement anywhere that the amount received for the land was the full value thereof. The fact that the City originally offered $12,000 to purchase the land by deed of conveyance establishes nothing since the offer may have been ridiculously low and the full value may well have been $20,000 or any other figure. It is entirely possible that the Condemnation Commissioners and the jury on appeal in determining the amount of their respective awards considered the fact that the property might some day revert and for that reason made awards of amounts smaller than what they considered the full value of the land.

POINT 3.

Where a statute authorizing condemnation does not specifically state the quantum of title to be taken, that title only is acquired which is necessary for the purpose for which the condemnation is authorized.

Since this point and some of the following points involve the language of the act in question we will quote the act in full.

AN ACT TO AUTHORIZE THE PURCHASE AND CONDEMNATION OF LAND AND THE ERECTION OF BUILDINGS FOR MARKET PURPOSES IN THE CITIES OF THIS STATE AND OTHER PLACES IN WHICH MARKET FACILITIES ARE OR MAY BE REQUIRED FOR PUBLIC USE, AND TO PROVIDE THEREFOR.

1. BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, That whenever in the judgment of the common council or other governing body of any city, additional market facilities are or may be required for

public uses, it shall and may be lawful for such council or other governing body to appoint five commissioners, who shall serve without any compensation, to purchase such lands and erect suitable buildings thereon, to be used as a public market.

2. AND BE IT ENACTED, That such council or other governing body may fix a limitation upon the amount of money which the said commissioners may expend in the purchase of such lands in the erection of such buildings, and may require a report from them before entering into a contract therefor, with a description of lands to be purchased, and plans of buildings to be erected, for approval, and the said commissioners shall in no case proceed in the purchase of such lands or the erection of such buildings until such approval is obtained, where the same is required.

3. AND BE IT ENACTED, That in case it should in any case be found that suitable property cannot be purchased by agreement with the owner or owners, or in case the price demanded by such owner or owners is, in the judgment of the commissioners, in any case exhorbitant, and more than a fair equivalent therefor, then the said commissioners shall report the same, with a description of the said lands, to the common council or other governing body, and the said council or other governing body may order and direct the condemnation thereof.

4. AND BE IT ENACTED, That if the said common council or other governing body shall, in any case, direct the condemnation of any lands, as provided for in the preceding section, the said commissioners shall forthwith apply to a judge of the circuit court of the county wherein which said city or place is situate, for the appointment of three commissioners to make an appraisement of the value of the lands so to be condemned for the purpose aforesaid, and of the damage which any owner or owners of such

lands may suffer by reason of the taking thereof.

5. AND BE IT ENACTED, That the said commissioners appointed by the circuit court, having taken an oath faithfully and impartially to execute the duties of their office, shall forthwith proceed to estimate and determine the fair value of the lands and real estate so to be taken and condemned as aforesaid, and of the damages which the owner or owners thereof will suffer by reason of the taking thereof, first having given at least ten days' notice in writing to the said owner or owners, either personally or by leaving the same at his or her place of abode, of the time and place when and where they may be heard in relation to the matter; in case any owner shall be an infant, married woman, non compos mentis, or absent from the city or place where such condemnation proceedings are taken, or be from any cause incapacitated to act in this behalf, then notice of the time and place, and object to, of said meeting shall be advertised or other notice given as the said judge may direct, and said meeting or meetings may be adjourned from time to time, at the discretion of said commissioners, and as soon as they shall have determined upon said valuation, they shall make and sign a certificate thereof, and file the same in the office of the city clerk of such city, or at such other place as the said judge may direct; and immediately upon the payment to said owner or owners of the amount of the said valuation, or in case he or they will not nor cannot receive the same, upon deposit of the same in such bank or institution as the said court or judge may direct, the title to and the right of possession of such property shall immediately become vested in such city or place; and any owner conceiving himself or herself aggrieved by the proceedings of said commissioners, may appeal therefrom to the supreme court of this state at any time within sixty days after the filing of the said cer-

tificate, and the said court shall thereupon order a trial by jury to assess the value of the said property and the said damages, which trial shall be conducted in all respects as in other cases of trial by jury, and the final judgment of the said court upon the verdict rendered therein shall be conclusive upon all parties as to the said valuation and damages, and the amount already paid or deposited as aforesaid shall be increased or diminished accordingly.

6. AND BE IT ENACTED, That all titles taken for the purposes mentioned in this act, shall be in the name of the city or place in which the lands are purchased, and the buildings erected, by virtue of the provisions of this act.

7. AND BE IT ENACTED, That the commissioners so to be appointed by the said judge of the circuit court, shall receive such compensation for their services as the said judge shall order and direct, and the same shall be paid as well as all other expenses incident to the condemnation proceedings, from the funds provided, as herein directed, for the purchase of lands and the erection of buildings.

8. AND BE IT ENACTED, That to pay for the land so purchased or condemned, and for the damages for the taking thereof, and for the cost of such buildings and other expenses connected therewith, the said city or place may, from time to time, issue its temporary loan bonds or certificates of indebtedness, on which shall be indicated the purpose for which they were issued, and the proceeds thereof shall be used only to defray the expenses aforesaid; and upon the final completion of the duties hereby imposed upon the said commissioners, they shall report to the said common council or other governing body their proceeding, and shall make a full and detailed statement of the entire cost of the lands purchased, the buildings erected, and of all the expenses in-

curred by them in the execution of their duties, and the said common council or other governing body, upon the ascertainment of such cost and expenses, are hereby authorized to issue the bonds of such city or place for an amount not to exceed three hundred and fifty thousand dollars, which bonds shall be of such denomination as the said common council or other governing body shall direct, and shall be made payable within not more than thirty years, nor less than ten years from the date of their issue, and shall bear such rate of interest not exceeding five per centum per annum, and be made payable as the said body may determine, and may be negotiated and sold at not less than their par value; such bonds shall be denominated "market bonds," and the proceeds thereof shall be used to retire the temporary bonds or certificates hereby authorized, and for no other purpose whatever.

9. AND BE IT ENACTED, That the net revenues from all lands and buildings used for market purposes in every such city or place shall be devoted exclusively to the payment of the interest which may accrue upon the said bonds, and to a sinking fund for their redemption and payment when due, where not otherwise appropriated by existing laws, and shall, where sinking fund commissioners exist in any such city or place, be annually paid over to them for this purpose, and where sinking fund commissioners do not exist, shall be kept separate and apart from the other funds of such city or place and exclusively devoted to this purpose.

10. AND BE IT ENACTED, That if after the lapse of five years from the time when said bonds are issued, it shall be ascertained that the said revenues are insufficient in any such city or place to provide a fund sufficient to meet the annual interest due upon the said bonds and furnish a sinking fund for their payment and redemption when due, that it shall be the duty of

the common council or other governing body of such city or place, annually thereafter, to place in the tax levy and collect such sums in addition to the revenue aforesaid as will be sufficient to provide a fund to pay such interest and redeem and pay such bonds at their maturity.

11. AND BE IT ENACTED, That this act shall take effect immediately.

Passed April 22, 1886.

The law of this state has been discussed in a number of cases where the conclusions reached have varied due to the different questions under consideration, the different wording of the statutes authorizing condemnation and the different manner in which title has been acquired whether by conveyance or condemnation.

The first case of importance is that of *Taylor* v. *N. Y. & Long Branch R. R. Co.*, 38 N. J. Law, page 28, where the railroad company condemned the plaintiff's land but before payment was made the plaintiff cut down certain trees upon the premises. The railroad company thereafter appropriated the cut timber to its own use and the action was brought for conversion. It was held that condemnation included everything of the land which was required for the purpose for which condemnation was made. In the opinion of the Court written by Chief Justice Beasley, it was stated:

> "When, therefore, the use of land is transferred by the action of the legislative will, the right to use, for a specified purpose, everything which in the legal sense is comprehended in the term land is transferred. I say the right is given to use such materials for the specified purpose because it is plain that the grant is a qualified one. The fee in the land is not acquired by the company but a mere easement in such land."

In *De Camp* v. *Hibernia R. R. Co.*, 47 N. J. Law, page 43, Justice Depue said,

> "In construing acts of the legislature granting powers of condemnation two rules are universally recognized; first, that the company shall take that which the legislature empowers it to take, and in the state and condition prescribed by the legislature; and second, that all powers of this nature will be strictly construed—what is not expressly given is withheld."

In discussing this question in the case of *N. J. Zinc & Iron Co.* v. *Morris Canal & Banking Co.*, 44 N. J. Eq. 398, at page 404, Vice-Chancellor Van Fleet says:

> "Where the State invests a corporation with the sovereign prerogative of eminent domain, for the purpose of enabling them to construct and operate a public highway, and they take land by force of their charter, or by any other means than by grant, for the purposes of such highway, it is manifest, that the plain purpose of the grant to them is not to give them capacity or invest them with power to take a fee, but merely to give them power to acquire such an easement in the land as will enable them fully to accomplish the purposes for which they were created. The plain design of the grant, in such a case, is to enable them to acquire what they require for the construction and successful operation of their highway, but nothing more. The title to the land taken remains in such cases, in the owner, subject only to such servitude as the corporation has power to impose, and their power in this respect is limited, as a general rule, to such use of the land as may be reasonably necessary for a right of way. Taylor *v.* New York & Long Branch R. R. Co., 9 Vr. 28; 1 Redf. on Railways, 270. Such grants, like all public grants, are to be strictly construed. The grantee takes nothing except what is plainly given either in express terms, or by neces-

> sary and unavoidable implication. What is not plainly given is to be understood as withheld. Any ambiguity in the terms of his grant will be fatal to his claim. To doubt in such a case is to deny."

In *Pennsylvania R. R.* v. *Breakenridge*, 60 N. J. L. 584, Judge Adams said (p. 586):

> "The public grant will be interpreted strictly and construed to give merely the power to take an easement adequate to the accomplishment of the corporate design."

In the case of *Currie* v. *N. Y. Transit Co.*, 66 N. J. Eq. 313, Chief Justice Gummere reviewed the cases on this subject and at page 316 says:

> "The quantity of interest which a railroad corporation obtains in land taken by it under the power of eminent domain is that which the statute conferring the power authorizes it to acquire. The legislature may authorize the taking of a fee, or any less estate, in its discretion."

It was held that the wording of the particular statute involved in that case operated to pass the entire title to the company condemning and that there were no rights reserved to the landowner in the lands taken. If anything, there was a restriction upon the use to which the property could be put and that only the Attorney-General could restrain an unauthorized use.

Mr. Justice Dixon writing for the Supreme Court in the case of *McEwan* v. *Pennsylvania R. R. Co.*, 72 N. J. Law, p. 419:

> "It also contravenes the principle underlying the many decisions in which the courts have held that even under a general power of condemnation corporations were authorized to take only such rights as were necessary. That principle was not wholly abrogated by the judgment in the case of Currie *v.* New York Transit Co., 21 Dick. Ch. Rep. 313, but

was merely limited so far as to give effect to the will of the legislature clearly expressed in the statute delegating the power. If the statute be ambiguous, it should still be construed in accordance with that principle. The import of this statute is, we think, that when the purposes of the company can be accomplished by acquiring rights and easements less than the fee of the land, the extent to which it may condemn the title of the general owner is correspondingly limited."

In the recent case of *Frelinghuysen* v. *State Highway Commission* decided October 30, 1930, by the Supreme Court of this State and reported in N. J. Advance Reports, Vol. 8, No. 47, p. 644, the question of the right of the State Highway Commission to take the fee simple absolute of the lands of the Prosecutor was under consideration. The opinion of the Court delivered by Mr. Justice Lloyd stated as follows:

"We come now to the third and last point which, though of minor importance, perhaps, to the owner, is of vital importance as bearing upon the fundamental powers conferred upon the legislature by the constitution of the state. The petition for the appointment of commissioners set forth that the state highway commission has determined to acquire in the name of the state as per a resolution adopted by the commission the land in question, 'together with all right, title and interest of Joseph S. Frelinghuysen in and to West End avenue, adjacent to the above-described premises,' and it is asserted in the brief of counsel for the commission that it is the purpose to take the entire fee of Frelinghuysen in the land to be condemned.

The right of the individual to be secure in his person and his property has been guaranteed by the constitution of the state and the constitution of the United States. In 1832 it was declared by the Chancellor of this state in the case of Scudder *v.* Trenton and Delaware

Falls Co., 1 N. J. Eq. 694, that 'private property shall not be taken for private use. The legislature has no right to take the property of one man and give it to another even upon compensation being made,' and since that time neither the constitution of 1844 nor the present constitution confer such power. That the power is thus limited is apparent from the recent decision of the Court of Errors and Appeals in Landell *v.* State, 101 N. J. L. 297, in which the Scudder case is cited. In 20 C. J. 546, it is said that 'independently of express authority given by the constitution private property can be taken only for a public use, and the legislature cannot authorize a taking for strictly private use even upon making compensation. The necessity that the use shall be public excludes the idea that property may be taken under semblance of public use and ultimately conveyed and appropriated to a private use,' citing numerous authorities.

Such we conceive to be the law of our own state. The present constitution provides in article 1, section 16, that 'private property shall not be taken for public uses without just compensation.' This is a recognition of a legislative power to take private property for a public use, but is far from giving authority to take such property for other than public uses. When the state takes the property of its citizens for highway purposes, it acquires an easement only, and it would seem that it is empowered to take only so much of the title as is essential to the public use authorized. New Jersey Zinc and Iron Co. *v.* Morris Canal and Banking Co., 44 N. J. Eq. 404. To take all the right, title and interest of an owner obviously may go beyond such necessity and be a contradiction in terms of the right to acquire an easement only. Public uses are constantly changing and particularly with regard to the lands occupied by our highways; the courses and directions of the highways are frequently altered and upon the abandonment of such lands for such

use, unless the state holds a greater title by the voluntary act of the owner, the easement ceases and the state has no further interest.

To sustain the contention of the commission in this case would open the door to wide and dangerous invasions of private property. A power thus conferred would permit the acquisition of private property for a public use with its ultimate destination intended to be devoted to a private use, and foreign to the cause for which it was condemned.

Our view is that this power does not exist, nor do we think the legislation, fairly construed, an attempt to exercise such power. Section 11, act of 1927 (at p. 724), provides that the commission may lay out, open and improve new roads over 'acquired rights of way' and there is nothing further in the act of 1927 indicating a broader purpose. While it is true that chapter 96 of the laws of 1926 provides that the commission shall have power whenever lands shall 'come into its possession or control,' or it shall take any such lands or real estate for the uses of a state highway and the lands shall no longer be required for such use, that the commission may sell the same, yet this must be limited to such lands as to which it has acquired a fee by deed, gift, grant or other lawful transfer from the owner. It was not intended to apply to 'rights of way' acquired by condemnation. It could scarcely be contended that the power thus conferred was intended to apply to all lands coming into the commission's 'possession or control' for this would include lands taken possession of temporarily, to leased lands and those occupied as a temporary possession by the consent of the owner, as well as lands acquired by condemnation for the most temporary needs in highway construction.''

The result of these decisions is that where a statute authorizes the condemnation of lands but

does not define the quantum of title to be acquired or where the language used is ambiguous only that title will be acquired which is necessary for the purpose for which the condemnation is authorized. All such statutes must be strictly construed so as to take from the land owner only that which is clearly authorized to be taken.

The opinion in the case of *Currie* v. *N. Y. Transit Co., supra,* states that:

> "The legislature may authorize the taking of a fee, or any less estate, in its discretion."

and we assume that in the use of the term fee it is meant fee simple absolute. We believe that assuming this to be the law it is nevertheless limited to cases where the taking of a fee simple absolute is necessary for the purpose for which the property is required. The case of Frelinghuysen *v.* State Highway Commission, *supra,* throws some doubt upon this general principle that the legislature can authorize the taking of any estate where it recognizes the constitutional right of an individual to be secure in his property. It seems apparent that if the use of an individual's property is required by a city for a period of one year in connection with some municipal work it would be unconstitutional for the legislature to authorize the city to take a fee simple absolute in the lands by condemnation. We can see no difference in principle in the instant case since the City of Newark required the property of Abraham Sickel only so long as it should use the same for market purposes and the right of the legislature was limited to authorize the taking of that amount of the title which was necessary for the purpose. To hold otherwise would permit a city to take the lands of an individual for a public purpose and then abandon the use for such purpose and devote the lands to

a private use or one foreign to the cause for which they were condemned. As pointed out in the Frelinghuysen case this would open the door to wide and dangerous invasion of private property. Assuming, therefore, for the moment, that the Market Act in question by its language should be construed to mean that the City would acquire by condemnation a fee simple absolute, nevertheless insofar as such title is not necessary for the purpose it would be and is unconstitutional and would result in the City having acquired only a fee simple determinable. We wish at this point to call attention to the fact that the Court below in its decision (p. 29) states that the plaintiffs contend that only an easement was taken. They do not contend that an easement was taken but a fee simple determinable.

Substantially the same rule of law holds in other states.

The Supreme Court of Pennsylvania in the case of *Lazarus* v. *Morris*, **61 Atl. Rep., p. 815** says—p. 816:

> "The grantee takes what the act gives and no more. If the act gives an absolute estate, and compensation is provided on this basis, the whole title may be acquired. If it only gives the right to use and occupy, the grantee only takes a conditional fee or easement, terminable on the abandonment of the use for which the land was appropriated. The appropriation of land under the power of eminent domain does not give a fee-simple estate therein, in the absence of express statutory language to that effect, but only a right to use and occupy the land for the purpose for which it is taken (citing cases). The exercise of the right of eminent domain, whether directly by the state, or its authorized grantee, is necessarily in derogation of private right, and the rule is that such authority must be strictly construed."

The Circuit Court of Appeals for the 6th Circuit in the case of *Newton* v. *Manufacturers Ry. Co.*, 115 Fed. Rep. 781, in considering this question says:

> "The question before us is one of statutory construction in Ohio wherein the decisions of the highest court of that state are of controlling authority. As we understand them where the statute does not undertake to authorize an appropriation of the fee the estate is limited to an easement for the purposes intended."

See also

In *re Clinton Street Police Station Site in the City of New York*, 123 N. Y. Supp., p. 198.

Lewis on Eminent Domain, 3rd edition, second volume, section 449.

> "Upon the principle that statutes conferring compulsory powers are to be strictly construed, it follows that, where the estate taken is not defined, only such an estate or interest will vest as is necessary to accomplish the end in view, and where an easement is sufficient no greater estate can be taken."

POINT 4.

The Market Act of 1886 does not specifically define the quantum of title to be taken and therefore only a fee simple determinable was acquired.

This involves the language used in the statute and the proper construction thereof. In the first place the act is entitled "An Act to authorize the purchase and condemnation of land *for market purposes.*"

The *first section* of the act authorizes the purchase of lands "to be used as a public market." The *third section* authorizes the condemnation of

the lands where they cannot be purchased. The *fourth section* provides for the application for the appointment of commissioners "to make an appraisement of the value of the lands so to be condemned for the purpose aforesaid, and of the damage which any owner or owners of such lands may suffer by reason of the taking thereof." The *fifth section* provides that the commissioners "shall forthwith proceed to estimate and determine the fair value of the lands and real estate so to be taken and condemned as aforesaid, and of the damages which the owner or owners thereof will suffer by reason of the taking thereof." It then goes on to provide "immediately upon the payment to said owner * * * title to and the right of possession of such property shall immediately become vested in such city or place." The *sixth section* provides "that all titles taken for the purposes mentioned in this act shall be in the name of the city."

The provisions which we have just referred to we believe are the only parts of the act which have any importance in determining the kind of title to be acquired under the act by condemnation.

It will be noted at once that the act does not anywhere clearly define the kind of title to be acquired. It merely says in the fifth section that upon payment, the title to and right of possession of such property shall become vested in the city. In the sixth section it provides that all titles shall be taken in the name of the city. This is far from saying that the city shall acquire a title in fee simple absolute to be taken in the city's name. We admit that whatever title the city acquired should be taken in the name of the city, but it does not follow that the title taken was a fee simple absolute. The very pur-

pose of the act is to authorize the purchase and condemnation of land for market purposes and all that was necessary for such purpose was the right of possession to the property so long as it should be used for market purposes which would constitute a determinable fee.

Titles are of various kinds and include a fee simple absolute, determinable fee, qualified fee, additional fee, base fee and all other lesser estates.

In *Campfield* v. *Johnson,* 21 N. J. Law 83, there was under consideration the meaning of the phrase "title to real estate" as used in the statute which declared that the jurisdiction of the justice shall not extend "to any action wherein the title to any lands, tenements, hereditaments or other real estate shall or may in anywise come into question." In discussing the meaning of the statute the Court said in its opinion written by Chief Justice Green, page 85,

> "The statute, both in limiting the jurisdiction of the Justice, and in prescribing the mode of proceeding, uses simply the phrase 'title to real estate.' It draws no distinction between freehold and leasehold estate, but uses the term in its broadest and most unlimited sense.
>
> 'Title,' says Sir Edward Coke, 'is when a man hath lawful cause of entry into lands whereof another is seized. It signifies the means whereby a man comes to his lands or tenements.' 'The word title includes that right, but is the more general word.' Title is generally applied to signify the right to land and real effects. It is the right of possession or of property in lands, as distinguished from the actual possession, and it is precisely in this sense that the word appears to have been used in the statute now under consideration. The right to try actions con-

> cerning real estate, involving the mere fact of possession, is vested in the court for the trial of small causes. But the statute excludes from its jurisdiction all cases where either in the support of the action, or in the maintenance of the defence, any right or title is involved other than the naked fact of possession.''

Even assuming for the minute that title is synonymous with fee simple, estates in fee simple are themselves divided into classes including fee simple absolute, fee simple determinable and others. The Court of Errors & Appeals in opinion written by Judge Depue in the case of *Pipe Line Co.* v. *D. L. & W. R. R. Co.*, 62 N. J. Law, p. 254, discusses this subject at page 267, where it says:

> '' 'Of fee-simple,' says Lord Coke, 'it is commonly holden that there be three kinds, viz., fee-simple absolute, fee-simple conditional and fee-simple qualified or a base fee. But the more genuine and apt divisions were to divide fee—that is, inheritance—into three parts, viz., simple or absolute, conditional and qualified or base, for this word *simple* properly excludeth both conditions and limitations that defeat or abridge the fee.' 1 Inst. 1 b. 'Where an estate limited to a person and his heirs has a qualification annexed to it, by which it is provided that it must be determined whenever that qualification is at an end, it is then called a qualified or base fee—as in the case of a grant to A and his heirs, tenants of the Manor of Dale, whenever the heirs of A cease to be tenants of that manor their estate determines.' 1 Cruise Dig. 63; 1 Inst. 27 a. 'If land is given to a man and to his heirs as long as he shall pay 70s. annually to A. or as long as the Church of St. Paul's shall stand, his estate is a fee-simple determinable, in which case he has the whole estate in him; and such perpetuity of an estate, which may con-

tinue forever, though at the same time there is a contingency which, when it happens, will determine the estate (which contingency cannot properly be called a condition, but a limitation), may be termed a fee-simple determinable.' Plowd. 557, 'Though the estate will determine when the event marked as the boundary to the time of contiuance shall happen, in the meantime the whole estate is in the grantee or owner, subject only to a possibility of reverter in the grantor. The grantee has an estate which may continue forever, though there is a contingency which when it happens, will determine the estate. This contingency cannot, with propriety, be called a condition; it is part of the limitation, and the estate may be termed a fee. Plowden uses the phrase 'fee-simple determinable.' 1 Pres. Est. 431, 441, 442, 484. Chancellor Kent uses the words 'qualified, base or determinable fee' promiscuously, as defininig an estate which may continue forever, but is liable to be determined without the aid of a conveyance by some act or event circumscribing its continuance or extent. And he adds: 'Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because, it is said, they have a possibility of enduring forever. It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee and not merely a freehold.' 4 Kent Com. 9. 'The proprietor of a qualified fee has the same rights and privileges over the estate till the qualification upon which it is limited is at an end, as if he were a tenant in fee-simple.' 1 Cruise Dig. 65; Plowd. 557; 4 Kent. Com. 11; Seymour's Case, 10 Co. 97; 1 Pres. Est. 404. So long as the qualified fee remained the grantor or his heirs had no right of entering upon the lands. If the estate granted was terminated by breach of the condition, then the whole estate was gone and there could be no partial forfeiture. He who enters for breach of condition regularly shall have the

> land of his first estate. Co. Litt. 202a; Com. Dig. 533 O 6; per Chief Justice Green, McKelway *v.* Seymour, 5 Dutcher 329. The precedents in our courts are strictly in conformity with this common law doctrine."

Thereafter in the opinion a number of decisions of this State were reviewed.

In the case of *Hepburn* v. *Jersey City*, 67 N. J. Law, p. 114, the statute authorized the City to acquire land, water, water rights or other property for the purpose of supplying the City with water and provided for the condemnation of the same in the event that it could not be purchased. The City endeavored to condemn a temporary use of twenty feet of land which was objected to by the Prosecutor on the ground that the language of the act did not confer authority to take a temporary use or interest in the land by condemnation. The Court held that the temporary use might be condemned and said:

> "Is it not, in fact, the correct rule that it should not be permitted to take any interest beyond that necessary? The act of 1895 authorizes the municipality to condemn 'land.' Does that contemplate the taking of the fee, or an exclusive permanent use only?"

In that case the City was authorized to acquire land for the purpose of supplying water and it was held that such authorization did not necessarily contemplate the taking of the fee. In the present case the act authorizes the condemnation of land for market purposes and provides for the determination of the damage to the owner by reason of such taking. It follows that this language likewise does not necessarily contemplate the taking of a fee simple absolute and therefore the exact title not being defined by the statute, the title acquired is only that which is

necessary for the purpose—namely, a determinable fee.

In the Pipe Line Co. case above referred to, where the condemning company was held to have acquired a complete title, the statute in conferring power to condemn land provided that upon the payment the corporation should be deemed to "be seized and possessed in fee simple of all such lands and real estate."

Likewise in the case of *Currie* v. *N. Y. Transit Co., supra*, where it was held that there was no part of the title retained by the landowner after condemnation, stress was placed upon the language of the act which provided that the report of the commissioners and proof of payment should at all times be considered as plenary evidence of the right of the company to "have, hold, use, occupy, possess and enjoy the said land." This language was considered as indicating that the condemning company was to have all the rights that an owner of property in fee simple absolute would have and that accordingly the statute was to be considered as authorizing the taking of such title. No such language as this is to be found in the Market Act of 1886. There is a further point of difference between the Currie case and the instant case in that in the former it appeared as a fact that the owner had received payment of the full value of the land condemned whereas in this case as hereinbefore stated it only appears that the owner received a certain sum of money and there is no evidence to show whether that represented the full value of the land or something less.

The case of *Quimby* v. *Vermont Central R. R. Co.*, 23 Vt. 387 involved a suit for the killing of a horse on the railroad tracks of the defendant.

The question arose as to the duty of the plaintiff and defendant to fence the property upon which the railroad was located which involved a determination of the ownership of the land over which the railroad ran. The railroad company defendant had acquired its interest in the property through condemnation. The Court in its opinion said,

> "In the railroad charters of that state (N. Y.) it is provided, that the company may take the fee of the land. The charter of the defendant's company, although copied, in the main, from the New York charters, adopts different language, as to the defendants title-only saying, that they shall be 'seized and possessed of the land'; that is, seized of such an estate as is necessary for their uses —a right of way. This form of expression seems to have been adopted by design, and with a view to limit the estate of the company strictly to their necessities. Indeed, we do not well see, how the legislature could assume to vest in the company any greater estate, than their necessities required."

In re: *Clinton Street Police Station Site in New York*, 123 N. Y. Supp. 198, it was necessary to determine the interest in land acquired by the City of New York by virtue of certain condemnation proceedings. The Bridge Commission was authorized by the Laws of 1899 to include as a part of the real estate necessary to be acquired for the East River Bridge and for the approaches thereto such additional lands adjacent to the anchorages and to the towers of the bridge as the commission should deem necessary. The question arose whether the City had acquired a title in fee simple absolute or only a limited estate. The Court held that a complete title was not acquired by the City saying at page 204:

> "The corporation counsel contends that the lands comprised within the fire protecting

space or roadway were acquired in fee simple absolute, because the counsel for the claimants entered into the following stipulation upon the record, viz:

> 'Mr. Bryne: The city's case is closed, and the case may now go to the commissioners upon briefs, provided only that it be stipulated of record that the city owns in fee all of the lands comprised within the bridge approach and lying northerly of the northerly line of the premises here taken in this proceeding, and northerly of the line marked 'southerly clearance line of the Williamsburg Bridge.'
>
> 'Mr. O'Connor: It is so stipulated.'

The term 'in fee' as applied in the foregoing stipulation, must be construed in the light of the purposes for which the land embraced within such fire protecting space was to be devoted, *viz.*, 'for the protection of the said anchorages and towers against the danger of fire or other casualty,' and therefore the taking by the city of such land in fee simple absolute was neither contemplated nor warranted by the language of the several provisions above quoted. Matter of City of N. Y. 74 App. Div. 197, 207, 208, 77 N. Y. Supp. 737, affirmed 174 N. Y. 26, 34, 66 N. E. 584; 1 Lewis on Eminent Domain (3d Ed.) secs. 127, 128; 2 *Id.* Sec. 450. The same reasoning applies with equal force to the further point made by the corporation counsel that because the petition in the proceeding to acquire the lands immediately adjoining on the north of the damage parcel in suit recites that such lands were sought to be acquired in fee simple, and because it was determined in such proceeding that the city did take such a title thereto, it actually acquired title in fee simple absolute, notwithstanding the purpose for which such space or roadway was to be used. This contention is contrary to the principle laid down in Matter of City of New York, *supra*, where although the law provided that the title to lands con-

> demned for the widening of streets designed to make a certain bridge with its structural approaches more accessible should vest in the city in fee simple, it was nevertheless held to mean a qualified fee and that the city could not dispose of the land for other purposes."

It is interesting to note that under this New York case even though the statute specifically states that the City shall acquire a title in fee simple, nevertheless they only take a qualified or determinable fee in the event that that amount of title is all that is required for the purpose. This is in recognition of the constitutional right of an individual to be secure in his property and that only such part of his title shall be taken from him as is necessary for the public use. It should also be noted that the statute in that case which authorized the bridge commission to purchase, receive, hold and use such real estate provided that "the title to all such real estate or interest therein shall be taken to and in the corporate names of the Cities of New York and Brooklyn as joint tenants."

The provision of the Market Act of 1886 that title to the land shall be taken in the name of the City has no particular significance since it may well mean the title to a fee simple determinable. If the City agreed with an owner to purchase a right to use the land so long as it should be used as a public market, a deed would be prepared and delivered conveying such an estate which would be a fee simple determinable and the deed would run to the City of Newark as grantee.

In *Slingerland* v. *Newark*, 54 N. J. Law 62, a condemnation proceedings by the City was under review. The condemnation was under chapter

CIV of the Laws of 1891 which was an act to empower cities to acquire land for a public use by condemnation. Its provisions were similar in many respects to the Market Act of 1886 and particularly it provided that after the commissioners had made their award upon payment or tender of payment of the amount so awarded "the said City is hereby empowered to enter upon and take possession of the said land; and all title thereto for the purposes for which the same is taken, shall upon such payment or tender pass from the said owners and parties interested in the said City." In the opinion of the Court it was said at page 66:

> "The object of the condemnation is, and its effect will be, to vest the land in the city to be used for its water supply. For this purpose, and for this only, does the statute transfer the title to the city, and authorize it to enter upon and take possession of the land."

Again at page 67:

> "But the same uncertainty attends almost every condemnation; after the taking something may occur to prevent the actual user. The common effect of such an occurrence is that the land reverts to the prior owner. Such would be the consequence here. The water company acquires no title whatever and the city acquires title for the specified use only, on failure of which the rights of the former owner would come into play."

And again at page 69:

> "The last objection is that the city cannot take the fee, but only an easement, and should be required to describe the easement in the proceedings.
>
> It is not incumbent upon the city to give any particular technical name to the right which it asks to condemn, and it has not done so. It has, in its petition, clearly set forth the purpose for which it designs to take the

> land of the prosecutor, and the statute declares that for such purpose the title to the land shall pass from the owners and parties interested to the city. By these means the rights condemned are sufficiently ascertained. Any attempt by the city further to define them would be as likely to obscure as to elucidate the matter, and could have no useful end."

The statute in that case authorized the municipality to acquire lands for a public use and provided that upon payment of the amount of the award all title thereto would pass to the City. Under the Market Act of 1886 cities are authorized to acquire land for market purposes and upon payment of the amount of the award the title to and right of possession of the land passed to the City. There is no substantial difference in the two statutes and the Slingerland case recognizes that the City does not acquire a fee simple absolute but that upon the termination of the use the title reverts.

To the same effect is *Paterson* v. *Kearny*, 84 N. J. Law 456 where a condemnation by a municipality was under review and the prosecutor raised the objection that the municipality's real purpose was not that stated in the statute—namely the supply of water for the town. Mr. Justice Swayze speaking for the Court said:

> "If that is not the real object or if the water is diverted to some other one not authorized, the right acquired will be at an end just as land reverts to the prior owner when the use for which it is condemned is abandoned."

The statute involved in that case was Chapter 311 of the Laws of 1911 which was an act to empower towns to acquire land and other property for water supply by condemnation. It em-

powered any town to acquire land, water, water rights or other property for such purpose.

POINT 5.

If the City acquired only a fee simple determinable the land reverted to the former owner or his heirs or devisees upon abandonment of the use of the property for market purposes and the City has no right to use the land for a different purpose without making compensation therefor.

It has been recognized and stated in most of the cases already cited in this brief that where the title acquired is for a specific use the municipality or other condemnor cannot substantially change the use and that an abandonment of the use for which the property was condemned terminates the interest of the condemnor.

The use of this property for market purposes was given up by the City in February, 1925 (Record, p. 14), when a new market was established on different property. The City then adopted an ordinance providing for the opening of the premises in question as a public street or highway to be known as Mulberry Court (Record, p. 15). Following the passage of such ordinance the Commissioners of Assessment for local improvements in the City of Newark made an award to plaintiffs of nothing for their damages but such award has not yet been confirmed by the Essex County Circuit Court and the City has not yet, therefore, acquired a right to possession thereunder (see p. 10 Agreed State of Facts, Record, p. 15).

In the case of *State* v. *Laverack*, *supra*, Chief Justice Beasley expressed the opinion that the use of property for market purposes was incon-

sistent with the use of property as a highway. It would certainly follow that the converse is also true and that the use of property as a public highway would be inconsistent with its use as a public market. It cannot be said then the change of use from that for a public market to a public highway is not substantially different and that the City would be entitled to do so without making additional compensation to the owner.

This principle is likewise recognized in the case of *Strock* v. *East Orange*, 77 Atl. 1051. The property was acquired by East Orange by condemnation to be used as a local playground, A supplement to the act under which the City acquired the premises allowed its use for outdoor exhibitions, concerts and contests. The Court held that such additional use was inconsistent with the original use. In the instant case we think that the change from a public market to a highway is a complete change of use and that such a change works a reverter is recognized in the Strock case where Mr. Justice Parker says p. 1053:

> "We think it is true that, if land is dedicated to public use for certain purposes, it is not within the power of the municipality or of the Legislature to authorize the municipality to divert such land to other purposes without first exercising the right of eminent domain and paying to the owner of the fee a proper compensation therefor."

CONCLUSIONS.

We therefore submit that the judgment under review here should be reversed for the following reasons:

First—The Market Act of 1886 did not define the quantum of title to be acquired by condemna-

tion and therefore the City acquired only that which was necessary which was a fee simple determinable.

Second—Insofar as the Market Act of 1886 may have attempted to authorize the City to acquire by condemnation a fee simple absolute it was in violation of the constitutional right of every person to be secure in his property and therefore must be construed as giving the City only a fee simple determinable.

Respectfully submitted,

RIKER & RIKER,
Attorneys of Appellants.

IRVING RIKER,
Of Counsel.

NOTICE OF APPEAL AND GROUNDS
Filed December 16, 1930
ESSEX COUNTY CIRCUIT COURT

JOHN L. CARROLL and HERMAN BORNEMANN, JR., Executors and Trustees of the Last Will and Testament of Christian R. Wolters, Sr. and Mary Elizabeth Carroll, Irene Quackenbos and Celia A. Wolters, Heirs at law of Christian R. Wolters, Sr., deceased, *Plaintiffs,* *vs.* CITY OF NEWARK, *Defendant.*	*Action at Law.* *Notice of Appeal and Grounds.*

To Frederick H. Groel, Esq., Attorney for Defendant, or To Whom it May Concern:
Sir:

Please take notice that the plaintiffs in the above entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, on the following ground, to wit:

1. Because the Essex County Circuit Court erred in giving judgment to the defendant instead of the plaintiffs, in that

(a) The Essex County Circuit Court determined that the defendant in its condemnation proceedings took a fee simple absolute to the property involved in this suit.

Respectfully yours,
LINTOTT, KAHRS & YOUNG,
Attorneys of Plaintiffs.

JUDGMENT RECORD
ESSEX COUNTY CIRCUIT COURT

JOHN L. CARROLL and HERMAN BORNEMANN, JR., Executors and Trustees of the Last Will and Testament of Christian R. Wolters, Sr. and Mary Elizabeth Carroll, Irene Quackenbos and Celia A. Wolters, Heirs at law of Christian R. Wolters, Sr., deceased, *Plaintiffs,* *vs.* CITY OF NEWARK, *Defendant.*	*Action at Law.* *Judgment Record.*

City of Newark, the defendant in this cause, was summoned to answer unto John L. Carroll and Herman Bornemann, Jr., Executors and Trustees of the Last Will and Testament of Christian R. Wolters, Sr. and Mary Elizabeth Caroll, Irene Quackenbos and Celia A. Wolters, Heirs at Law of Christian R. Wolters, Sr., deceased, the plaintiffs therein, in an action at law upon the following complaint:

Summons issued June 7, 1928.

COMPLAINT

Filed June 7, 1928

Plaintiffs, John L. Carroll and Herman Bornemann, Jr., Executors and Trustees of the Last Will and Testament of Christian R. Wolters, Sr., of the City of Newark, Essex County, New Jersey, and Mary Elizabeth Carroll of said City of Newark, Essex County, New Jersey, Irene Quackenbos and Celia A. Wolters of the City and State of New York, heirs at law of Christian R. Wolters, Sr., deceased, demand of City of Newark, the defendant herein, the possession of a tract of land, with the appurtenances, situated in the City of Newark, Essex County, New Jersey, and described as follows:

> BEGINNING on the North side of Commerce Street at the Westerly corner of a lot conveyed by Joseph C. Hornblower and wife to Frederick H. Smith by deed dated on or about October 31, 1832, which corner or place of beginning is 89 feet distant from the Westerly corner of the dwelling house now or late of Uzal Tuttle, and from thence (1) along the North side of Commerce St. towards Broad Street 30 feet; thence (2) towards the Morris Canal on a line parallel with the West side of a line of the lot so as aforesaid conveyed to Frederick H. Smith 62 feet to a brick wall erected by the City of Newark on the South side of their Market ground; thence (3) along the said brick wall 30 feet to the Westerly line of said lot so as aforesaid conveyed to said Frederick H. Smith and thence (4) along the said Westerly line of said lot to Commerce Street and place of BEGINNING.

and also the sum of ONE HUNDRED THOUSAND ($100,000) DOLLARS for mesne profits and damages, and the plaintiffs further say that their right to the possession of the same accrued on the 13th day of April, 1926, and that the defendant wrongfully deprives them of the possession thereof to their damage, ONE HUNDRED FIFTY THOUSAND ($150,000) DOLLARS

LINTOTT, KAHRS & YOUNG,
Attorneys of Plaintiffs.

AFFIDAVIT OF SERVICE

Filed July 18, 1928

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

DANIEL DEMAREST, JR., of full age, being duly sworn according to law on his oath deposes and says that he served the Summons and Complaint of John L. Carroll and Herman Bornemann, Jr., Executors and Trustees of the Last Will and Testament of Christian R. Wolters, Sr., and Mary Elizabeth Carroll, Irene Quackenbos and Celia A. Wolters, Heirs at Law of Christian R. Wolters, Sr., deceased, *v.* the City of Newark June 8, 1928, personally upon William J. Egan, Clerk of the City of Newark, within named defendant, at his principal place of business, City Hall, Newark, N. J.

Deponent further says that he was appointed special deputy on June 8, 1928, by Conrad Deuchler, Sheriff of Essex County, to serve the above named Summons and Complaint.

D. DEMAREST, JR.

Sworn to and subscribed before
me this 17th day of July, 1928.

STANLEY W. KEOUGH,
Notary Public of N. J.
My Comm. Expires June 1, 1932.

ANSWER

Filed July 12, 1928

Defendant says that:

1. It denies the truth of the matters contained in the complaint.

JEROME T. CONGLETON,
Attorney for the Defendant.

DEMAND FOR BILL OF PARTICULARS

Filed March 13, 1930

Please take notice that the defendant demands a bill of particulars of the plaintiff's claim or title to the premises mentioned and set out in the said plaintiff's complaint.

JEROME T. CONGLETON,
Attorney of Defendant.

Dated: June 11, 1928.
To LINTOTT, KAHRS & YOUNG,
Attorneys of Plaintiffs.

BILL OF PARTICULARS

Filed March 15, 1930

The following is a bill of particulars of the claim or title of the plaintiffs to the premises mentioned in the plaintiffs' declaration and the same being a reference to such documentary evidence in title as the said plaintiffs intend to give in evidence on the trial of the above stated cause, viz:

1. Deed dated June 25, 1870, made and executed by Thomas O. Connor and wife to Christian R. Wolters, Sr., for a valuable consideration and recorded in the office of the Register of Essex County, New Jersey, June 30, 1870, in Book X 14 of Deeds for said County, page 473, etc.

2. Proceedings in Essex Circuit Court entitled "In the matter of the condemnation of lands of Christian Wolters for Market Purposes in the City of Newark" instituted by the Mayor and Common Council of the City of Newark, by virtue of an act of the Legislature of the State of New Jersey, entitled, "An act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in cities of this State, and other places in which market facilities are or may be required for public use, and to provide therefore," passed April 22d, 1886, requiring for market purposes the property described in the Bill of Complaint, resulting in a judgment recorded in the Office of the Clerk of said Essex County in Book 32 of the minutes of the Essex Circuit Court, page 299, whereby and whereunder said Mayor and Common Council of the City of Newark took possession of the tract of land mentioned in plaintiffs' declaration and used the same for market purposes.

3. That the corporate title of said municipality was changed from the "Mayor and Common Coun-

cil of the City of Newark" to "City of Newark" by proper corporate resolution during the year 1917 under and by virtue of an act of the Legislature of New Jersey entitled "An Act concerning municipalities," P. L. 1917, page 319.

4. Said Christian R. Wolters, Sr., died December 15, 1917, a resident of said City of Newark, leaving a last will and testament which was duly probated in the office of the Surrogate of said Essex County in Book U 5 of Wills, page 91, a true copy of same being hereto annexed and made part hereof; said Christian R. Wolters, Jr., died January 8, 1921, and Norton A. Wolters died March 16, 1928, and said John L. Carroll and Herman Bornemann, Jr., have duly qualified as executors and trustees under said will and are now acting as such.

5. That on or about April 13, 1926, said City of Newark abandoned the property described in the complaint herein for the use for which it was condemned, and the effect of such occurrence was the reversion of said land to plaintiffs herein.

Dated: June 28th, 1928.

LINTOTT, KAHRS & YOUNG,
Attorneys of Plaintiffs.

To

JEROME T. CONGLETON, ESQ.,
Attorney of City of Newark.

EXCERPTS FROM THE LAST WILL AND TESTAMENT OF CHRISTIAN R. WOLTERS

Secondly. I do hereby nominate, constitute and appoint my son, Christian R. Wolters, Junior, and my son-in-law, John L. Carroll, both of the City of Newark, Executors of and trustees under this my last will and testament. In case either of the said executors should fail to qualify as such, within two months after my decease, or in the even of the death, disability or discharge of either of them, I nominate and appoint my son, Norton A. Wolters, executor and trustee in the place and stead of the one not qualifying or acting. And in case of the death, failure to qualify, or discharge of two of the three above mentioned, I nominate and appoint my son-in-law, Herman Borneman, Junior, such executor and trustee; the said Norton A. Wolters and Herman Bornemann, Junior, if they or either of them succeed to the offices of Executor and trustee to assume all the duties and be vested with all the powers and authority herein given my two executors first named: It is my desire that there shall be two executors and trustees of my estate until the same be distributed, if any two of the four herein mentioned shall so long survive me. I further direct that none of my said executors or trustees shall be obliged to give any bond or security for the performance of his duties.

Thirdly. I do hereby authorize and empower my executors and trustees and the survivor of them, in their discretion to lease or to grant, bargain, sell and convey any and all of my real estate to any person, persons or corporation, in fee or otherwise, at public or private sale and upon such terms as to them may seem best; and to make, execute and de-

liver to the lessees or purchasers of the same good and sufficient leases or deeds therefor, subject, however, to the life estates in the premises No. 18 Central Avenue, in the said City of Newark, New Jersey, hereinafter devised by me; and also to sell and exchange any of my personal property not herein specifically bequeathed, but no act of my said executors and trustees shall be binding on my estate while two are acting as such executors and trustees, unless both of them join in such act.

Seventhly. I give, devise and bequeath all the rest, residue and remainder of my estate and property, real and personal to my said executors and trustees and the survivor of them to have and to hold the same, in trust nevertheless, for the uses and purposes following, viz:

1. Semi-annually on the fifteenth day of April and October of each and every year, to distribute the net income of my estate in five equal shares or portions among my five children, namely: Mary Elizabeth Carroll, Irene Quackenbos, Celia A. Wolters, Christian R. Wolters, Junior, and Norton A. Wolters, provided that if any of said five children, above mentioned, should die before me, leaving no lawful issue, then it is my will that the said income during the continuance of the said trust shall be divided equally among my surviving children. If any of my said five children should die before me, leaving lawful issue however, the child or children of such deceased one or ones, excepting in the case of my son Norton A. Wolters, shall receive the parent's share of such income per stirpes and not per capita. If the said Norton A. Wolters shall predecease me, his share shall go to my surviving children and their issue as aforesaid. In case of the death of any of my said five children now living,

after my decease, before the expiration of the period hereinafter prescribed for distribution of principal (that is ten years after the next income payment day following my decease) the income aforesaid is to be equally divided among my surviving children, if the deceased one or ones leave no lawful issue; or in case of lawful issue surviving any of the said deceased children, except said Norton A. Wolters, the share of income of such deceased ones shall go to his, her or their lawful issue per stirpes, as aforesaid. But if the said Norton A. Wolters shall die before such time for distribution, leaving issue, his share of said income shall go to my said four other children and issue of any of them deceased as aforesaid.

11. At the expiration of ten years following the next income payment day after my death, if the said Christian R. Wolters, Junior, or Celia A. Wolters be then living, I order and direct my said Trustees to set apart from my estate a fund or portion thereof, the income whereof will be sufficient in their judgment to pay the expenses and charges about my mousoleum and about the premises No. 18 Central Avenue, above directed to be paid, and out of the income of such fund to continue to pay all expenses and charges aforesaid as above directed; and upon the death of the survivor of my two children last mentioned, and the said time for distribution having arrived, to distribute the said fund as herein directed as to the remainder of my estate.

111. At the expiration of ten years following the next income payment day after my death I order and direct that the rest, residue and remainder of my estate shall be distributed equally among my said five children, namely: Mary Elizabeth Carroll, Irene Quackenbos, Celia A. Wolters, Christian R.

Wolters, Junior, and Norton A. Wolters, or the survivors of them and the lawful issue of any then deceased, such issue to take the parent's share per stirpes and not per capita: Provided, however, that if my son, Norton A. Wolters, be then deceased, the share which would be his, if living, shall go to my surviving children and the issue of the deceased ones, other than Norton's issue, in the manner and proportions herein directed as to the income.

Lastly. I do hereby authorize and empower my said executors and trustees, in their discretion, to continue to hold such personal securities as I may own at my death, inasmuch as they have been carefully selected by me and in my judgment are perfectly safe.

STATEMENT OF RIGHT IN CONTROVERSY AND AGREED STATEMENT OF FACTS

Filed March 6, 1930

It Is Agreed Between the Parties Hereto, by their respective attorneys, that the following shall constitute a statement of the right in controversy and agreed statement of facts, and that the said cause of action be submitted to the Honorable William A. Smith, Judge of the Essex County Circuit Court, who shall hear and determine the case, and that judgment of the Court shall be entered upon his findings.

STATEMENT OF RIGHT IN CONTROVERSY

The plaintiffs, as executors and trustees under the last will and testament of Christian R. Wolters, Sr., deceased, and the heirs at law of Christian R. Wolters, Sr. deceased, claim to be the owners in fee simple of the lands and premises hereinafter described, and entitled to the possession thereof. The defendant, The City of Newark, claims to be the owner in fee simple of said premises by reason of the condemnation proceedings hereinafter referred to, and to be entitled to use said premises for market purposes or for any other public purpose.

AGREED STATEMENT OF FACTS

1. Christian R. Wolters, Sr., acquired title from Thomas O. Connor and Catherine Connor, his wife, to premises then known as No. 29 Commerce Street, Newark, Essex County, New Jersey, by Warranty Deed, Dated June 25, 1870, and recorded in the office of the Register of Essex County in Book X 14 of Deeds, page 473, and which premises are marked "D" on map which is attached hereto and

made a part hereof, and more particularly described as follows:

> Beginning on the north side of Commerce Street at the westerly corner of a lot conveyed by Joseph C. Hornblower and wife to Frederick H. Smith by deed dated on or about October 31, 1832, which corner or place of beginning is 89 feet distant from the westerly corner of the dwelling house now or late of Uzal Tuttle, and from thence (1) along the north side of Commerce Street towards Broad Street thirty feet; thence (2) towards the Morris Canal on a line parallel with the west side a line of the lot so as aforesaid conveyed to Frederick H. Smith 62 feet to a brick wall erected by the City of Newark on the south side of their market ground; thence (3) along the said brick wall 30 feet to the westerly line of said lot so as aforesaid conveyed to said Frederick H. Smith and thence (4) along the said westerly line of said lot to Commerce Street and place of Beginning.

2. In the year 1886, the Legislature of the State of New Jersey passed an act known as:

> "An Act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in the cities of this State and other places in which market facilities are or may be required for public use, and to provide therefor," passed April 26, 1886, General Public Laws, 1886, page 268.

3. Pursuant to the provisions of said act, the Common Council of the City of Newark on September 2, 1887, appointed Commissioners to pur-

chase or condemn said lands, and entered into negotions with Christian R. Wolters, Sr., the owner of said premises, for the purchase thereof, but failed to agree with him as to the price to be paid to him for said lands. On April 14, 1888, a petition for the appointment of condemnation commissioners was filed in the Circuit Court of the County of Essex, and on May 5, 1888, notice was given to the said Christian R. Wolters that on May 16, 1888, the City would apply for an order appointing condemnation commissioners in accordance with said petition. Thereafter the said Christian R. Wolters, Sr., appeared at the hearing of said condemnation commissioners and presented evidence as to the value thereof, and on October 5, 1888, the commissioners appointed by the Essex Circuit Court filed their report, by which report there was awarded to the said Christian R. Wolters the sum of Twenty Thousand ($20,000.00) Dollars for the premises herein described.

4. Thereafter the said Christian R. Wolters appealed to the Essex County Circuit Court from the aforesaid award of the Commissioners, and after the hearing thereon before the said Circuit Court, the said Circuit Court made an award to said Christian R. Wolters of the sum of Twenty-five Thousand Four Hundred Sixty-six Dollars ($25,466.00), which was greater than the award of the commissioners by the sum of Five thousand four hundred sixty-six dollars ($5,466.00). On June 7, 1889, the City of Newark paid to the said Christian R. Wolters and the said Christian R. Wolters received, the entire amount awarded to him by the Circuit Court of the County of Essex.

5. The corporate title of said municipality, by proper legislation, was changed from "The Mayor

and Common Council of the City of Newark" to "The City of Newark."

6. The City of Newark received no deed for said premises from Christian R. Wolters, or his heirs, but acquired its title to the same by the aforesaid condemnation proceedings (plaintiffs do not hereby admit that the City of Newark acquired title in fee simple, or any other title) and entered into and upon the above described premises and used the same, together with the adjoining premises, for market purposes.

7. In or about the month of February, 1925, or shortly thereafter, the City of Newark opened a new market place on premises to the east of Mulberry Street, and disconnected from the premises in question, which new market place is a permanent structure built on lands acquired by the City of Newark for that purpose, is of the same character as the market that was conducted upon the premises in question, and is now and has ever since about February, 1925, been conducted as such market.

8. The old market place as conducted prior to February, 1925, comprised property as shown on map hereto annexed marked A, B, C, D and F, and the adjacent public streets Mulberry, Commerce and South Canal Streets, which were used for market purposes in connection therewith on the market days. All the buildings and structures comprising the old market buildings on the old market place were completely demolished and the old market place has not been used for market purposes since about February, 1925. Subsequently to the establishment of the new market place the City of Newark entered into a lease for fifty years with the Lefcourt Company embracing property marked B on the map hereto annexed. The property in ques-

tion in this suit is marked D and the properties marked A and C are involved in similar suits. The Lefcourt Company is now erecting on the westerly property marked B a modern steel and brick office building of about thirty-five stories in height.

9. On or about March 21, 1924 the City of Newark adopted an ordinance entitled "An Ordinance to provide for the opening of Commerce Court from Commerce Street to South Canal Street," which ordinance provided that Commerce Court, from Commerce Street to South Canal Street, shall be opened as a public street or highway, and that the premises described in Paragraph 1 are included within said Commerce Court, a copy of which ordinance is attached hereto and made part hereof.

10. The Commissioners of Assessments for Local Improvements of the City of Newark made no award to the plaintiffs for damages and benefits caused by the taking of said lands under the said ordinance, alleging in their report that "ownership of the property in question is found to be in the City of Newark," and certified and reported the same to the Circuit Court of the County of Essex. Judge Mountain, to whom the said report was referred, has taken no action to confirm the said report or to return the same for revision, pending the determination of the question of title in this proceeding.

11. Christian R. Wolters, Sr. died on or about December 15, 1917, leaving a last will and testament which was duly admitted to probate by the Surrogate of Essex County and recorded in Book U 5 of Wills, page 91, of which a true copy is hereto annexed, and Christian R. Wolters, Jr. and John L. Carroll were duly appointed executors thereunder and qualified as such; said Christian R. Wolters, Jr., one of said executors, died January 8,

1921; said Norton A. Wolters, named in said will of Christian R. Wolters, Sr. to act as executor and trustee in the place of one of the aforesaid executors not qualifying or acting, was granted letters testamentary on January 14, 1921, by the Surrogate of Essex County; said Norton A. Wolters died at Newark in said County of Essex, March 16, 1928; Herman Bornemann, Jr., one of the parties plaintiff in this cause of action, named in said will of Christian R. Wolters, Sr. to succeed as executor and trustee in the place of one of the aforesaid executors not qualifying or acting, was granted letters testamentary in March, 1928, and duly qualified as such in the place of said Norton A. Wolters, so deceased.

12. Said Mary Elizabeth Carroll, one of the daughters of Christian R. Wolters, Sr., and named as one of the beneficiaries in his last will and testament, died intestate July 24, 1928, leaving as her heirs at law and next of kin her husband, said John L. Carroll, and four children, Norman F. Carroll, Ruth E. Carroll, Janet C. Merrall and Romayne C. Dempsey, all of said children being over the age of twenty-one years.

13. In view of the death of said Mary Elizabeth Carroll it is agreed that said John L. Carroll and four children, Norman F. Carroll, Ruth E. Carroll, Janet C. Merrall and Romayne C. Dempsey, be made additional parties plaintiff in the above cause of action, they being her only heirs at law and next of kin and an order to that effect may be entered.

14. Said Christian R. Wolters, Jr. died January 8, 1921, without ever having been married and leaving no children.

15. Said Cecelia Wolters, one of the daughters of Christian R. Wolters, Sr. and named as one of the beneficiaries in his last will and testament, died on November 1, 1928, leaving a last will and testament

which was duly admitted to probate by the Surrogate of Essex County and recorded in Book K 8 of Wills, page 67, of which a true copy is hereto annexed, and John L. Carroll and W. Gordon Holbrook were duly appointed executors thereunder and qualified as such, and the said Norman F. Carroll, Ruth E. Carroll, Janet C. Merrall, Romayne C. Dempsey, and Dorothy Norton Bornemann, Herman Bornemann, 3rd and Frances Wolters are entitled, under said will, to the residue of the estate of said Cecelia Wolters.

16. In view of the death of Cecelia Wolters, it is agreed that said Dorothy Norton Bornemann, Herman Bornemann, 3rd and Frances Wolters be made additional parties plaintiff in the above cause of action, they being, with the children of said Mary Elizabeth Carroll, entitled under said will to the residue of the Estate of said Cecelia Wolters.

17. The defendant has no knowledge of the facts stated in Paragraphs 1, 11, 12, 13, 14, 15 and 16 and therefore neither admits nor denies the same, except that it admits such facts for the purpose of the determination of the issues in this suit.

LINTOTT, KAHRS & YOUNG,
Attorneys for Plaintiff.

FRANK A. BOETTNER,
Attorney for Defendant.

EXCERPTS FROM THE LAST WILL AND TESTAMENT OF CECELIA WOLTERS

Sixth. All the rest, residue and remainder of my property I hereby direct my executors, hereinafter named, to divide into such a number of equal parts, or shares, as shall be equal to the number of my nieces and nephews who shall survive me, and of my nieces and nephews who shall have predeceased me leaving any lineal descendant or lineal descendants who shall survive me, and one of such equal parts, or shares, I give, devise and bequeath to each niece and nephew of mine who shall survive me; and one of such equal parts or shares, I give, devise and bequeath to the lineal descendant, or lineal descendants, of each one of my nieces or nephews who shall have predeceased me, leaving such lineal descendant, or lineal descendants, me surviving, share and share alike, per stirpes and not per capita.

Eighth. (a) I appoint my brother-in-law, John L. Carroll, and my friend and secretary, W. Gordon Holbrook, executor and trustees of my will, and if the said John L. Carroll shall die, resign or become incapacitated, either before or after my decease, I appoint my nephew, Norman Carroll, executor and trustee in his place; furthermore, if said Norman Carroll should outlive his father but then should die, resign or become incapacitated, either before or after my decease, I appoint the National Newark and Essex Banking Company of Newark, N. J. in his place, to act jointly with said W. Gordon Holbrook; if said W. Gordon Holbrook shall die, resign or become incapacitated, either before or after my decease, I appoint the said National Newark and Essex Banking Company of Newark, N. J., executor and trustee in his place, to act jointly with either said John L. Carroll or Norman Carroll.

(d) The power to sell any stocks, bonds, securities or property of any nature which they, in their discretion, shall think wise, necessary or expedient.

(f) I hereby give to the executors of this, my will, full power and authority, in their discretion, to sell at public, or private sale, at such times, and in such manner, and upon such terms and conditions, as they shall deem expedient, any and all of my real and personal estate, or to lease, or to rent for such periods, and upon such terms and conditions as they shall deem expedient, any and all of my real estate, wheresoever the same may be situated, and to execute and deliver any and all deeds, leases, or other instruments necessary, or proper, for the accomplishment of such purposes.

CITY OF NEWARK

Certified Copy of an Ordinance adopted by the

BOARD OF COMMISSIONERS

WILLIAM J. EGAN
City Clerk
Newark, N. J.

8728-D

An Ordinance to provide for the opening of Commerce Court from Commerce Street to South Canal Street.

The Board of Commissioners of the City of Newark, do ordain:

Section 1. That Commerce Court from Commerce Street to South Canal Street shall be opened as a public street or highway, as follows:

Beginning at a point in the northerly line of Commerce Street distant westerly 413 feet more or less from the northwesterly corner of Mulberry Street and Commerce Street and which beginning point is in the easterly line of land conveyed to Christian R. Wolters by deed recorded in Book X-14 of Deeds, page 473, in the office of the Register of Deeds of Essex County; thence running northeasterly along said easterly line and the easterly line of land conveyed to Peter Lindsley by deed recorded in Book M-3 of Deeds pages 314-315 in the office of the Register of Deeds of Essex County, 115 feet more or less to the southerly line of South Canal Street; thence westerly along the southerly line of South Canal Street 30 feet to the westerly line of Lindsley aforesaid; thence southwesterly along said westerly line of Lindsley and the westerly line of above mentioned Wolters 115 feet more or less to the northerly line of Commerce Street, thence east-

erly along the northerly line of Commerce Street 30 feet to the place of beginning.

All as shown on a map prepared under the direction of this Board, which map is hereto attached and made a part hereof and a copy of which map also is on file in the office of the Chief Engineer, Division of Surveys, Department of Streets and Public Improvements, known and designated as No. 1231-0 dated January 3rd, 1924.

Under and by virtue of the provisions of an act entitled, "An Act Concerning Municipalities," approved March 27, 1917 (P. L. 1917-319) and the supplements thereto and amendments thereof.

Section 2. That said improvement shall be undertaken as a local improvement and the cost thereof shall be assessed against the property peculiarly benefitted by said improvement in proportion to the benefits received, and in no case shall any assessment for said improvement exceed in amount such peculiar benefit, under and by virtue of the provisions of the act above referred to.

Section 3. That the sum of $500.00 is hereby appropriated to pay the cost of said improvement, and for the purpose of meeting said appropriation and temporarily financing said improvement, temporary bonds or notes shall be issued from time to time in an amount not to exceed $500.00 under and by virtue of the provisions of an act entitled, "An Act to Authorize and regulate the issuance of bonds and other obligations and the incurring of indebtedness by county, city, borough, village, town, township or any municipality governed by an improvement commission" approved March 22, 1916 (P. L. 1916-525) and the supplements thereto and amendments thereof, which bonds or notes shall bear interest at a rate not to exceed six per centum per

annum. All other matters in respect to such temporary bonds or notes shall be determined by the Director of Revenue and Finance, who is hereby authorized to execute and issue said bonds or notes.

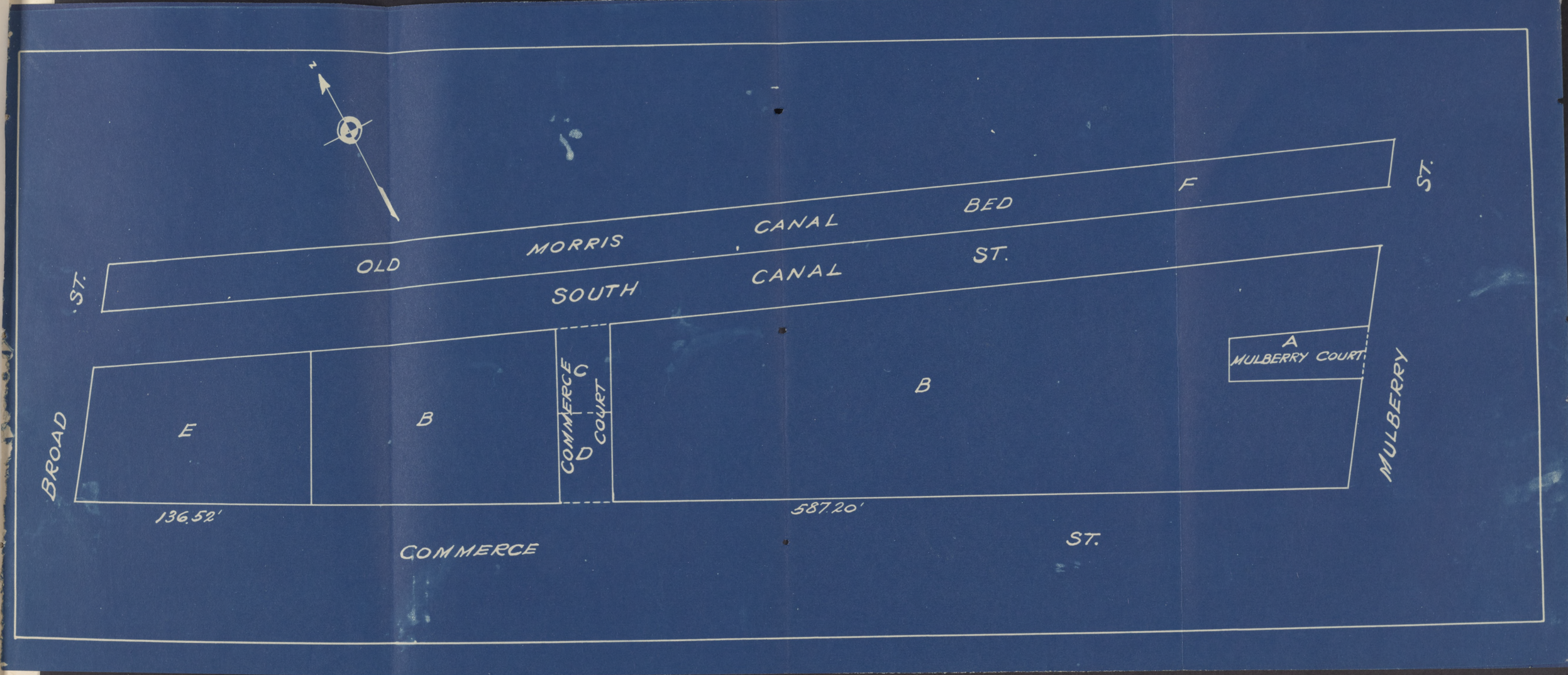
Section 4. That this ordinance shall take effect immediately and all ordinances or parts of ordinanes inconsistent with the provisions of this ordinance, be and the same hereby are repealed.

JOHN HOWE,
W. J. BRENNAN,
F. C. BREIDENBACH,
The Board of Commissioners of the City of Newark, N. J.

I hereby certify that the foregoing is a true copy of an ordinance adopted by the Board of Commissioners of the City of Newark at a meeting held March 25, 1924.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal (SEAL) of the City Newark, this eighth day of November, A. D. 1928.

(Signed) W. J. EGAN,
City Clerk of Newark, N. J.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MULBERRY
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COMMERCE
ST.

State of Case
page 25
Carroll v. City of Newark

70 MAY.T.1931

DECISION

Action in ejectment. Heard by the Court without a jury on an agreed statement of facts.
SMITH, *J.*

These are actions of ejectment brought to recover possession of land from the City of Newark which was formerly used as part of the City Market.

The city's title was acquired by condemnation under an act authorizing the purchase and condemnation of land and the erection of buildings for markets, passed April 26, 1886, P. L. 1886, p. 268.

1 Comp. Stat. 866. The plaintiffs are the successors in title to those from whom the land was taken by condemnation. No deeds were delivered upon the payment of the award. The city demolished the market and has laid out a public street over the property taken by condemnation, and it is the contention of the plaintiffs that only an easement was taken under the condemnation proceedings, and therefore under the principal of abandonment of use of an easement, the title to the property condemned reverts to the successors in title of those from whom the property was taken by condemnation. It is the contention of the defendant that the title acquired by the condemnation pursuant to the statute was a fee simple title and that there can be no reversion upon the change of use of the property.

The determination of the question is purely one of construction of the statute under which the condemnation was had. That the legislature may authorize the taking of a fee when condemning for public use, cannot be disputed. Therefore, as I have

said, the question is one of construction of the statute.

While it may be true that the construction of statutes authorizing the taking of private property for public use should be strictly construed as against the taking power, this is merely a rule of construction where a doubt is presented as to how the statute should be construed. The particular statute in question contemplates the paying of the full value of the land, and the use for which it is taken is a use which preempts the entire use of the property as against the party from whom it is taken. The words of the statute contemplate, it seems to me, the taking of a fee.

The taking of private property for street use or for rights of way of various kinds, implies that in so far as the owner does not interfere with such rights taken, he may use the property. But certainly there could be no implication that where property was taken to erect a building on it for a market, there could be withheld any user by the person from whom the property was taken.

The reference in the statute that the property may be taken for the specific use designated, is a limitation upon the power of the municipality to condemn. In other words, if the city attempted to condemn under the statute in question for the purpose of using the property for some other municipal use, it would be a good ground to defeat the proposed condemnation. But the city once having condemned a fee for one public use, it cannot be claimed that it should not be used for another public use.

The city having taken a fee to the property condemned, the plaintiffs have no interest therein, and there must therefore be a judgment in favor of the defendant.

My construction of the statute does away with the necessity for deciding the question of the abandonment of the use for the purposes for which the property was condemned. The City having taken proceedings to lay out a public street over this particular property, the plaintiffs would not be entitled to possession of the land as against the municipal proceedings to take the property for street purposes. If it is desirable that I find as a fact the question of whether or not the use for which the property was condemned was abandoned, I will find as a fact from the agreed statement of facts that the use of the property for market purposes has been abandoned; the fact that the City has already passed an ordinance laying out a street over the property in question would be an abandonment.

WILLIAM A. SMITH,
Judge.

October 9, 1930.

* * *

In Ejectment

JUDGMENT

The summons in this cause having been returned duly served with a complaint attached and with the statutory notice to file an answer therein within the time required by law; and defendant having filed an answer within the time limited by law for that purpose; and the finding being a matter of law, title to the fee being in the defendant, and the facts as stated in the agreed state of facts upon which the cause was submitted; and judgment having been rendered in favor of the defendant;

It is, on this 19th day of November, 1930, on motion of Frederick H. Groel, Attorney of Defendant,

Ordered, that judgment final be entered in favor of the defendant and against the plaintiff for possession of the lands described in said complaint; and,

It Is Further Ordered, that defendant recover of plaintiff the costs of this suit to be taxed.

WILLIAM A. SMITH,
Judge.

STIPULATION

It is hereby stipulated and agreed by and between the parties to the above entitled cause that:

1. Paragraphs 1, 4, 5, 6, 8 and 9 of the last will and testament of Christian R. Wolters, contained in the Bill of Particulars, be omitted from the Judgment Record in the above entitled cause.

2. Paragraphs 1, 2, 3, 4, 5, 7, 8(b), (c), (e), (g), and 9 of the last will and testament of Cecelia Wolters, contained in the "Statement of Right in Controversy and Agreed Statement of Facts" be omitted from the Judgment Record in the above entitled cause.

3. The last will and testament of Christian R. Wolters, contained in the "Statement of Right in Controversy and Agreed Statement of Facts" be omitted from the Judgment Record in the above entitled cause.

FREDERICK H. GROEL,
Attorney for Defendant.

LINTOTT, KAHRS & YOUNG,
Attorneys for Plaintiff.

Action at Law.
In Ejectment.
Judgment Entered
November 5, 1930.
Costs $86.60.

Frederick H. Groel, Attorney for Defendant.

This action was tried before Judge William A. Smith without a jury at the Essex Circuit Court on November 5, 1930.

The Court after consideration of the agreed state of facts finds as follows: "The City having taken a fee to the property condemned, the plaintiffs have no interest therein and judgment is rendered in favor of the defendant City of Newark and against the plaintiffs John L. Carroll, Herman Bornemann, Jr., executors and trustees of the last will and testament of Christian R. Wolters, Sr., Mary Elizabeth Carroll, Irene Quackenbos, Celia A. Wolters, heirs at law of Christian R. Wolters, Sr., Deceased, for the sum of Eighty-six Dollars and Sixty Cents, costs of suit.

Judgment signed and entered November 5, 1930.

WILLIAM S. GUMMERE,
C. J.

Book 112, page 15, C C Judgments.

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

I, John H. Scott, 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 all the pleadings in the case of John L. Carroll and Herman Bornemann, Jr., Executors and Trustees of the last will and testament of Christian R. Wolters, Sr. and Mary Elizabeth Carroll, Irene Quackenbos and Celia A. Wolters, heirs at law of Christian R. Wolters, Sr., Deceased, Plaintiffs vs. City of Newark, Defendant, together with a copy of the Judgment record entered in Book 112, page 15, of Circuit Court Judgments on November 5, 1930, and the same is taken from and compared with original copies of all records and as the same now remains on the files of said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Court and County of Newark, N. J., this 12th day of January, A. D., 1931.

JOHN H. SCOTT,
(Seal) *Clerk.*

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

New Jersey Court of Errors and Appeals

JOHN L. CARROLL and HERMAN BORNEMANN, JR., Executors and Trustees of the Last Will and Testament of CHRISTIAN R. WOLTERS, SR., and MARY ELIZABETH CARROLL, IRENE QUACKENBOS and CELIA A. WOLTERS, Heirs at law of CHRISTIAN R. WOLTERS, SR., Deceased,

Plaintiffs-Appellants,

vs.

CITY OF NEWARK,

Defendant-Respondent.

Action at Law
In Ejectment.

On Appeal from Essex County Circuit Court.

BRIEF FOR APPELLANTS

FACTS

The City of Newark in 1886 condemned the property of Christian R. Wolters, located in Commerce Court, for market purposes, under an act entitled,—

> "An Act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in the cities of this State and other places in which market facilities are or may be required for public use, and to provide therefor," passed April 26, 1886, General Public Laws, 1886, page 268.

The City received no deed from the said Christian R. Wolters.

Subsequently the City abandoned said premises for market purposes and, on March 21, 1924, passed "An ordinance to provide for the opening of Commerce Court from Commerce Street to South Canal Street. Thereby opening said premises for a public street or highway—a use other than that for which said premises were condemned.

The City subsequently leased for fifty (50) years, the adjoining property on the west, upon which an office building has been constructed.

CONTENTION

The property in question having been condemned for market purposes, and the City of Newark taking an interest less than a fee simple absolute upon abandonment for market purposes, the property reverted to the former owner.

I.

Public grants are to be construed against the grantee.

Vice-Chancellor Van Fleet in *Lehigh Valley R. R. Co.* vs. *Orange Water Co.* (42 Eq. 205) in construing the charter of the Orange Water Co. to enter property before first making compensation stated the law to be,—

> "The principle is fundamental, and universally recognized that public grants are to be strictly construed. The grantee can take nothing except what his grant plainly gives. Any ambiguity in its terms will be fatal to his claim. To doubt in such a case is to deny."

Citing:

Pennsylvania R. R. Co. vs. *National Ry. Co.,* 8 C. E. Green 441.

Perrine vs. *Chesapeake & Delaware Canal Co.,* 9 How. 192.

The Charles River Bridge vs. *The Warren Bridge,* 11 Peters, 420.

II.

Statutes conferring the power of eminent domain are strictly construed.

In the case of *Mettar* vs. *Middlesex and Somerset Traction Company* (72 L. 524) the Court of Errors and Appeals in construing a statute granting the power of eminent domain in a unanimous opinion delivered by Justice Read said:—

> "The rule of construction to be applied in solving this question is entirely settled. The grant of power is to be strictly construed against the grantee."

Citing:

Vreeland vs. *Jersey City,* 25 Vroom 49.

Loucheim vs. *Hemsley,* 30 Vroom 149.

In *New Jersey Zinc & Iron Co.* vs. *Morris Canal and Banking Co.,* 17 Stewart Equity 398, Vice-Chancellor Van Fleet said,

> "Such grants like all public grants are to be strictly construed. The grantee takes nothing except what is plainly given either in express terms, or by necessary and unavoidable implication. *What is not plainly given is to be understood as withheld.* Any ambiguity in the terms of his grant will be fatal to his claim. To doubt in such a case is to deny."

To quote from 20 Corpus Juris, p. 1222,

> "Since the statutes conferring the power of eminent domain are in derogation of the common right and therefore must be strictly construed, the provisions thereof with respect to the extent of the interest or right which may be taken are also to be strictly construed."

III.

Applying the Doctrine of Strict Construction, the City of Newark took but an easement in the property condemned.

In the *National Docks Railway Co.* vs. *United New Jersey Railroad Co.* (52 Equity 366) Vice-Cancellor Van Fleet, reiterating his opinion expressed in *New Jersey Zinc and Iron Co.* vs. *Morris Canal* (*supra*), said:

> "On general principles of justice, I think it is clear that a grant acquired by a railroad corporation by the exercise of the power of eminent domain should not be enlarged or extended by inference or implication. With respect to such grants, the rule of construction should be held to be, that *whatever is not granted by express words must be understood to have been withheld.*"

In *New Jersey Zinc and Iron Co.* vs. *Morris Canal and Banking Co.*, 17 Stewart Equity, at 404 (affirmed 2 Dickinson Ch. Rep. 598) Vice-Chancellor Van Fleet said:

> "Where the State invests a corporation with the sovereign prerogative of eminent domain, for the purpose of enabling them to construct, and operate a public highway, and they take land by force of their charter, or by any other

> means than by grant, for the purposes of such highway, it is manifest, that the plain purpose of the grant to them is not to give them capacity or invest them with power to take a fee, but merely to give them power to acquire such an easement in the land as will enable them fully to accomplish the purposes for which they were created, the plain design of the grant, in such a case, is to enable them to acquire what they require for the construction and successful operation of their highway, but nothing more. The title to the land taken remains in such cases, in the owner, subject only to such servitude as the corporation has power to impose, and their power in this respect is limited, as a general rule, to such use of the land as may be reasonably necessary for a right of way."

And in *Pennsylvania Railroad Co.* vs. *Breckenridge,* 31 Vroom 583, Justice Adams in delivering a unanimous opinion of the Court of Errors and Appeals said,

> "The public grant will be interpreted strictly and construed to give merely the power to take an easement adequate to the accomplishment of the corporate design."

Although, as pointed out by Chief Justice Gummere in *Currie* vs. *New York Transit Co.* (68 Equity 313) the above opinions are obiter dicta, because the extent of the right acquired under the exercise of the power of eminent domain was not squarely presented, nevertheless the opinions of such eminent jurists should be given great weight.

More so, because there seems to be no holding contrary to this view in New Jersey. In *DeCamp* vs. *Hibernia Railroad Co.* (47 L. 43) it was clear

that by the condemnation proceedings the railroad was to take something more than a mere easement, as the Statute reads,

> "Proceed to view and examine the said land, and to make a just and equitable estimate or appraisement of the value of the same and an assessment of damages to be paid by the Company for such land, which report shall be made in writing, and filed in the clerk's office of the County in which the land is situate; and thereupon, and on payment or tender of the amount awarded, the said company is empowered to enter upon and take possession of the said land, for the purposes aforesaid, and the said report, and proof of payment or tender of the amount awarded, shall at all times be considered as plenary evidence of the right of the company to *have, hold, use, occupy, possess and enjoy the said land.*"

and Justice Depue said that the words of the statute were

> "technical words of conveyance, wholly inapplicable to anything else than a corporeal hereditament—land, in its legal signification."

Justice Depue said further:

> "In construing acts of the legislature granting powers of condemnation, two rules are universally recognized: first, that the company shall take that which the legislature empowers it to take, and in the state and condition prescribed by the legislature; and second, that all powers of this nature shall be strictly construed—*what is not expressly given is withheld.* The Company cannot carve out such an interest in, or incident of, property authorized

> to be taken as will suit its convenience, and condemn that. It must take what the legislature authorized it to take, and in the state and condition prescribed by the legislative will."

Chief Justice Beasley followed this case in *New York, Susquehanna and Western Railroad Co.* vs. *Trimmer* (24 Vroom 1) in reversing his own construction of the same statute (section 12 of the Railroad Act) in the case of *Taylor* vs. *New York and Long Branch Railroad Co.* (9 Vroom 28).

Justice Depue in *United States Pipe Line Co.* vs. *Delaware, Lackawanna and Western Railroad Co.* (33 Vroom 254) pointed out that the charter of the railroad expressly granted the company the right to acquire land by eminent domain in fee simple and again, as before (in the DeCamp case) the learned justice reiterated the doctrine of strict construction of a public grant, so that his decision might not meet with misconstruction.

In the late case of *Currie* vs. *New York Transit Co. and National Docks Railway Co.* (*supra*), the Court of Errors and Appeals in construing section 12 of the General Railroad Law, followed the former opinions as to the right acquired under the statute and held, as had justice Depue in the *DeCamp* vs. *Hibernia Mine Railroad Co.* (*supra*), that the railroad took more than a mere easement.

The Court through Chief Justice Gummere said:

> "The complainants' bill therefore was properly dismissed, for, as the condemnation proceedings vested in the Bergen Neck Railroad Company the whole present estate in the land, and that estate was not divested by the act of its successor in subjecting the land to the ad-

ditional and unauthorized use complained of, the complainants had no interest therein for the protection of which they were entitled to invoke aid of a court of equity."

And further that,

"It needs no argument to show that the interest acquired in land by virtue of proceedings taken under one statute is as widely different from that acquired from proceedings taken under the other, as would be the case were the interest obtained by deed or grant from the land owner instead of by the exercise of the power of eminent domain."

It is to be noted that in *McEwan* vs. *Pennsylvania Railroad Co.,* 72 N. J. L. at page 420. The Supreme Court in discussing the interest that may be taken under a statute of eminent domain and the trend of the decisions of the Courts of this State, and particularly the decision of the Court of Errors and Appeals in the case of *Currie* vs. *New York Transit Company,* said:

"The claim thus made by the prosecutor renders the reference in the statute under rights and easements practically meaningless, for it has never been questioned that under the power to condemn land all outstanding interest in the land could be taken. Lewis Eminent Domain at Paragraph 285. It also contravenes the principles underlying the many decisions in which the Courts have held that even under a general power of condemnation corporations were authorized to take only such rights as were necessary. That principle was not wholly abrogated by the judgment in the case of Currie *vs.* New York Transit Company, 21 Dickerson Ch. Rep. 315, but was merely limited so far

> as to give effect to the will of the Legislature clearly expressed in the statute delegating the power. If the statute be ambiguous, it should still be construed in accordance with that principle. The import of this statute is, we think, that when the purposes of the company can be accomplished by acquiring rights and easements less than the fee of the land, the extent to which it may condemn the title of the general owner is correspondingly limited."

This contention is substantiated by the subsequent decision of *Paterson* vs. *Kearney* (84 N. J. L. 456 aff. 87 N. J. L. 327) or otherwise the Court of Errors and Appeals must be considered to have taken an opposite view to that which it took in the Currie case. In the Paterson case a statute identical to the one in the Currie case was under construction. The Court held the condemnor did not take a fee simple absolute under that statute when it said:

> "There is no charge of bad faith on the part of the defendant, and we see no reason to doubt that the real object of the proceedings is to secure a supply of water for the town. If that is not the real object *or the water is diverted to some other use not authorized,* the right acquired will be at an end, just as land reverts to the prior owner when the use for which it is condemned is abandoned."

That this is the great weight of authority is shown in 20 Corpus Juris at 1223.

> "Where the interest to be taken is not expressly stated, the condemnor is presumed to take no greater interest than an easement where an easement is sufficient to satisfy the purposes of the taking."

It is said in 10 American and English Encyclopaedia of Law (2nd Edition) page 1068:

> "It is within the province of the legislature to determine the estate or extent of interest that may be taken, whether an estate for years, for life, a mere easement, a fee absolute or conditional. And where it has prescribed the interest to be taken, no other interest can be taken than that specified. The Courts enforce a strict construction and where the quantity and interest to be taken are not definitely set forth by the legislature only such an estate or interest and quantity may be taken as are necessary to answer the purpose in view" (cases cited).

Neitzel vs. *Spokane International Railway Company,* 117 Pac. 864.

The Railroad had condemned property of the plaintiffs and had placed it to uses other than for which it was condemned. The Supreme Court of Washington explained the power of eminent domain and its being peculiar to a sovereign power and said further:

> "When a legislature delegates to any subordinate agency, such as a municipal or a public service corporation, the right and authority to exercise the power of eminent domain, it ordinarily defines the estate or interest to be appropriated having power to authorize the taking of a complete fee-simple title, a qualified fee, or an easement only. When it has prescribed by statute the extent of interest to be vested, none further can be taken. *Courts, in construing statutes, which grant the power and authorize the taking of a certain estate or interest, enforce the rule of strict construction,*

permitting no greater title or interest to vest than has been expressly authorized or may be necessary to the contemplated public use. When an easement will be sufficient, no intendment or rule of liberal construction will be indulged to support an attempt to obtain any greater interest or estate."

The Court commented on the fact that there is now an act in force in Washington that vested a fee title in a city or town, when property was condemned.

In *Newton* vs. *Manufacturers Railway Co.* (116 Fed. 781), Justice Day in delivering the opinion of the Circuit Court of Appeals in the Sixth Circuit as to interest acquired under condemnation proceedings of property for park purposes said:

"The question before us is one of statute construction in Ohio, wherein the decisions of the highest court of that State are of controlling authority. *As we understand them, where the statute does not undertake to authorize the appropriation of the fee the estate is limited to an easement for the purposes intended."*

The Court then supported its interpretation of the Ohio decisions by excerpts from them.

In *McCambe* vs. *Stewart,* 40 Ohio State, 647, the case involved title to lands in which the right was appropriated to overflow the same by means of a dam. In speaking of the extent of the estate acquired, the Supreme Court through Judge Dickman, said:

"But whether the property taken is paid for in money or in accruing benefits and advantages it should clearly appear by the terms of

> the act that *it was the legislative intent to take a fee before such an intent can be given it. In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied, as in the case at bar, with the taking of an easement.*"

The Court then cited *Voight* vs. *Railroad Co.*, 58 Ohio State 123, 50 N. E. 442, the act permitting condemnation for canal purposes and provided that

> "a complete title to the premises to the extent and for the purposes set forth in and contemplated by this act shall thereby be vested and forever remain in said Company and their successors forever."

The Supreme Court of Ohio, holding only an easement was obtained. The syllabus reads:

> "Lands acquired for its use by a canal Company a private corporation, organized under an act of the general assembly before the adoption of the present constitution, as the Lancaster Lateral Canal Co., 24 Ohio Laws, page 71, authorizing it to acquire lands for its use by donation, grant, or appropriation, without expressing the interest or estate to be acquired thereby, revert to the owner from whom they were acquired, on the abandonment of the canal, or his successor in titles; *the general rule being, that where lands are required for public use, an easement only is taken therein, unless the taking of a greater estate, as a fee simple, is expressly authorized by law.*"

In *Quick* vs. *Taylor* (113 Indiana 569, 16 North Eastern 588), the general rule was again expressed by the Court:

> "The doctrine generally accepted is that the right acquired by the power of eminent domain extends only to an easement in the land taken, unless the statute plainly provides for the acquisition of a larger interest."

In *Neitzel* vs. *Spokane* (*supra*), the Court said:

> "Our conclusion that the fee simple will not vest in the condemning corporation in the absence of express statutory direction, and that it has not vested in respondent railway company in this action, is well sustained by authority."

The statute construed read that the decree shall vest

> "The legal title * * * in the corporation * * * for corporate purposes."

In construing the statute, the court said:

> "Under the prevailing strict rules of construction which the courts enforce when considering eminent domain statutes, we conclude the legislature, by the enactment, of this section did not intend an unqualified fee simple title should vest in the respondent railway company. It therefore took such qualified title or interest only as it needed for its corporate purposes, constituting a public use. When a public service corporation obtains property by right of eminent domain, the permanency of the right, title or easement which it obtains will, in the absence of a statute vesting an absolute fee be dependent upon continued ap-

> plication to the public use, and, should such public use, become impossible or be abandoned, the rights of the condemning corporation may be terminated and the property may be reclaimed by the owner of the fee."

In the case of *Hudson and Manhattan Railway Co.* vs. *Wendel* (193 New York 166, 85 North Eastern 1020), the court of last resort in New York, in construing the interest acquired by the condemnor, said:

> "The provisions of the rapid transit act relating to acquiring and holding property do not expressly direct that the absolute fee of real property may or shall be taken. An unqualified possession of said real property for the purposes of the corporation during the continuance of the corporate existence will answer the purposes of the act, and reading such sections of the Rapid Transit Act, with the provisions of the general railroad law that we have quoted requires the courts to hold that the real property condemned is to be held only during the continuance of the corporate existence." (Cases cited.)

The Court then held the corporation obtained merely an easement, and then said further:

> "We have not overlooked the fact that the courts frequently affirm the right of *municipalities and corporations to take the fee of real property through proceedings in condemnation but a reference to the authorities will show that they are based upon statutes expressly authorizing the taking of a fee in behalf of the state.*"

Citing:

People vs. *Fisher,* 190 New York, 408, 83 North Eastern 48.

Rexford vs. *Knight,* 11 New York 308.

Matter of City of New York, 174 New York 26, 66 North Eastern 584.

Brooklyn Park Commission vs. *Armstrong,* 45 New York 234.

Cases illustrating opinion.

See also IN Re Clinton Street Police Station Site, 123 N. Y. S. 198.

In *Lazarus* vs. *Morris* (61 Atl. 815), a school district condemned land for school purposes under an act permitting the school district "to enter upon and occupy sufficient ground for the purpose."

The Supreme Court of Pennsylvania, in affirming the lower Court's holding that the condemnor did not obtain a fee interest under the statute, expressed the general rule, as to the interest acquired under a statute of eminent domain, as illustrative of the law of the Commonwealth.

> "It therefore becomes necessary for any corporation, public or private, or individual claiming thereunder, asserting title under the power of eminent domain, to point to the provisions of the Act of Assembly under which the power is asserted. The grantee takes what the act gives, and no more. If the act gives an absolute estate, and compensation is provided on this basis, the whole title may be acquired. If it only gives the right to use and occupy, the grantee only takes a conditional fee or easement, terminable on the abandonment of the use for which the land was appropriated.

The *appropriation of land under the power of eminent domain does not give a fee-simple estate therein, in the absence of express statute language to that effect, but only a right to use and occupy the land for the purpose for which it is taken.*"

Citing:

Pittsburgh, etc., R. R. Co. vs. *Bruce,* 102 Pa. 23.
Lances Appeal, 56 Pa. 16, 93 Am. Dec. 772.
Pa. Schuylkill Valley R. R. Co. vs. *Paper Mills,* 149 Pa. 18, 24 Atl. 205.

SUMMATION OF SECTION III.

The City of Newark under the Statute of 1886 entitled "An act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in the cities of this state and other places in which market facilities are or may be required for public use, and to provide therefor," obtained merely an easement and not an absolute fee-simple title, as that which is not expressly granted is deemed to be reserved. That is the uniform holding in New Jersey.

It is to be noted that:

Taylor vs. *New York and Long Branch Railroad Co.* (*supra*).
DeCamp vs. *Hibernia Mine Railroad Co.* (*supra*).
New York, Susquehanna and Western Railroad Co. vs. *Trimmer* (*supra*).
Currie vs. *New York Transit Co., etc.* (*supra*),

were cases which involved condemnation proceedings under Section 12 of the General Railroad Law.

In *Pennsylvania Railroad* vs. *Breckenridge* (P. L. 1835 p. 28) involving the construction of another statute, the Act expressly granted a fee-simple title, as distinguished from a base fee.

The general rule clearly supports the contention of the plaintiff.

IV.

The Court determining the City of Newark being vested in fee, and acquiring not merely an easement, it is a conditional or base fee.

In the case of *Slingerland* vs. *Newark* (54 N. J. Law 62) the Supreme Court had before it for review proceedings to condemn lands "for the purpose of laying down and constructing and maintaining a pipe line or lines" in pursuance of the Act of March 17, 1891 (P. L. 172) entitled "An Act to empower cities to acquire land for public use by condemnation." Under the marginal heading of "Title to pass to City," the act reads as follows:

> "* * * and thereupon, and on payment or tender of payment of the amount so awarded to the party or parties entitled thereto, the said City is hereby empowered to enter upon and take possession of the said land; *and all title thereto* for the purpose for which the same is taken shall upon such payment or tender *pass from the said owners and parties interested to the said City.*"

Paragraph 5 of the Statute under construction reads:

> "* * * and immediately upon the payment to said owner or owners of the amount of the said valuation, or in case he or they will not

> or cannot receive the same, upon deposit of the same in such bank or institution as the said court or judge may direct, the title to and the right of possession of such property shall immediately become vested in such city or place."

The Defendant may assert that the words "for the purpose for which the same is taken" contained in the Statute under construction in the Slingerland case, distinguishes the Slingerland case from the instant case. The plaintiffs strongly contend this cannot be so.

First, because in the late case of *Currie* vs. *New York Transit Co. and National Docks Railway Co.* (*supra*), the Court of Errors and Appeals said:

> "It is contended that, because the right of the company to enter and take possession of the land, after payment of the award, is given by the statute *'for the purposes aforesaid'* the land owner still retains such an interest in the land as will enable him to restrain an unauthorized use of it by the company. *But the words quoted do not operate to restrict the quantity of the interest which passes to the company by virtue of the condemnation proceeding,* or to reserve to the land owner any rights in the lands taken. They merely limit the uses to which the lands may be put."

Second, because Paragraph 6 of the Statute under construction provides,—

> "That all titles taken for the purposes mentioned in this act, shall be in the name of the city or place in which the lands are purchased, and the buildings erected, by virtue of the provisions of this act."

Words tantamount to those used in the Statute in the Slingerland case.

Third, because Sec. VII, paragraph 4, of the New Jersey Constitution provides,—

> "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

The title to the Act under construction reads,—

> "An act to authorize the purchase and condemnation of land and the erection of buildings for market purposes in the cities of this state and other places in which market facilities are or may be required for public use, and to provide therefor."

Consequently, the title to the Act embracing one object, namely the condemnation of land for market purposes, it of necessity allows the taking of property for market purposes alone.

The late case of *Wentz* vs. *Philadelphia* (151 Atl. 887), the Pennsylvania Supreme Court clearly sets forth this rule:

> "Thus limited, the ordinance does not violate the requirements of article 16, pp. 6 of the Act of June 25, 1919, P. L. 581, 603 (Pa. St. 1920, pp. 3069), which requires that in cities of the first class no ordinance 'shall be passed containing more than one subject, which shall be clearly expressed in its title.' The wording of the ordinance of May 29, 1929, expressly limits its scope to the acquisition and use of property for airport purposes, and does not set forth an intention to use the

land acquired for general railroad and marine shipping business. If it was the purpose of the city to conduct such an operation, the title might be well questioned, but it can be construed only as permitting such operations as are incidental to the proper operation of the airport."

That the above doctrine is that of this State is apparent from the Court's opinion in the Slingerland case and it is readily apparent that the largest interest the condemnor took was a conditional or base fee.

> "The object of the condemnation is, and its effect will be, to vest the land in the city to be used for its water supply. *For this purpose, and for this only, does the statute transfer the title* to the city and authorize it to enter upon and take possession of the land."

The Prosecutor contended in *Slingerland* vs. *Newark* that it being uncertain that his land would be used for public purpose, the proceedings are improper, as the City might determine not to accept the water works from the company with which it had contracted. The Court said:

> "But the same uncertainty attends almost every condemnation; after the taking something may occur to prevent the actual user. The common effect of such an occurrence is that the land reverts to the prior owner. *Such would be the consequence here.* The water company acquires no title whatever, *and the City acquires title for the specified use only, on the failure of which the right of the former owner would come into play.* It can afford the prosecutor no ground of complaint that his rights may so soon revive."

And, further,—

> "It is not incumbent upon the city to give any particular technical name to the right which it asks to condemn, and it has not done so. It has, in its petition, clearly set forth the purpose for which it designs to take the land of the prosecutor, and the statute declares that for such purpose the title to the land shall pass from the owners and parties interested to the city. By these means the rights condemned are sufficiently ascertained. Any attempt by the city further to define them would be as likely to obscure as to elucidate the matter, and could have no useful end."

The Court of Errors and Appeals followed *Slingerland* vs. *Newark* (*supra*) in the late case of *Paterson* vs. *Kearny* (84 N. J. Law 456, affirmed 87 N. J. Law 327). There property was condemned under an act of May 1, 1911, which allowed the town to enlarge its water supply. The act states that the property shall be taken pursuant to an act of 1900 page 875 "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use." Section 7 of the latter act reads, as to the extent of the right acquired, as does Section 12 of the General Railroad Law, under which *Currie* vs. *New York Transit Co.* (*supra*) and the cases cited in connection with it were decided.

Apparently, therefore, *Paterson* vs. *Kearny* follows, and yet goes a step further than *Currie* vs. *New York Transit Co.* (unless it be considered the Currie case grants a fee simple absolute, which would clearly indicate a different view is now held by the Court of Errors and Appeals) in construing the language of a similar statute in holding,—

> "There is no charge of bad faith on the part of the defendant, and we see no reason to doubt that the real object of the proceedings is to secure a supply of water for the town. If that is not the real object *or the water is diverted to some other use not authorized,* the right acquired will be at an end, just as land reverts to the prior owner when the use for which it is condemned is abandoned."

Citing: *Slingerland* vs. *Newark* (*supra*).

The defendant may contend that the word "title" in the statute under construction indicates the legislative intent that the condemnor is to take a fee interest.

The law is well settled to the contrary.

In the case of *Campfield* vs. *Johnson* (21 L., at 85) in construing a statute setting forth the jurisdiction of the Court for the trial of small causes, Chief Justice Green said:

> "The statute, both in limiting the jurisdiction of the Justice, and in prescribing the mode of proceeding, uses simply the phrase 'title to real estate.' It draws no distinction between freehold and leasehold estate, but uses the term in its broadest and most unlimited sense.
>
> " 'Title,' says Sir Edward Coke, 'is when a man hath lawful cause of entry into lands whereof another is seized. It signifies the means whereby a man comes to his lands or tenements.' 'The word title includes the right, but is the more general word.' Title is generally applied to signify the right to land and real effects. It is the right of possession or of property in lands, as distinguished from the actual possession, and it is precisely in this

> sense that the word appears to have been used in the statute now under consideration. The right to try actions concerning real estate, involving the mere fact of possession, is vested in the court for the trial of small causes. But the statute excludes from its jurisdiction all cases where either in the support of the action, or in the maintenance of the defence, any right or title is involved other than the naked fact of possession."

Then, too, in *Slingerland* vs. *Newark* (*supra*), the statute reads "and all title thereto" yet the Supreme Court expressly stated that should the City at any future period use the property for other than the specified use the right of the former property owner to the property would again exist.

Likewise, in the case *In re* Clinton Street Police Station Site (*supra*) the statute under construction states:

> "The title to all such real estate of interest therein shall be taken to and in the corporate names of the cities of New York and Brooklyn as joint tenants."

Yet the New York Supreme Court specifically held that the City did not take a fee simple title to the property condemned.

The words "value of land" or "valuation" in the statute are no indication that the fee was intended, as in "Randolph on Eminent Domain" we find this statement, p. 234, pp. 252.

> "The market value of property is usually the basis of assessment."

And that is so whether the condemnation contemplates the taking of the fee or the subjecting of the property to an easement.

See *Montclair R. R. Co.* vs. *Benson, et al.*, 36 L. 557.

Manda Inc. vs. *D. L. & W. R. R. Co.*, 89 L. at 329.

Acquackanonk Water Co. vs. *Weidmann & Co.*, 99 L. 175.

SUMMATION OF SECTION IV

The decisions of the Courts of this State are uniform in holding that unless an absolute fee-simple title is expressly granted in the statute of condemnation, the utmost the condemning corporation can obtain is a conditional, base or determinable fee. Counsel for the plaintiffs respectfully submit that there is no holding to the contrary in this State.

V

The use for which the property was condemned being abandoned, the property reverts to the former owner.

In *Slingerland* vs. *Newark* (*supra*) the doctrine of reversion is clearly set forth.

> "After the taking something may occur to prevent the actual user. *The common effect of such an occurrence is that the land reverts to the prior owner.*"

And, further,

> " * * * and the city acquires titles for the specified use only, on the failure of which the rights of the former owner would come into play."

In *Slingerland* vs. *Newark,* the Court took for illustrative purposes a situation where the condemnor is prevented from using the property for the purposes contemplated by the statute and stated the land would then revert to the prior owner. In the instant case, a far stronger case for the application of the doctrine, the City of Newark by its own volition determined arbitrarily to place the property to a use other than that for which it was condemned.

That the law is well settled and in entire uniformity cannot be questioned is shown by the opinion of Justice Swayze, following *Slingerland* vs. *Newark* (*supra*) in *Paterson* vs. *Kearny* (*supra*):

> "There is no charge of bad faith on the part of the defendant, and we see no reason to doubt that the real object of the proceedings is to secure a supply of water for the town. If that is not the real object, *or if the water is diverted to some other use not authorized, the right acquired will be at an end, just as land reverts to the prior owner when the use for which it is condemned is abandoned.*"

In 92 North Eastern 352, the Illinois Supreme Court stated there was no distinction between cases, first, where there was a user and a subsequent abandonment, and second, where there was no user but only an abandonment. The condemnor here only acquired the property for use as a reservoir, and the Court said further:

> "Property condemned for public use cannot be devoted by the condemnor to any other use than that for which it was taken. Where its use for that purpose becomes impossible, the effect is the same as an abandonment and there is a reverter to the owner of the fee."

VI

To allow the City of Newark to retain the property upon abandonment of the use for which the property was condemned, would be to abrogate the doctrine of a uniform line of decisions of the Courts of this State.

These cases hold that statutes granting the power of eminent domain must be strictly construed and the condemnor is rigidly restricted to the exercise of that power for the purposes designated and none other.

Among the cases so holding are:

Ballantine vs. *Kearny* (52 N. J. L. 338).

Cheney vs. *Atlantic City Water Works* (55 L. 235).

Slingerland vs. *Newark* (*supra*).

Metlar vs. *Middlesex & Somerset Traction Co.* (*supra*).

Paterson vs. *Kearny* (*supra*).

Frelinghuysen vs. *State Highway Commission* (152 Atl. R. 79).

To concur in the contention of the City of Newark would be to allow a municipal or other corporation invested with the prerogative power of eminent domain, to condemn property for the purpose designated in the Act, and immediately thereafter to place the property to another use unrelated to that purpose for which the property was condemned.

The danger involved in sustaining such a contention would be to encourage the condemnation of property for a use other than that authorized, and

to do so, to quote Chief Justice Gummere in *Paterson* vs. *West Orange Water Co.* (87 N. J. L. 538, at 540):

> "Under color of these proceedings, for any other purpose, would be not only a fraud upon the state, but would subject the company to liability to make compensation for the injury resulting from its wrong-doing."

CONCLUSION

The conclusion of the appellants is that the City of Newark took but an easement or at most a base, conditional or determinable fee title, and upon the abandonment of the use for which it was condemned, the property reverted to the plaintiffs herein.

Wherefore it is respectfully submitted that the judgment must be reversed.

(Italics and underscoring is ours.)

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