New Jersey Court of Errors and Appeals

DOROTHY REUTLER, *Plaintiff-Respondent,* *vs.* EUGENIA RAMSIN, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF FOR APPELLANT

SYNOPSIS

Statement of Cause of Action

The action was brought by respondent to recover back a deposit of two thousand dollars ($2,000.00), paid on account of the purchase price provided for in a contract to convey appellant's farm, on an attempted recision of the contract by respondent, she having refused to take the deed offered (1) because of a prior grant by appellant of a right to erect and maintain a telephone and telegraph line along the highway adjoining the farm and (2) because the back deeds for the property excepted a school house lot.

POINTS FOR APPELLANT

I

The respondent should have been non-suited because her proof showed that when suit was instituted, the time for performance had been extended and she had given no notice of a recision.

II

The description in the contract did not embrace the street over which the telephone grant had been given, and the legal presumption, arising from the intention of the parties is that the contract called for a conveyance of the title to the street just as the title was when the contract was made.

III

(a) The contract does not call for the conveyance of the excepted lot.

(b) The excepted lot was not shown to be within the boundaries of the farm contracted to be conveyed and the burden was on the respondent to show that.

(c) The appellant and her predecessors have been in possession of the farm contracted to be conveyed for more than seventy years and an irrebuttable presumption of a grant to her of the whole farm arises from such possession.

Facts

On April 15th, 1911, the appellant entered into a contract with the respondent to convey to her a farm in Linden Township, New Jersey, consisting of about 47¾ acres for the price of four hundred and fifty dollars ($450.00) per acre, the farm to be measured and the acreage shown by a survey to be made; the price to be calculated on the acreage so shown.

The respondent paid two thousand dollars ($2,000.00) on account.

The date for closing title was postponed from time to time until April 17th, 1912, and at that time appellant was ready to deliver a deed for the premises, but respondent refused to accept the same and pay the balance of the purchase price.

Negotiations were then continued while efforts were being made to dispose of certain objections which respondent raised to the title.

By agreement between the parties, on July 11th, 1912, a suit was begun in the Court of Chancery, by the respondent, for specific performance of the contract and to quiet the title, and the appellant and the Township of Linden and the Linden School District were made defendants. The Township of Linden filed a disclaimer and the ~~respondent~~ appellant was given an indefinite time to answer. No further steps were taken in this suit until September 27th, 1915, when the respondent dismissed the bill of complaint, and three days later, October 1st, 1915, she filed her complaint in this cause. No demand was made on the appellant that she perform the contract, nor was any notice of a recision or an intention to rescind given by the plaintiff.

This action was brought to recover back the deposit money ($2,000.00), the respondent claiming that she is entitled to it because the appellant had failed to perform her contract.

No proof was offered by the defendant of a forfeiture by the plaintiff, nor was that point urged in the brief of the defendant, and that defense and the counterclaim of the defendant must, therefore, be considered to have been abandoned.

The Court did not consider that point but treated the proof as showing that the defendant could not convey and that, therefore, a tender was not necessary.

ARGUMENT

I

The respondent should have been non-suited because her proof showed that at the time suit was instituted the time for performance had been extended and she had given no notice of a recision.

It is contended on behalf of the appellant that the proofs disclose a failure of proof on the respondent's part, of material allegations in her complaint, *i. e.,* that the

> "Defendant has refused and still refuses and has failed to deliver any deed of conveyance for said property in accordance with the terms of said contract, and she still refuses so to do" (State of Case, p. 3, par. 4).

and that, therefore, judgment should have been against the plaintiff.

The proofs are that the time for performance was extended to April 17th, 1912, and at that time defendant was ready to deliver a deed and accept the mortgage called for in the agreement, and plaintiff refused to take the title. (See agreed state of facts, Case, p. 18, ll. 19-25.)

Then by agreement between the parties the Chancery suit was instituted to quiet the title and to compel the defendant to convey (Case, p. 18, ll.

29 to 40, see also, prayer of chancery bill, Case, p. 25, ll. 30 to 40, and p. 26, ll. 1 to 12).

There was, by this bill, an insistment by the plaintiff that the contract was binding on both parties and that she intended to carry it out, and an implication that the means taken to clear up the points in question were sufficient for the purpose. This position was maintained by the plaintiff until September 27th, 1915, when she discontinued the Chancery suit without warning or notice of her change of mind, and attempted to rescind the contract without giving notice, by bringing this action (Case, p. 19, ll. 1 to 14).

The effect of these negotiations and proceedings up to the date of this action was to extend the time for performance on both sides, and neither could rescind without reasonable notice to the other.

The case of *McTague* vs. *Sea Isle City Bldg. Assn.*, 57 N. J. L., 427, decided by this Court, is exactly in point. The law is there stated as follows, see page 429:

> "The conduct of both parties down to the time this suit was brought showed that in the mind of each the original undertaking was in force. The repeated demands of the plaintiff for his deeds under the special contract with the association were repeated affirmations of the existence of such a contract; at no time did he give to these demands any character or force inconsistent with the original scheme under which he had parted with his money. Inasmuch as no notice of an intention to rescind was given, the form and effect of such notices are not up for present consideration. The case must rest upon the actual conduct of the parties prior to suit brought, concerning which it is sufficient to say that it is consistent alone with the notion that, in the contempla-

> tion of each, the other was bound by the rules that made up the original agreement between them. In such a state of the proofs, the plaintiff could not elect to treat the special contract as rescinded and sue on the common counts for the money he had paid under it."

In our case, the defendant had tendered a deed, as early as April 17th, 1912, but she had never refused to take steps to make a satisfactory disposal of the objection made by the plaintiff to her title. She acquiesced in the bringing of the Chancery suit. It was done by mutual agreement, but done by the plaintiff, and the defendant had a right to suppose that the means taken were satisfactory to the plaintiff and sufficient. No demand was ever made on her to do any thing other than was being done (Case, p. 18, l. 20 to p. 19, l. 24).

Notice of an intention to rescind is necessary before suit.

> *Lyons* vs. *Wait,* 51 N. J. Eq., 60 (p. 68).
> *Bayard* vs. *Holmes,* 33 N. J. Law, 119.
> *McTague* vs. *Sea Isle City Bldg. Assn.* (57 N. J. Law, 427), 1894.
> Garrison, *J.* (for Court of E. & A.), p. 428.
> *Nissel* vs. *Shimley,* 76 N. J. L., 288.
> No notice was given.

What the defenses were, does not affect this point, because this goes to the weakness of the plaintiff's case alone.

The trial judge overruled this point on the ground, that, in view of the defendant's answer, the plaintiff was not obliged to make a tender. That we think is not the main question. The contract was in full force and effect and so recognized by both parties to it, up to the day this suit was brought, and the fact that the defendant sets up matters in defense of her title, does not excuse the

plaintiff from proving the facts set out in her complaint and which are necessary to sustain the cause of action. Paragraphs 3 and 4 of the complaint (Case, p. 3) are denied by the answer (Case, p. 9) and there is no proof for the plaintiff of any material allegation set forth in those paragraphs.

The first, second, third and fourth defenses (Case, pp. 9 to 11) set forth that the plaintiff failed to perform and that the money paid was forfeited. The first is an allegation of fact, the last a conclusion of law. The allegation of fact was not sustained by the proof, nor was the conclusion of law urged by the defendant, either as a defense or as a counterclaim.

Th rule referred to in *Koch* vs. *Wassman,* 75 Eq., 109, has no application to the present case. There was no admission in this case by the defendant of the plaintiff's material allegations, nor by the plaintiff of defendant's allegations, but both were denied.

AS TO THE OBJECTIONS MADE TO APPELLANT'S TITLE

The plaintiff seeks to maintain her right to rescind and recover back the deposit paid, not by showing an actual failure to perform by the defendant, but by attempting to show that the defendant was unable to deliver a warranty deed free from all encumbrances.

1st. Because of a grant, by a prior owner, of a lot of land for the purpose of erecting a school house thereon for the accommodation of the neighborhood; 2nd, because a grant, made August 23rd, 1900, by the defendant to the North Jersey Telephone and Telegraph Company, permitted the construction and maintenance of a telephone and telegraph line along defendant's land. See Case, p. 33, ll. 21 to 25, and p. 34, ll. 10 to 23.

The defendant now contends, without prejudice to her right to dispose of these matters in some other way, if given a reasonable opportunity to do so, that the findings of the trial court that the matters mentioned were encumbrances and gave the purchaser the right to refuse to take the deed (Case, p. 67, ll. 23 to 26 and p. 69, ll. 11 to 13) were erroneous.

II

The Description in the Contract did not embrace the street *over* which the Telephone Grant had been given, and the presumption, arising from the intention of the parties is that the Contract called for a Conveyance of the Title to the Street, just as the title was when the contract was made.

One objection to the title urged below by the plaintiff was that the defendant having granted a right to a telephone company to erect and maintain a telephone and telegraph line along the highway adoining her property and to trim trees, could not carry out her contract to convey clear of encumbrances (Case, p. 34, ll. 18 to 23, and p. 40, ll. 18 to 31). And the Court below held that this telephone grant was an encumbrance, the existence of which gave the purchaser the right to refuse the deed (Case, p. 67, ll. 23 to 26), although the defendant argued below that the telephone grant did not prevent the defendant from performing the contract (Case, p. 53, ll. 23 to 30).

The ground on which the Court below rested was that when the contract was made, with no mention of the telephone grant, the purchaser had the right to assume that he would get all the land to the middle of the street, not part of it (Case, p. 67, ll. 18 to 22).

We submit that there is no authority in the law

or in the facts of this case for that conclusion, and that it was erroneous.

The contract called for a conveyance of a farm, * * * located on the road from Rahway to Elizabeth, * * * as stated in deed made to party of the first part. There was no deed to the party of the first part, she having become seized of it by devise from her husband, but in the deed to her husband the property is described as lying on the northerly side of the road leading from Rahway to Tremley's Point * * * and bounded southerly by the highway aforesaid (Case, p. 14, ll. 35 to 40 and p. 15, l. 18 to p. 16, l. 9).

There is no other reference to the road.

The contract does not by its terms call for the conveyance of the land in the street.

The plaintiff and the Court below rest their contention and finding on the legal presumption that where the land is described as binding on a public street, the title of the land to the center line of the street will (in the absence of words excluding the street) be held to pass to the purchaser.

This rule was established by the case of *Salter* vs. *Jonas*, 10 Vr., 469, the law being uncertain on this point before that time. See *Anthony etc.*, vs. *West Jersey R. R. Co.*, 57 N. J. Eq., 607 (614).

The rule so adopted was based on "the practice and general understanding" more than on authority.

On page 472 (*Salter* vs. *Jonas*), the Court says:

> "And it is the very general notion that these two parcels of property" (the lot and the contiguous street) "are inseparably united, and pass as a whole by force of an ordinary conveyance, that accounts for the absence of any settled formula in general use for the description of city lots in a transfer of their title. Upon an examination of such conveyance it

would, I am satisfied, be disclosed that the utmost laxity prevails in this respect. The property conveyed is indiscriminately described as going to the street and running along it, or as going to one side of such street and thence running along such side. Such discriminations are not intentional, the purpose being to convey all the interest the seller has in the property and in its belongings and the mode of accomplishing this purpose is not the subject of attention, the street lot, as I have said, being regarded as a mere adjunct of the property sold and worthless for any other use."

And on page 473:

"The particular words should, in such transactions, be controlled and limited by the manifest intention which is unmistakably displayed *in the nature of the affair and the situation of the parties.* When the conditions of the case are altered, as if the vendor should, in a given case, have an apparent interest to reserve to himself the parcel of street in question, a different rule of interpretation might become proper."

It becomes apparent from the above quotation that this is a rule of construction based on the intention of the parties as such intention can be deduced from the nature of the affair and the situation of the parties, and is not at all an invariable rule of law transferring the title in every case.

In *Ayres* vs. *Penn. R. R. Co.,* 48 N. J. L., 44 (Supreme Court) it was held that the conveyance of a lot bounded by a public street carried the title to the land in the street to the center line, subject to the public easement and subject to the burden of the use of a portion as a railroad right of way. The Court said (p. 48):

"Under Salter *vs.* Jonas the presumption re-

> quires the deed to be construed as passing the title to the center of the street subject to the public easement, and I can perceive no reason why a similar construction is not required when the public easement is burdened by the possible devotion of a portion to railroad uses."

In *Ocean City Hotel Co.* vs. *Sooy,* 77 N. J. L., 531, this Court said (p. 531):

> "The ordinary rule in such a case is that established by Salter *vs.* Jonas, 10 Vroom, 469, but that rule is a rule of construction only. Chief Justice Beasley was careful to say: 'The particular words should, in such transactions, be controlled and limited by the manifest intention which is unmistakably displayed in the nature of the affair and the situation of the parties.' "

And on page 530:

> "It is obvious that the mere fact that a street is referred to as a boundary and is delineated upon a map indicates nothing as to the title to the land covered by the street."

The same interpretation of the rule is found in the Equity cases. In *National Dock Ry. Co.* vs. *United New Jersey R. R. Co.,* 52 N. J. Eq., 366 *V. C.* Van Fleet said (p. 377):

> "And it is upon the ground of the presumed intention of the parties, *and upon this ground alone,* that the doctrine rests that the delineatory words of a deed may be extended by construction so as to make the deed convey more land than they describe."

See also *Commissioners* vs. *Johnson,* 36 N. J. Eq., 211, and *Humphries* vs. *Eastlack,* 36 N. J. Eq., 136.

In these cases it was held that the land in the street would not be presumed to be included in the

deed unless the grantor owned the land in the street.

All these cases concerned the construction of deeds and we are unable to find any case in which the same question has come before the Court in the construction of a contract to convey, but it is fair to assume from the similarity of the circumstances and effects that the same rule of construction will be applied by the Court.

The intention of the parties is the controlling factor.

The nature of the affair and the situation of the parties must be considered in determining the intention of the parties.

We maintain that there is nothing in the case to indicate that the defendant intended to convey more than she owned in the street and in the absence of any showing to the contrary it must be presumed she intended to convey the land in the street just as it was, that is, subject to the grant which she, herself, had previously given to the Telephone Company. She must have known about the grant and in the absence of any showing to the contrary cannot be presumed to have intended to convey more than she had.

III

AS TO THE SCHOOLHOUSE EXCEPTION

(A)

The Contract does not call for the Conveyance of the Excepted Lot.

It is to be observed that the contract called for the conveyance of a tract which was therein described as follows:

> "Which said tract or parcel of land to be conveyed consists of a farm with the buildings thereon, located on the road from Rahway to Elizabeth in said township and supposed to

> contain forty-seven and three-quarters (47¾) acres more or less, as stated in the deed made to the party of the first part" (Case, p. 14, ll. 35 to 40).

The only punctuation for this sentence is the comma following the word "thereon," the comma following the words "more or less," and the period at the end. It is evident that the part between the two commas is descriptive of the main portion of the sentence and that the words following the second comma refer back to the words which precede the first comma, and that the sentence if reconstructed in accordance with its meaning would read:

> Which * * * consists of a farm as stated (*i. e.,* set forth or described) in deed made to party of the first part, located on the road from Rahway to Elizabeth and supposed to contain forty-seven and three-quarters (47¾) acres.

The deed is referred to for the purpose of describing the farm and not to limit the area.

This construction of the sentence is borne out by the sentence which follows, which is:

> "But it is agreed that the exact acreage is to be ascertained by a survey of the farm to be made by Jacob L. Bauer, C. E., and the price to be paid is to be for the number of acres ascertained by said engineer from said survey, at the rate of four hundred and fifty dollars ($450.00) per acre" (Case, p. 15, ll. 1 to 7).

It appears from this that the number of acres stated in the deed are of no importance for the acreage is to be determined by survey and the price is dependent on the acreage found. They first state that the acreage is "supposed" to be 47¾ and follow with this statement as to the survey.

A further indication that the words "as stated in

the deed" refer to the word "farm" and not to the words "47¾ acres" is the fact that no description or reference to a description is set out in the contract, unless it is by the reference to the deed to the first party.

The survey was to be made, not for the purpose of determining the description, but the price. That is certain from the language used, which expressly states the purpose.

It seems, therefore, that the reasonable construction of the contract is that it calls for the conveyance of the farm as it was described in deed to grantor, for a price of four hundred and fifty dollars ($450.00) per acre, as shown by a survey to be made.

Now the deed was to the defendant's husband, she having acquired title by devise from him, and that deed describes the farm as being on the northerly side of the road and bounded westerly, northwesterly and northeasterly by the Shotwells and southerly by the highway

> "excepting thereout and thereupon a lot of land whereon a school house stood, which was heretofore given and granted by the former owner of the land for the purpose of erecting and building a school house thereon for the accommodation of the neighborhood" (Case, p. 15, l. 22 to p. 16, l. 14).

The position of the plaintiff is that defendant is bound to convey that lot which is excepted from the deed. We contend that she is not so bound and that a conveyance by the same description contained in the deed to defendant's husband will comply with the requirements of the contract. That will except the school house lot.

(B)

The excepted lot was not shown to be within the boundaries of the farm and the burden was on the respondent to show that.

The plaintiff specifically admits that defendant is in possession of all the land that she offers to convey and that she and her predecessors in title have been in possession for seventy years last past.

Plaintiff produces no proof that the school house was ever on the land mentioned in the contract, but specifically admits that it has not been on any part of the defendant's land for seventy years last past (Case, p. 12, ll. 19 to 30).

The essence of her contention is that the description in the deed through which the defendant acquired title, and which is specifically mentioned in the contract, contains an exception; that the defendant is bound to convey that exception; that she cannot because it is an exception; and that therefore the plaintiff may rescind the contract.

We submit that the burden is on the plaintiff to show that the title of the defendant is not good at law.

In *Meyer* vs. *Madreperla,* 68 N. J. L., 258, this Court said (p. 268):

> "To recover at law for a breach of such a contract it must be shown that the title tendered was not good at law. The discretionary power of a Court of Equity with respect to a title which is doubtful, though good, is not within the province of a court of law."

Under the rule in that case it was necessary for the plaintiff to show that the excepted lot was within the bounds of the property contracted to be conveyed and this she has not done.

(C)

The appellant and her predecessors have been in possession of the farm for more than seventy years and an irrebuttable presumption of a grant to the whole farm arises from such possession.

The proofs are that the defendant and her predecessors in title have been in full, uninterrupted, peaceable, notorious and undisputed possession of the whole farm for more than seventy years last past, and the last mention of the exception is in the deed to defendant's husband, given fifty years ago.

The defendant contended below, that, if this grant for a school was a private grant, the possession of the defendant was sufficient to make her title good, and that even if it were construed as a grant for a public use a presumption of a grant arises to defendant from possession (Case, p. 52, ll. 1 to 9).

The plaintiff contended that it was a dedication for a public use, and that lapse of time, however long the public user is suspended, ~~sustained~~, though coupled with a user by the owner, would not make title by prescription, against the public, and the Court below held that the words "accommodation of the neighborhood" showed a use for public purposes, that, if the grant was to the governing body, it would be public in character, that it might be a dedication which could not be defeated by adverse possession (Case, pp. 67-69).

The plaintiff below cited numerous cases which undoubtedly hold that easements of the public in a public street will not be lost by a non-user or adverse possession. The principle on which this rule rests is the ancient one that time will not run against the sovereign, which rule has been extended to cover not only the state, but subordinate municipal bodies

representing public interests. The rule is, however, not of universal application. It has its limitations at common law which are thoroughly well recognized, and which are pointed out in the case of *Brown* vs. *Trustees of Schools* (Sup. Ct. of Illinois) reported in 79 N. E. Rep., p. 579. The Court there says (p. 580):

> "The rule is founded on the maxim of the common law: *'Nullum tempus occurrit regi.'* It was supposed that the time and attention of the sovereign was occupied by the cares of government, and there could be no negligence or laches on his part. The same prerogative extends to the state, in its sovereign capacity, as to all governmental matters. As to them no delay in resorting to the remedy will bar the right, but if the state becomes a partner with individuals, or engages in business, it divests itself of its sovereign character and is subject to the statute. * * * The rule that statute of limitations do not run against the states also extended to minor municipalities created by it as local governmental agencies, in respect to governmental affairs affecting the general public. The exemption extends to counties, cities, towns and minor municipalities in all matters respecting strictly public rights as distinguished from private and local rights, but as to matters involving private rights they are subject to statutes of limitation to the same extent as individuals. * * *
>
> *The question in this case is whether there is an implied exemption from the statutes of limitation in favor of trustees of schools with respect to property held for the use of a particular school district, and that depends upon the meaning of the term 'public rights' as used in the decisions.* In one sense, all property held

by a municipal corporation is held for public use, and the public at large, or some portion of the public, have rights or interests in such property. It may be held for the use of the people of the state generally, or the use may be limited to the inhabitants of the local subdivision or municipality, such as the city, village, or school district. * * * It was held in that case (Piatt *vs.* Goodell) that *the public right and public use must be in the people of the state at large, and not in the inhabitants of a particular local district.* It was said that there is a well founded distinction between cases where the municipality is seeking to enforce a right in which the public in general have an interest in common with the people of such municipality, and cases where the public have no such interest; that the public generally had no interest in the tract of land in question in that case in common with the voters and tax payers of Piatt County; and that the county for that reason was subject to the limitation laws.

There are numerous cases where it has been held that *municipalities or minor political subdivisions of the state are not subject to limitation laws in respect to streets and public highways, but streets and highways are not for the use of the inhabitants of any municipality or locality alone, but for the free and unobstructed use of all the people of the state. Such rights are clearly distinguishable from the rights or interests of the inhabitants of a locality in property acquired for a mere local use, such as city offices, a library site, or the use of a fire department. Such property is held and used for strictly local purposes."*

In the above case the property was held as a part

of the public school system of the state, but in our case, in view of the fact that there was no public school system at the time the grant was made, prior to 1855, the most that can be said in favor of the theory of a public use is that the grant was for a limited charitable use. It was for the accommodation of the neighborhood.

In the case of *Trustees of M. E. Church* vs. *Hoboken,* 33 N. J. L., 13, the Court said, p. 18 (Supreme Court):

> "In fact it is the essence of a dedication to public uses that it shall be for the use of the public at large. There may be a dedication of lands for special uses, but it must be for the benefit of the public and not for any particular part of it. Wash on Easements, 135; Munson *vs.* Hungerford, 6 Barb., 265; Curtis *vs.* Kessler, 14 Barb., 512; Talmadge *vs.* East River Bank, 26 N. Y., 105. There may be a dedication of a way for a limited purpose, as for a foot way, but there cannot be a dedication for a limited part of the public, as to a parish. Poole *vs.* Huskinson, 11 M. & W., 827; Vestry of Bermondsly *vs. Brown,* L. R. 1 Eq. cases, 204."

It is very hard to see how it can be maintained that the original grant, or the references thereto in the deed, can have created in the state as a sovereign power, or in any political sub-division thereof, any rights, in the premises mentioned, for the use of the public of the state at large.

Section 20, p. 3170, Compiled Statutes, provides:

> "That no person or persons, bodies politic or corporate, shall be sued or impleaded by the State of New Jersey, for any lands, tenements or hereditaments, or for any rents, revenues, issues or profits thereof, but within twenty

> years after the right, title or causes of action to the same shall accrue, and not after."

This section was discussed by this Court in the case of *Jersey City* vs. *Hall,* reported in 50 Vroom, page 559, where the Court said (page 567):

> "This is an old statute passed originally in 1799 and has remained on the books without change to the present time. * * * There were at that date lands held by the state under conveyances for the purposes of government and for its public institutions; lands acquired by foreclosure, and yet others that need not now be specified, which would be appropriately affected by this statute. * * * The argument is that, if the statute can be pleaded against the state, it must follow that it may be pleaded against the city which represents the state and can assert the latter's right. We may assume, without deciding, that this position is correct."

The question in that case was whether the statute would apply to lands of the state under navigable waters.

In *Cornelius and Impson* vs. *Giberson,* 25 N. J. L. (1 Dutch), page 1, the Court said (page 29):

> "The policy of modern legislation, both in England and America has been to subject the sovereign power itself to the operation of the statute of limitations. By the law of this state the same lapse of time that bars an individual claim to lands, bars the claim of the state." Revised Statutes, 95, par. 14.

It is thus evident both from the philosophy out of which the rule grows, and from the section of the statute mentioned, and the discussion of the same by the courts, that the rule *"Nullum tempus occurrit regi"* is limited in its scope, and we know

of no case where it has been extended to cover land held for such a use as that mentioned in the exception in the deeds in the defendant's title, which is purely a local use.

On the other hand we maintain that the statute of limitations would apply to this case even if it can be said that it was in any sense a public use.

A period of possession of far less extent than exercised in this case raises a conclusive presumption of a grant. See *Lehigh Valley R. R.* vs. *McFarland,* 43 N. J. L., 605.

The Court below held that this might have been a dedication to a public use, and such a dedication would bind the owners.

But dedication is a matter of intention, *Wood* vs. *Hurd,* 434 N. J. L., 87, and arises not in a grant, but by a devotion to public uses of the land by an unequivocal act of the owner of the fee manifesting such clear intention.

Mayor of Jersey City vs. *Morris Canal Banking Company,* 12 N. J. L., 545.

Now the facts are that the references to the school house plot are, in each case, to a grant.

The first reference appears in 1805 (Case, p. 16, l. 20), where the following language is employed:

> "Excepting thereout the school house and lot heretofore *granted* for the purpose of erecting a school house for the accommodation of the neighborhood."

This language is substantially followed in every conveyance down to 1867.

The only apparent purpose of its being mentioned in the deeds is to define the property conveyed. No other intention can be imputed to the person making the conveyance in each case. He was simply granting other land than that excepted.

Nor are any other acts of the various owners shown from which an intention to dedicate may be

deduced. Now the evidence by the deeds is that the excepted property was first granted by a former owner. If there was a grant, there must have been a grantee, and the rights of the grantee must have been limited by the grant. If there was a grantee it must have been a private person for it was prior to 1805, and at that time no public body was in existence to take land for public school purposes. There were no public schools in this state at that time. Nor was the use as a school a public use.

If the plaintiff should now grant to trustees a lot for the use of the neighborhood as a place of worship we would have a situation analogous to the case in hand, taken in the aspect most favorable to the plaintiff.

That would at most have constituted a charitable use. But a charitable use is not such a public use as to prevent the operation of the statutes of limitation or the legal presumption created to dispose of claims which are unenforced.

See cases and statutes above referred to under this heading.

We have not been able to find in this state any case in which the question of whether the statute of limitations will run against a charitable use has been before the courts, but in other jurisdictions the question has come before the courts, and it is held that in the absence of some statutory provision, to the contrary, title by adverse possession, may be acquired as against a charitable or religious corporation or educational corporation.

> "Where it is provided by statute that limitations shall not extend to any lands granted to any pious or charitable use, title by adverse possession cannot be acquired to land granted to the trustees of a church for use as a place of worship. But in the absence of some statutory provision to the contrary, title by adverse pos-

session may be acquired as against a religious or charitable corporation or educational corporations, and that too although such corporations are expressly prohibited by statute from conveying their lands. And it has been held that a statute providing that limitations shall not extend to any lands granted for any pious or charitable use does not preclude the defense of adverse possession against heirs of church trustees suing in their individual right for possession of church property and not as representatives of the church or its members."

2 *Corpus Juris,* page 225, section 476, citing *Gallupville Reform Church* vs. *Schoolcraft,* 65 N. Y., 134; *Camden Orphans' Soc.* vs. *Lockhart,* 26 S. C. L., 84; *Magdalen Hospital* vs. *Knotts,* 4 App. Cas., 324, 15 Erc., 417; *St. Mary Magdalen College* vs. *Atty.-Gen.,* 6 H. L. Cas., 189, 10 reprint, 1267; *DeKalb College* vs. *Williams* (Tex. Civ. A), 143 S. W., 348, 352; *Society for Propagation of Gospel* vs. *Sharon,* 28 Vt., 603.

It is respectfully contended that the plaintiff has not shown any specific part of the land as outstanding in the public, or in a private person, and it is obvious that she cannot as a consequence of that failure, show all the land outstanding.

The plaintiff can give good title to every part of the premises covered by her contract. She has long ago tendered a deed in conformity with the contract, and we respectfully submit that the ruling of the Court below as to the telephone grant and as to the school house exception was erroneous, and that the judgment should have been for the defendant.

The facts essential to a determination of the case having been stipulated by counsel, this Court is in a position to render such judgment as should have been rendered in the trial court. In such cases the findings of the trial court are treated in this court

as a special verdict, and this court renders the same judgment that the trial court ought to have rendered.

National Bank of N. J. vs. *Burrell,* 70 N. J. L., 757.

Eatontown vs. *Monmouth County,* 78 N. J. L., 493.

Meeker vs. *East Orange,* 77 N. J. L., 623.

Respectfully submitted,

CLARK McK. WHITTEMORE,
ABRAM H. CORNISH,
Attorneys for Appellant-Defendant.

New Jersey
Court of Errors and Appeals

DOROTHY REUTLER *Plaintiff-Respondent* vs. EUGENIA RAMSIN, *Defendant-Appellant*	*Action at Law* *On Appeal from* *Supreme Court.*

SUPPLEMENTAL BRIEF OF PLAINTIFF-
Respondent
~~APPELLANT~~

STATEMENT

The letter referred to in appellant's supplemental brief (while not a part of the record) was not intended as an invitation to improperly *change* the record. As a matter of fact the appellate proceedings were facilitated by dispensing with the usual bond on appeal, and no objection was made to printing the briefs of counsel, which are ordinarily no part a record on appeal.

Since the service of the respondent's brief the appellant applied to the trial judge to amend the postea: (1) by making part thereof the agreed

state of facts as the findings of fact of the court below; (2) by making part thereof the findings of law; (3) by noting in the postea the formal exception *now* taken by the defendant to the findings of law.

The original postea was entered by the plaintiff without incorporating these matters, because they were not properly a part of the postea. No request for findings of fact or of law, or the taking of an exception to any ruling of the Court, was had or made prior to the service of the respondent's brief. When the application to *amend* the postea was made, the respondent objected because the proposed *amendment* was in effect an *addition* or *supplement* to the record and was no part of the proceedings prior to the entry of judgment.

POINTS

I

THE TRIAL COURT HAD NO POWER TO CORRECT THE RECORD BY ADDING THERETO PROCEEDINGS AFTER JUDGMENT.

The trial court may amend the record pending appeal to insert matters inadvertently omitted or to correct defects in form. Where, pending an appeal the rights of one of the parties under a judgment would be affected, by a correction which changes the actual history of the proceedings before the appeal, the Court has no jurisdiction.

See 2 Cyc. at page 976 (cited with approval) *Bull vs. International Power Co., 84 N. J. Equity 209, at page 216.*

The rule in the *Blanchard* case cited in the respondent's brief has been well established. The situation is somewhat analogous, in the *Benz* and *Kargman* cases cited in the appellant's supplemental brief. Referring to the necessity of a formal challenge of a ruling *at the trial* the learned Court in the Benz case says: —

> "The rule therefore is based on *no technical or captious grounds,* but, on the contrary, is essential to the administration of justice with due regard to private interests and the public policy against needless litigation." (See Appellant's Supplemental Brief, page 11.)

The *Blanchard* case makes it incumbent upon counsel *at the trial* to request findings of fact or of law, even with an *agreed state of facts.*

There is no authority cited by the appellant which supports the trial court in making the order creating a *supplemental record,* and a substantial right of respondent would be invaded by affirming the legality of such procedure.

The record on appeal has in no way been changed as to what actually transpired before judgment, and the points argued in the respondent's brief are applicable to the State of the Case.

Respectfully submitted,

FOSTER M. VOORHEES,
Attorney and of Counsel for Respondent.

FRANCIS A. GORDON,
On Brief.

New Jersey Court of Errors and Appeals

DOROTHY REUTLER, Plaintiff-Respondent, vs. EUGENIA RAMSIN, Defendant-Appellant.	*Action at Law* *On Appeal from* *Supreme Court.*

BRIEF FOR RESPONDENT.

STATEMENT.

This is an appeal by the defendant below from a judgment of the Supreme Court, awarding to the plaintiff Two thousand six hundred thirteen and 32/00 ($2613.32) dollars.

Plaintiff sued to recover a deposit which was paid in instalments, under a written agreement, on account of purchase price of defendant's farm.

The facts were agreed upon by counsel, and after oral argument before the Court, without a jury, briefs were submitted.

The Court filed a short memorandum of his decision rendering judgment for the plaintiff. A postea was signed January 5th, 1917 (State of Case, page 69), upon which a judgment was entered January 10th, 1917 (State of Case, page 13).

POINTS.

I.

The record on appeal presents no legal error for review.

This case was submitted to the trial court without a jury, by consent, upon facts, that were stipulated and handed up in written form to the judge. After oral argument, briefs were submitted on the questions of law, and the trial judge subsequently filed a short memorandum of his decision.

No requests to find were submitted in accordance with Rule 113 of the Supreme Court. (See Postea, State of Case, page 69. The record is barren of any formal challenge to any ruling of the court below. The case, it is submitted, is embraced in the rules enunciated in many cases by this Court.

Webster v. *Board of Chosen Freeholders of Hudson County, 86 N. J. L., 256 (1914).*

Counsel for the appellant may contend that the cause at bar having been submitted to the trial court on an agreed upon state of facts, objections could not well have been made at the trial for want of a trial, so to speak.

Even under such circumstances, this Court makes it incumbent upon counsel "*to request the court to make a finding or findings of law or fact, or law and fact, and to except or object to an adverse finding, when made, in order to lay the foundation for a review on appeal.*"

See

Blanchard v. *Beveridge, 86 N. J. Law, 561,*

and cases therein cited.

See also

Sulzberger v. *Miller, 87 N. J. L., 720.*
Edwards v. *Excelsior Works, 95 Atl., 976.*

Here no request to find was made and no exceptions were taken to any refusal to find.

No legal error is presented for review and, under the cases cited, the judgment of the Supreme Court should be affirmed.

II.

Appellant is unable to deliver a warranty deed conveying the premises free from all encumbrances in accordance with the agreement for the sale.

The respondent respectfully refers to the argument submitted to the Court below, which is printed in the State of the Case on pages 33 to 44 inclusive.

The statute of limitations referred to in the appellant's brief does not apply to this case.

Conceding for the sake of argument that in all other respects it would be applicable, there is nothing in this case to show that the cause of action barred by the statute has ever accrued. Nowhere in the record is there anything to show that the right to the public user to the lot excepted had come into existence by reason of the needs of the neighborhood.

The cases cited for the appellant in connection with the constructions of deeds and the interests conveyed do not alter the situation of the parties to the contract in this case. The rule is correctly stated by the appellant as follows:

> "The intention of the *parties* is the controlling factor.

> The nature of the affair and the situation of the *parties* must be considered in determining the intention of the *parties.*"
> (Italics ours.)

On behalf of the appellant it is now urged that her intention was to convey no more than she owned in the street.

The argument of the learned counsel goes upon the assumption that it is the intention of only one of the parties to the contract which is to govern. But there must be a meeting of the minds of both parties to the agreement.

What the respondent had the right to assume the appellant intended to give her enters into the question. She had the right to assume that appellant intended to grant to the center of the highway.

The legal presumption that a conveyance carries title to the center of the highway is established in this State in the case of

Salter v. *Jones, 39 N. J. L., 469.*

In the absence of any waiver, the respondent submits that *as one of the parties her* intention with reference to the lands purchased ~~are~~ is a vital factor for consideration.

III.

The respondent duly performed her part of the contract.

(1). No formal tender was necessary.

The respondent respectfully refers to the argument presented to the Court below which is printed in the State of the Case on pages 56 to 59, inclusive.

(2). The appellant abandoned the contract and there was no mutual extension of performance.

The respondent respectfully refers to the argument presented to the Court below, which is printed in the State of the Case on pages 59 to 62, inclusive.

IV.

The judgment appealed from should be affirmed.

Respectfully submitted,

FOSTER M. VOORHEES,
Attorney and of Counsel for Respondent.

FRANCIS A. GORDON,
On Brief.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

DOROTHY REUTLER, *Plaintiff-Respondent,* *vs.* EUGENIA RAMSIN, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

Supplemental Brief of Defendant-Appellant.

Supplemental Facts.

This case was submitted to the trial Judge on an agreed state of facts. The Court thereupon wrote an opinion in which he found for the plaintiff-respondent.

Without notice to the defendant the plaintiff then prepared and filed a postea, erroneously omitting therefrom any findings of fact.

Defendant was not present before the trial Court at that time and so could not at that time request that the findings of law be included in the postea and [illegible] except thereto. The attorney for plaintiff, however, offered in writing, before notice of appeal and notice of argument was filed, as follows: "I am anxious to have this matter disposed of at the February term and would appreciate the service of notice of appeal and notice of argument therefore. If there are any matters affecting the records that can be stipulated in order to facilitate the proceedings, I shall be pleased to assist you."

Nevertheless, the first point made by plaintiff in the brief filed in this Court is that "the record on appeal presents no legal error for review because there was no request to find and no exceptions taken to any refusal to find."

Notice was thereupon given by defendant to plaintiff of an application to be made to this Court for a stay of proceedings pending a motion in the trial Court for an amendment to the postea.

The attorney for plaintiff agreed to waive the application to this Court, and appeared before the trial Court in opposition to the motion to amend the postea.

The trial Court made an order amending the postea and certifying the said amended postea with defendant's exception to the findings of law noted thereon as part of the record of this cause. (See Supplement to State of Case.)

ARGUMENT.

I.

IF THE RECORD ON APPEAL TO THE COURT OF ERRORS AND APPEALS IS DEFECTIVE EITHER IN FORM OR IN SUBSTANCE THE APPELLANT WILL BE PERMITTED TO AMEND. IF THE DEFECT BE ONE OF FORM, THE APPELLATE COURT WILL AMEND OF ITS OWN ACCORD, BUT IF THE DEFECT BE IN SUBSTANCE, THEN THE APPELLATE COURT WILL GRANT THE APPELLANT TIME TO HAVE THE DEFECT CURED IN THE COURT BELOW.

Apgar's Adm'rs. v. *Hiler,* 24 N. J. L. 808.
D. L. & W. R. R. v. *Toffey,* 38 N. J. L. 525.

American Ins. Co. v. *Day,* 39 N. J. L. 89.
Brown v. *Warden,* 44 N. J. L. 177.
Lefferts v. *State,* 49 N. J. L. 26.
Meirs v. *Bussom,* 57 N. J. L. 383.
Traplet v. *Empire Life Ins. Co.,* 64 N. J. L. 387.
Mummer v. *Easton & Amboy R. R. Co.,* 73 N. J. L. 653 (658).
Hansen v. *De Vita,* 76 N. J. L. 331.

"The error in the judgment is an error not of form merely, but of substance, and if not amended, fatal to the validity of the judgment. It prejudices the rights of the plaintiffs in error, and renders them liable in a manner and to an extent, to which by law they are not amenable.

"Nor is it a mere clerical error in the mode of making up the record which this court can, as a matter of course, amend. The amendment must be made by the court below, upon the record there remaining, and be from thence duly returned to this court. The motion is to amend as well the verdict, as the judgment. There is nothing in this court to amend by. *The record remains in the court below. It is the practice after error brought, for the court below to amend the record in matters of substance, and to certify the record so amended to the court above.*" Apgar's Admr's *v.* Hiler (*supra*), page 809.

"If a verdict be faulty, the court in error may permit the case to stand over, even after argument, to afford an opportunity for an amendment in the court below. The amendment having been made, and diminution of the record being alleged, a certiorari will issue to bring up the record as amended,

and the case will be heard on the record as amended. Whether this course shall be pursued, is within the discretion of the court in error, upon the circumstances of the particular case. *If the defect in the record be in mere matter of form, it may be amended without the intervention of the court below.*"

D. L. & W. R. R. v. *Toffey* (*supra*, page 526).

"It does not appear, however, and it is not even alleged, that the company, by reason of this error, have lost or been deprived of any right or advantage whatever, or have been in any way prejudiced. Their defense has not been in any wise abridged or limited or affected by it, nor has their adversary had any advantage on account of it. The objection, therefore, is *purely technical.* Inasmuch as it is so, and involves no merits, the *power of amendment will be exercised.*

"The one hundred and thirty-eighth section of the practice act (Rev., 1874, p. 625, Rev., p. 869), is of highly remedial character, and should be so construed as, in its own language 'to prevent the failure of justice by reason of mistakes and objections of form.' The power of amendment thereby conferred, extends to this court, and in cases where no injury has been done to the party complaining, by or through error of mere form, it is incumbent on this court, in the interest of justice, to exercise the power."

American Life Insurance Company v. *Day* (*supra,* page 91).

"In this case the bill of exceptions, as originally signed and sealed by the Court of Quarter Sessions, stated that the three complaints already mentioned were rejected

when offered by the defense, but it failed to state, as was proper, that they were afterwards admitted and placed before the jury. The state, giving notice to the defendant of the motion, applied to the Court of Quarter Sessions to amend the bill, so as to make it embrace the matter inadvertently omitted. The amendment was made and the legality of that act was challenged by the counsel of the defendant in his argument before this court. But the denial of the right to amend a bill of exceptions does not seem to be countenanced by any rule of practice or principle of jurisprudence. If such a power does not exist, such a condition of affairs is anomalous, and does not accord with the usual course when error has been discovered in the other parts of judicial procedure. Originally, at common law, it would seem as though every step of a suit, from its commencement to its close, was alterable by the court, for it required an act of parliament, in the time of Edward I., to prevent the exercise of such power with respect to judgments that had been formally enrolled. But this statutory restriction went no further than that, and from that era to the present almost all the other proceedings in a suit at law have been amended in a most liberal manner by the English courts. The same practice has prevailed in this commonwealth, as is exemplified by a train of decisions. Thus, a faulty verdict, although accredited by a postea signed by the judge, has been always deemed amendable, and the record has been remitted to that end by a court of error. Delaware, Lackawanna and Western R. R. Co. *v.* Toffey, 9 Vroom, 525. In the

> case of Apgar's Adm'r *v.* Hiler, 4 Zab. 808, this course was taken with a judgment that had been improperly entered. There are many similar and analogous cases in our reports, to which it is unnecessary to refer."

Lefferts v. *State* (*supra,* page 28).

In *Traplet* v. *Empire Life Insurance Co.,* 64 L. 387 (1900), two suits were started against the Empire Life Insurance Company on a policy of insurance, one by an administratrix appointed in New York, and one by an administrator appointed in New Jersey. The New York suit was started first.

In the New Jersey action (which was in the Essex Circuit) a verdict was directed in favor of the plaintiff, subject to the opinion of the Supreme Court on certain questions of law reserved.

(The Court in its opinion explains the difference between a special verdict, where the law is applied by the *Nisi Prius* Judge, and where there is a right of appeal, and a special case, in which, as in a case certified, the facts are certified to the Court *en banc* and the law there applied. From the latter there is no appeal; but the Court allows the aggrieved party the right to have the special case turned into a special verdict, on application to the *Nisi Prius* Judge, so that there may be a right of appeal.) Depue, *J.,* p. 394:

> "The state of the case as presented conforms to the rules with respect to the findings of the facts, but is informal in not stating that leave was reserved to turn the special case into a special verdict. *In that respect the Judge at Nisi Prius will amend the certificate if desired.*"

II.

ALTHOUGH A CERTIORARI MAY ISSUE TO PROCURE AN AMENDMENT OF THE RECORD, THE AMENDMENT MAY BE MADE BY THE COURT BELOW WITHOUT A CERTIORARI.

Hansen v. *De Vita,* 76 N. J. L. 330.

Mellish v. *Richardson,* 1 Cl. & F. 224, cited in *Davis* v. *Township of Delaware,* 42 N. J. L. 516.

III.

EVEN AFTER WRIT OF ERROR AND REMOVAL OF THE CAUSE TO THE APPELLATE COURT, THE RECORD REMAINS IN THE COURT BELOW FOR THE PURPOSE OF AMENDMENT.

Apgar's Adm'r v. *Hiler* (*supra*).

Hansen v. *De Vita* (*supra*).

Davis v. *Township of Delaware* (*supra*).

Matheson's Admr's v. *Grant's Admr's,* 2 How. 263 (U. S. Sup. Ct.).

"If the record below is erroneous in misstating the real verdict, the proper tribunal to correct it is the Circuit Court. The record remains in the Circuit Court for this purpose. It is the practice, after error brought, for the court below to amend the record in matters of substance, and to certify the record so amended to the court above."

Hansen v. *De Vita,* (*supra,* page 332).

"The action of a court relative to any part of its records, is within the same rule. It is an act of discretion, and not of right. Each court is the guardian of its own record, and in each court subsists the sole authority to see that its proceedings are accurately

recorded. The leading case in England, upon the subject now under discussion, is probably that of Mellish *v.* Richardson, 1 Cl. & Fin. 224. In this case, a writ of error had been taken to the Court of King's Bench, from a judgment rendered in the Common Pleas. The judgment brought up was reversed. In the meantime, both the verdict and the judgment, in the Common Pleas, had been in that court amended. Afterward, the Court of King's Bench amended the transcript, in accordance with the amendment in the Common Pleas, and the Court of King's Bench then, upon the amended record, affirmed the judgment of the Common Pleas. Upon this judgment of affirmance, a writ of error was brought to the House of Lords. After argument there, Lord Tenterden said: 'This case seems to resolve itself into this question—whether it is competent for a court of error to examine the propriety of an amendment of the record in the court below, on the order for the amendment being sent up as a part of the record.' Upon the question being put, it was ruled that a court of law has authority over its own records, which it may amend even after error is brought. It was further ruled that a court of error will not inquire into the propriety of an amendment made in the court below.''

In *Matheson* v. *Grant,* 2 How. 263, the record of a verdict was amended in the Circuit Court and it was held not reviewable by writ of error.

Davis v. *Township of Delaware, supra,* p. 516.

Although a copy of the record has been filed, the Court below retains jurisdiction of the case

far enough to enable it to make such amendment to the record as it shall deem proper and to order that the amendment be duly certified; and a motion to remit for the purpose of permitting an amendment below is unnecessary.

Peterson v. *Swan,* 119 N. Y. 662, 23 N. E. 1004.

> "Nothing is more common than motions to amend the record after a writ of error has been brought; nay, after a writ of error has been argued in the court above, and sometimes even after judgment in the court of error, pending its session. Especially in cases of misjoinder of counts, which are incompatible with each other, as well as in cases where there are several counts, some of which are bad and some good, and a general verdict given for the plaintiff, such applications, when made within a reasonable time, are usually granted after error brought, and the verdict allowed to be amended so as to be entered upon the good counts, or upon the counts not incompatible with each other. * * * The practice is a most salutary one, and is in furtherance of justice, and to prevent the manifest mischiefs from mere slips of counsel at the trial, *having nothing to do with the real merits of the case.*"
>
> Mr. Justice Story in *Matheson's Admr.* v. *Grant's Admr., supra.*

IV.

THERE IS NO LIMITATION OF TIME FOR AMENDING THE RECORD.

Apgar's Admr's. v. *Hiler, supra* (in which two terms of court intervened between the return

of the writ of error into Court, and the application for the amendment).

Davis v. *Township of Delaware, supra* (in which the Court said):

> "Nor is the right to exercise this privilege limited to any stated period of time. There is no limitation which will prevent a correction where there is that conclusive evidence which satisfies the court that the amendment should be made."

In *Doe* v. *Perkins,* 3 Term. R. 749 (1790), an amendment of the postea by the *Nisi Prius* Judge was sanctioned by the King's Bench, when the amendment was made after writ of error was brought. Objection to the amendment was made on the ground that "the instant a postea is delivered into the court to which the record belongs, the Judge of *Nisi Prius* has no longer any control over it; he is then *functus officio.*

"But the Court said, there was no foundation for the objection; * * * the amendment might be made at any time."

V.

THE PLAINTIFF IS NOT PREJUDICED BY THE FACT THAT DEFENDANT DID NOT TAKE EXCEPTION TO THE FINDINGS OF LAW OF THE TRIAL COURT AT ONCE; THE MERITS OF THE CASE ARE NOT AFFECTED.

The argument contained in the first point raised by the respondent, viz.: There should have been a formal challenge to the ruling of the Court below, is, in view of the manner in which this case was presented to and determined by the trial Court, without substantial merit.

The reason for the rule requiring that formal objection be made to the rulings of the trial Court in order that a foundation for review may be made, is clearly stated by Mr. Justice Garrison in *Benz* v. *Central Railroad of New Jersey,* 82 N. J. L. 197 (198), as follows:

> "The rule therefore is based on no technical or captious grounds, but, on the contrary, is essential to the administration of justice with due regard to private interests and the public policy against needless litigation. Common sense and common fairness alike require that if counsel notices a slip in judicial language, or what he deems the commission of legal error in the *conduct of the trial,* he shall call the Judge's attention to it *at a time* and in a manner conducive to its correction *at the trial.* It is solely upon the assumption that this has been done that the right of review rests, appellate courts uniformly refusing to give to an unsuccessful litigant the benefit of a trial error that he himself could have had corrected *at the trial* for the mere asking."

It will be noted that the Court speaks of judicial error made "in the conduct of the trial." The rule requiring that specific objection be made to this judicial error so that the trial Court might have an opportunity to reconsider and modify its ruling was created to cure the growing practice of standing silent while the judicial error, in the trial Court, was being made, and then urging it for the first time in the Appellate Court. Such practice was, on the face of it, unfair to the trial Court, and the Appellate Courts adopted the practice of refusing to review any question unless it had been brought to the attention of the lower Court.

Thus, in *Webster* v. *Freeholders of Hudson,* 86 N. J. L., 256 (cited by the respondent), in which case there were eight grounds of appeal "seven of which consist of propositions of law or fact, or both, which are urged upon this Court without any intimation that they were ruled on or even presented to the Court below, still less ruled adversely and excepted to; and the eighth, which is merely that the Court gave judgment for the plaintiff when it should have given it for the defendant," Mr. Justice Parker, speaking for the Court of Errors and Appeals, said that no legal error was presented for review, and that the judgment below would therefore be affirmed.

In *Benz* v. *Central Railroad of New Jersey, supra,* as well as in *Kargman* v. *Carlo,* 85 N. J. L. 632, the upper Court refused to consider exceptions to instructions of the trial Court because no specific objection to them had been made at the trial.

There was no actual trial in the case at bar, nor was there any opportunity or occasion for the appellant to take exception to any ruling of the trial Court. In the brief submitted along with the Agreed State of Facts the appellant set out in detail the contentions upon which she relied, and moved in the brief for a non-suit (see page 45, State of the Case), and for judgment in her favor (see page 56). Only those contentions which were made in the brief, and which were presented to the trial Court, are raised in the appeal, and there is nothing urged before this Court of which the trial Court was not fully apprised.

The opinion of the Court containing the finding of the law and the Court's determination in favor of the respondent were sent by mail to the

attorney of the appellant; and to proceed in accordance with the ruling referred to by the respondent in her Point I it would have been necessary only that the appellant should enter a very formal exception to the ruling of the trial Court.

This state of facts does not present the situation contemplated by the cases which recite the rule of practice in question. Such rule should go no further than the intention for which it was created and should not be applied when the primary reason for it is not being served by its application. There was no mere "slip in judicial language" here which the appellant should have called to the Court's attention, so that the Court itself might modify it. There was, on the contrary, a written opinion setting forth in detail the determination of the trial Court.

There was no harm and no prejudice created by the appellant's not taking her exception to the findings of law of the trial Court until the said findings were incorporated in the postea.

VI.

THE POSTEA, THE IRREGULARITY OF WHICH THE PLAINTIFF IS OBJECTING TO, *WAS PREPARED AND FILED BY THE PLAINTIFF WITHOUT NOTICE TO DEFENDANT;* AND HE CANNOT NOW TAKE ADVANTAGE OF HIS OWN MISTAKE.

Rule 113 of the Supreme Court provides as follows:

> "In trials without a jury, a finding of the facts in issue, signed by the trial judge, shall be filed and entered on the record. In actions in the Supreme Court the findings shall be included in the postea. Upon re-

quest of any party, the rulings of the Court upon any point of law involved in the decision or judgment shall be stated in the findings."

The plaintiff prepared the postea and wrongfully omitted any findings of fact. The provision that the postea should contain findings of fact is mandatory; the provision regarding findings of law leaves it to the option of either party to request such findings.

It requires no citation of authority to show to the Court that the plaintiff, having without notice to the defendant prepared and filed the postea, is not now in a position to say, as she does on page 3 of her brief, that "here no request to find was made and no exceptions were taken to any refusal to find."

VII.

THE AMENDMENT OF THE RECORD IN THE COURT BELOW, AFTER WRIT OF ERROR BROUGHT, IS CONSIDERED TO BE A MATTER OF DISCRETION WHICH THE APPELLATE COURT WILL NOT REVIEW.

"It does not involve a question of power, but a question of judicial discretion. Were it the former, it would be reviewable; as it is the latter, we have no more power to review it than if it was a refusal to amend the pleadings in a cause.

"The unreviewable character of the act of the court, in amending or refusing to amend the pleadings, is well settled in this state."

Reed, *J.*, in *Davis* v. *Township of Delaware*, 42 L. 513, 516.

In *Mellish* v. *Richardson,* 1 Cl. & F. (H. of L.) 224, 6 E. R. 900, the amendment made by the Common Pleas after the case had been reviewed to the King's Bench by writ of error, consisted in amending the postea by entering the verdict for the plaintiff on the good count in the complaint, and for the defendant on the others, although the original verdict was for the plaintiff generally.

In the House of Lords, on error from the King's Bench, the question was put whether "it is competent to a Court of Error to examine the propriety of an amendment of the record made by the Court below, being a court of record, the order for the amendment being sent up as part of the record? Secondly, whether, supposing it to be competent, an amendment made by the court of record in which the action was originally brought, in the manner and under circumstances similar to those stated in the case of *Mellish* v. *Richardson,* would be lawfully made?"

Mr. Baron Bayley, p. 234:

> "Upon the first of these questions, his Majesty's Judges are of opinion, that it is not competent to a court of error to examine the propriety of an amendment of the record made by the court below, being a court of record, although the order for the amendment is sent up as part of the record. The proper object of a writ of error is to remove the final judgment of the court below, for the revision of the Superior Court, in order that such court, from the premises contained in the record of the inferior Court, may either affirm or reverse the judgment as they draw the same or a different conclusion from that which has been pronounced by the court below.

"We think, therefore, that it is not competent for the Superior Court to examine into the propriety of the amendment, which is left to the sole discretion of the court by which it has been made."

"Mellish *v.* Richardson lays it down positively, that a court of error cannot review the propriety of amendments made in the court below. After that case, I think we ought not to suffer the matter to be discussed."

Lord Denman, *C. J.*, in Scales *v.* Cheese, 12 M & W 685 (152 Eng. Rep. 1374).

CONCLUSION.

In view of these decisions, and the desire of this Court at all times to determine the substantial rights of the parties, no support should be given to the objection made by the respondent to the form of the record, and the cause should be decided on its merits.

Respectfully submitted,

CLARK McK. WHITTEMORE,

ABRAM H. CORNISH,
Attorneys for Defendant-Appellant.

NEW JERSEY SUPREME COURT

UNION COUNTY

DOROTHY REUTLER, *Plaintiff,* vs. EUGENIA RAMSIN, *Defendant.*	ACTION AT LAW. ORDER.

This matter being open to the Court by Clark McK. Whittemore, attorney for the defendant, upon notice of motion for that purpose, dated March 16, 1917, to Foster M. Voorhees, attorney for the plaintiff, and in the presence of the attorneys for the respective parties, and good cause therefore being shown,

IT IS on this twenty-second day of March, Nineteen hundred and seventeen, after objection however of the attorney of the plaintiff upon the ground that no request as to findings of fact or law or of both fact and law were actually made or exceptions thereto actually taken and upon the further ground that there were no findings made except so far as the same are to be found in memorandum of the Court's decision prior to entry of judgment entered in said cause and this Court is without power in the premises,

ORDERED that the postea filed in the above stated cause be amended as follows:

(1) By making part thereof the agreed state of facts filed in this cause, which are hereby made

the findings of fact of this court; (2) by making part thereof the findings of law now made by this court; and (3) by noting in the said postea the formal exception now taken by the said defendant to the said findings of law.

And it is further ordered that the said amended postea, containing the said findings of fact and of law and the said exceptions be included in as well also as a copy of this order and made part of the record in this cause; and that the said amended postea containing the said findings of fact and law and the said exceptions, together with this order and the exception of the plaintiff's attorney to the making thereof, be certified to the Court of Errors and Appeals as part of the said record.

GEO. S. SILZER,
Judge.

Exception now being taken to the above order it is hereby ordered that the said exception be entered in the minutes of this Court.

GEO. S. SILZER,
Judge.

Date New Brunswick, N. J.
March 22, 1917.

NEW JERSEY SUPREME COURT

UNION COUNTY

DOROTHY REUTLER, *Plaintiff,* vs. EUGENIA RAMSIN, *Defendant.*	ACTION AT LAW. AMENDED POSTEA.

This case was tried before Judge George S. Silzer, without a jury, on the fifth day of May, Nineteen hundred and sixteen, at the Union County Circuit Court, and was submitted on an agreed state of facts and briefs. The Court rendered a judgment against the defendant and in favor of the plaintiff, for the sum of two thousand dollars ($2,000), together with the sum of five hundred and sixty-six dollars ($566) interest, making in the aggregate the sum of two thousand five hundred and sixty-six dollars ($2,566).

I find as the facts of this case the Agreed State of Facts filed herein, which Agreed State of Facts is hereby made the findings of fact of this Court.

I find as the law in this cause the following:

(1) I find that the plaintiff had the right to maintain her action without first making a tender, and without first giving notice of her intent to rescind.

(2) I find that the telephone grant is an encumbrance the existence of which gave the purchaser a right to refuse to accept the deed.

(3) I find that the existence in the deed to

F. Celestin Ramsin and in the previous deeds of the schoolhouse lot exception is an encumbrance which justified the plaintiff in refusing to consummate the sale.

Dated: New Brunswick, N. J.
March 22, 1917.

GEO. S. SILZER,
Judge.

Exception now being taken to the said findings of law it is hereby ordered that the said exceptions be entered in the minutes of this Court.

Dated: New Brunswick, N. J.
March 22, 1917.

GEO. S. SILZER,
Judge.

INDEX.

Notice of Appeal.

Filed January 30, 1917.

New Jersey Supreme Court.

UNION COUNTY.

DOROTHY REUTLER, *Plaintiff-Respondent,* *vs.* EUGENIA RAMSIN, *Defendant-Appellant.*	*Action at Law.* *Notice of Appeal.*

To FOSTER M. VOORHEES,
Attorney of Plaintiff.

TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals from the whole judgment in this cause on the following grounds:

1. The trial judge refused to non-suit the plaintiff on the motion of the defendant. Defendant's motion should have been granted because the agreed statement of facts shows that plaintiff failed to perform and was never ready to perform the contract on her part, and that there was no default on the part of the defendant.

2. The conclusion of the trial judge, holding that the exception of the schoolhouse lot in the deed under which the appellant holds title is an encumbrance which justified the plaintiff in refusing to accept the deed subject thereto, is erroneous, because that exception does not consti-

tute such an encumbrance, and is not such a defect in the title of the appellant as to prevent her from performing the contract, or to justify the plaintiff to suing for damages for failure to perform, or to allow the plaintiff to rescind.

3. The conclusion of the trial judge holding that the telephone grant along the public street is an encumbrance, the existence of which gave the purchaser a right to refuse to take a deed is erroneous, because that grant is not such an encumbrance, and it is not such a defect in the title of appellant as to prevent her from performing her contract, or to justify the plaintiff in suing for damages for failure to perform, or to allow the plaintiff to rescind the contract.

CLARK McK. WHITTEMORE,
Attorney of Appellant.

Dated January 26, 1917.

Judgment Record.

Eugenia Ramsin, the defendant in this case, was summoned to answer unto Dorothy Reutler, the plaintiff therein, in an action at law upon the following complaint:

Complaint.

Filed October 4th, 1915.

Plaintiff residing at No. 1439 Rosedale avenue, Bronx, New York City, says that:

1. On April 15, 1911, plaintiff and defendant signed an agreement for the sale of lands and premises in the Township of Linden, County of Union and State of New Jersey, a copy of which agreement is hereto annexed.

2. That in accordance with the aforementioned agreement the plaintiff paid to the defendant the sum of One Hundred Dollars ($100.00) on the 29th day of March, 1911, Four Hundred Dollars ($400.00) on the 12th day of April, 1911, and Fifteen Hundred Dollars ($1,500.00) on the 15th day of April, 1911, making in the aggregate the sum of Two Thousand Dollars ($2,000.00).

3. That on the 17th day of April, 1912, plaintiff duly demanded from the defendant a deed of conveyance according to the terms of the said agreement and after the said closing was by agreement duly adjourned to said date and then tendered to her the balance of the price mentioned in the said contract, and she has at all times been ready and willing and has offered to this defendant to pay the balance of said contract price and to perform all the terms of the said contract upon her part, upon the like performance by the defendant.

4. Defendant has refused and still refuses and has failed to deliver any deed of conveyance for said property in accordance with the terms of the said contract and she still refuses so to do.

5. That although duly demanded no part of the aforementioned sum of Two Thousand Dollars ($2,000.00) has been returned and there is now due and owing from the defendant to the plaintiff the sum of Two Thousand Dollars ($2,000.00) with interest upon the sums of One Hundred Dollars ($100.00) from the 29th day of March, 1911; Four Hundred Dollars ($400.00) from the 12th day of April, 1911, and Fifteen Hundred Dollars ($1,500.00) from the 15th day of April, 1911.

Wherefore plaintiff demands as damages against the defendant the sum of Two Thousand Dollars ($2,000.00) with interest upon the sums of One Hundred Dollars ($100.00) from the 29th day of March, 1911; Four Hundred Dollars ($400.00) from the 12th day of April, 1911, and Fifteen Hundred Dollars ($1,500.00) from the 15th day of April, 1911, besides the lawful costs.

FOSTER M. VOORHEES,
Attorney for Plaintiff.
No. 286 North Broad Street, Elizabeth, N. J.

ARTICLES OF AGREEMENT, made the Fifteenth day of April, in the year One Thousand Nine Hundred and Eleven.

BETWEEN

EUGENIA RAMSIN, of the Township of Linden, in the County of Union and State of New Jersey, party of the First Part;

AND

DOROTHY REUTLER, of the Township of Linden, in the County of Union and State of New Jersey, party of the Second Part; WITNESSETH, that the said party of the first part, for and in

consideration of the sum of FOUR HUNDRED AND FIFTY DOLLARS per acre for the farm hereinafter described, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that her, the said party of the first part, will well and sufficiently convey to the said party of the second part, her heirs and assigns by Deed of Warranty free from all encumbrance except only as hereinafter stated. On or before the second day of October next ensuing the date hereof, all that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Linden, in the County of Union and State of New Jersey. Which said tract or parcel of land and premises to be conveyed consists of a farm with the buildings thereon, located on the road from Rahway to Elizabeth in said Township and supposed to contain forty-seven and three-quarters acres (47 3/4 A), more or less, as stated in deed made to party of the first part. But it is agreed that the exact acreage is to be ascertained by a survey of said farm to be made by Jacob L. Bauer, C. E., and the price to be paid is to be for the number of acres ascertained by said Engineer from said survey, at the rate of Four Hundred and Fifty Dollars ($450) per acre.

AND the said Dorothy Reutler, for herself, her heirs and executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns, that she, the said party of the second part, will pay and satisfy, or cause

to be paid and satisfied, unto the said party of the first part, the said sum of Four Hundred and Fifty Dollars per acre for said farm, as and for the purchase money of the foregoing described land and premises in the following manner, that is to say: the sum of four hundred dollars paid on the 12th of April, 1911, (the sum of one hundred dollars having been paid on March 29th, 1911), the sum of Fifteen hundred Dollars ($1,500.00) on execution of this contract, and the balance of said purchase money to be paid when the deed is delivered, except the sum of Ten Thousand Dollars ($10,000) of said purchase money, which is to be paid by said Dorothy Reutler, executing to said Eugenia Ramsin a purchase money bond and mortgage on said lands above described for said sum of Ten Thousand Dollars, with interest at rate of five (5) per cent. per annum, payable semi-annually, payable three years from date of same and to contain the usual thirty day interest and tax default clause. It is further agreed that above lands is sold subject to the lease of the present tenant, Charles Ramsin, who is to vacate on the third day of November, 1911. It is further agreed that party of first part is to have two weeks after deed is delivered to move and vacate the house and buildings she now occupies. It is further agreed that after deed is delivered party of the second part is to have the privilege of tearing down and removing any of the buildings now on said property, except the dwelling house now occupied by party of the first part, but this can be repaired and added to if party of second part shall so desire. It is further agreed that party of second part after deed is delivered shall have the right and privilege to cut off all the standing woods or timber she may

desire without interference of party of first part on account of the mortgage she may hold thereon, and that each of the parties hereto will pay one-half of the taxes assessed for year 1911.

And it is Further Agreed, by the parties to these presents, that the said party of the second part, her heirs and assigns, may enter into and upon the said land and premises and from thence take the rents, issues and profits to her and their use, from the date possession is to be surrendered by said Charles Ramsin and said party of first part as above stated.

And it is Further Agreed, by the parties hereto, that the said Deed shall be delivered and received at the office of C. H. Angleman, Rahway, N. J., between the hours of nine in the forenoon and eleven o'clock in the forenoon on the said second day of October next ensuing the date hereon. It is further agreed if party of the second part shall fail to fulfill or carry out her agreements and covenants as above stated, the sum of Two Thousand Dollars so paid by her shall be forfeited to party of the first part and this is made not in nature of a penalty, but for the essence of time allowed party of second part to pay balance of purchase money. And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heir, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of Two Thousand Dollars, which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

EUGENIA RAMSIN,
DOROTHY REUTLER.

Signed, sealed and delivered
in the presence of

The words "within 30 days from date" erased and "on execution" inserted before execution. The words "on the signing of this agreement," erased and sign, "order on April 12, 1911," inserted before execution.

CHARLES H. ANGLEMAN.

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

BE IT REMEMBERED, That on this fifteenth day of June, in the year One Thousand Nine Hundred and Eleven, before me the subscriber, a Master in Chancery of New Jersey, personally appeared EUGENIA RAMSIN, who I am satisfied is the Grantor in the within agreement named; and I, having first made known to her the contents thereof, she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

Contract endorsed as follows:—Time for closing extended to April 17th, 1912, at Fidelity Trust Co., Elizabeth, N. J.

Answer.

The defendant answered as follows:

Answer.

Filed October 25th, 1915.

Defendant residing in the Township of Linden, Union County, New Jersey, says that

1. She admits paragraph 1.

2. She admits paragraph 2.

3. She denies paragraph 3.

4. She denies paragraph 4.

5. She admits that she has not returned to defendant any part of the sum of two thousand dollars mentioned in the complaint, but denies that the same or any part thereof, or any interest thereon, are due to the defendant from the plaintiff.

1. For a first defense to said complaint defendant says that although requested so to do, said plaintiff failed, refused and neglected to pay or offer to pay to defendant the balance of the cash purchase price or one-half of the taxes, mentioned in the contract annexed to the complaint, and although requested so to do failed, refused and neglected to execute and deliver to defendant a purchase money bond and mortgage for the sum of ten thousand dollars provided to be given by the terms of said contract, all within the time specified in said contract, or at any other time and otherwise failed, refused and neglected to perform any of the covenants and agreements in said contract on the part of the said plaintiff to be done and performed; and that defendant was ready and willing at all times between the first day of October, Nineteen hundred and eleven, and the seven-

teenth day of April, 1912, to receive such payment and said bond and mortgage and to convey the premises described in said contract as therein provided, and frequently offered to the said plaintiff so to do and to comply with the terms of said contract in all respects on her part to be done and performed.

2. For a second defense said defendant says that in said contract it was expressly agreed that if said plaintiff should fail to fulfill or carry out her agreements and covenants as stated therein the said sum of two thousand dollars paid by her should be forfeited to defendant and that said agreement was made not in nature of a penalty but for essence of time allowed to plaintiff to pay balance of purchase money. And defendant says that said plaintiff did fail to fulfill or carry out her agreements and covenants as stated in said contract and that said sum of two thousand dollars is therefore forfeited to the defendant as provided in said contract.

3. For a third defense defendant says that by said contract it was further agreed and provided that for the performance of all and singular the covenants and agreements aforesaid, the said parties did bind themselves and their respective heirs, executors and administrators, and they thereby agreed to pay, upon failure to perform said covenants and agreements, the sum of two thousand dollars which they did thereby fix and settle as liquidated damages therefor. And defendant says that said plaintiff wholly failed to perform said covenants and agreements in said contract on her part to be done and performed, and that plaintiff therefore has forfeited to said defendant and is now indebted to said defendant in the sum of two thousand dollars with interest thereon from April 17th, 1912, as

liquidated damages for her breach of said contract as agreed, the same being just and reasonable.

4. For a fourth defense defendant says that plaintiff wholly failed and neglected to perform said contract in any of the respects on her part to be performed and defendant here repeats the allegations contained in the first defense of this answer; and defendant says that by reason of such breach of contract by the said plaintiff the defendant has sustained great loss and damages for attorney's fees and services, legal expenses, and expenses of preparations for removal, and arranging for a termination of the leasehold interest in the premises in question as provided in the contract, and for depreciation in the value of said premises, and for the value of defendant's time and trouble connected with the negotiation of said contract and the performance of same by defendant, and for other losses and damages, amounting in the total to the sum of five thousand dollars, for which plaintiff is now indebted to the defendant.

By way of counterclaim against the plaintiff defendant says that:

1. She repeats the allegations in the third defense above stated.

2. In case it shall be determined that the above stated third defense or the first paragraph of this counterclaim are not enforceable as a matter of fact or law, then the defendant as an alternative makes a further counterclaim by repeating the fourth defense above set forth.

The defendant counterclaims five thousand dollars damages.

CLARK McK. WHITTEMORE,
Attorney of Defendant.

Reply.

The plaintiff replied as follows:

Reply.

Filed November 17th, 1915.

The plaintiff replying to the answer of the defendant herein says:

1. She denies each and every allegation contained in the first defense of the answer herein.

2. She denies those allegations in the second defense of the defendant's answer herein, that she did fail to fulfill and carry out her agreements and covenants as stated in the said contract and said sum of Two Thousand Dollars ($2,000.00), is therefore forfeited to the defendant as provided in said contract, and she denies that any sum or sums of money paid to the defendant by reason of the contract herein was forfeited and says she has duly performed and offered to perform all of the conditions on her part to be performed according to the terms of the contract mentioned and set forth in the complaint herein.

3. She denies those allegations contained in the third defense of the defendant's answer herein that she wholly failed to perform said covenants and agreements in said contract on her part to be done and performed, and she denies that she has forfeited and is now indebted to the said defendant in the sum of Two Thousand Dollars ($2,000.00), with interest from April seventeenth, 1912, and she further denies that any sum or sums of money paid to the defendant by reason of the contract herein were forfeited.

4. She denies each and every allegation contained in the fourth defense of the answer herein.

She denies that this defendant has any counterclaim against the plaintiff herein and says with reference thereto.

1. She repeats the denials set forth in the third paragraph of this reply.

2. She repeats the denials to the allegations herein set forth with reference to the fourth defense contained in the defendant's answer.

Wherefor plaintiff demands judgment as prayed for in the complaint herein.

FOSTER M. VOORHEES,
Attorney for Plaintiff.
No. 286 North Broad Street, Elizabeth, N. J.

Judgment.

This case was tried before Judge George S. Silzer without a jury, on the fifth day of May, 1916, at the Union County Circuit Court and was submitted on an agreed state of facts and briefs. The court rendered a judgment against the defendant and in favor of the plaintiff for the sum of two thousand dollars ($2,000.00), together with the sum of five hundred and sixty-six dollars ($566.00), interest, making in the aggregate the sum of two thousand five hundred and sixty-six dollars ($2,566.00).

Whereupon it is adjudged that the plaintiff recover from the defendant, the sum of two thousand five hundred and sixty-six dollars ($2,566.00), and her costs which are taxed at the sum of forty-seven and 32-100 dollars ($47.32), making in the whole the sum of two thousand six hundred and thirteen and 32-100 dollars ($2,613.32).

Judgment entered January 10th, 1917.

WM. S. GUMMERE, *C. J.*

Agreed State of Facts.

At the May, 1916, term of the New Jersey Supreme Court in Union County, the above stated case was called for trial. Foster M. Voorhees, Esquire, and Francis Gordon, Esquire, appearing for the plaintiff, and Clark McK. Whittemore, Esquire, and Abram H. Cornish, Esquire, appearing for the defendant. After the jury was duly sworn and seated, and before any evidence was taken, the case was opened for the plaintiff and for the defendant by the respective attorneys, whereupon it was suggested by the court that the opening of the plaintiff and the defendant disclosed practically no dispute as to any question of fact, and that it would be more convenient for the Court to consider the matter on an agreed state of facts stipulated by the parties, and briefs upon the points of law submitted by the parties. The suggestion of the court was agreed to by both parties in open court and the jury was discharged, and the parties, through their attorneys, thereupon by stipulation agreed upon the following state of facts:

Agreed Upon Statement of Facts.

The defendant, by her agreement with the plaintiff, dated April 15th, 1911, contracted to convey, by deed of warranty free from encumbrances, except only as stated in said agreement, lands in Linden Township, Union County, New Jersey, described as follows:

"Which said tract or parcel of land and premises to be conveyed consists of a farm with the buildings thereon, located on the road from Rahway to Elizabeth in said township and supposed to contain forty-seven and three-quarters (47¾) acres more or less, as stated in deed

made to party of the first part. But it is agreed that the exact acreage is to be ascertained by a survey of said farm to be made by Jacob L. Bauer, C. E., and the price to be paid is to be for the number of acres ascertained by said engineer from said survey, at the rate of four hundred and fifty dollars ($450) per acre." (See copy of agreement attached to complaint.) No specific exceptions are recited.

The plaintiff paid from time to time in all, the sum of two thousand dollars ($2,000) on account of the purchase price.

The suit is brought to recover the amount so paid.

Defendant acquired title by devise from her husband, whose title came from John Smith Loyd by deed dated February 4th, 1867, and recorded in Book 22 of Deeds for Union County on pages 663, etc. The lands conveyed by that deed were described as follows:

"All those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Linden, in the County of Union and State of New Jersey, which were conveyed to said J. Smith Loyd by deed from Samuel Gordon and wife dated the 25th day of September, A. D. 1865, recorded in the clerk's office of said County of Union in Book 17 of Deeds page 576, etc., and therein described thus which were conveyed to said Gordon by Edward Pierson, sheriff, and recorded in Book No. 1 of Deeds for Union County, pages 206 and 207 and therein described as follows, to wit:

"First lying on the northerly side of the road leading from Rahway to Tremley's Point containing by estimation forty-seven and seventy-two hundredths (47 72-100) acres of land be the

same more or less and being bounded westerly by land belonging to the estate of Enoch M. Shotwell, deceased, northwesterly and northeasterly by land of John Shotwell northeasterly by land of Aaron Shotwell and southerly by the highway aforesaid always excepting thereout and thereupon a lot of land whereon a schoolhouse stood which was heretofore given and granted by the former owner of the land for the purpose of erecting and building a schoolhouse thereon for the accommodation of the neighborhood."

The first recorded mention of the schoolhouse clause is found in a deed for part of the farm made one Oliver Kelley and wife to Aaron Miller dated May 6th, 1805, and recorded in the Register's Office of the County of Essex in Book K, pages 387-390, in which the following language was employed: "Excepting thereout the schoolhouse and lot heretofore granted for purpose of erecting a schoolhouse for the accommodation of the neighborhood." It occurs again in the next recorded deed being a deed from Aaron Miller to Israel Minor, recorded October 12th, 1850, in Book K-7, page 286. The language used is, "except a lot whereon a schoolhouse stood." In the deed from Israel Minor to Russell W. Robinson, dated December 13th, 1853, and recorded in Book T-8 of Deeds on page 528, the exception reads: "Except land where schoolhouse stood." In a deed from Russell W. Robinson to Joseph Denison dated November 1st, 1853, recorded in Book V-8, page 513, the language is, "always excepting therefrom lot whereon a schoolhouse stood, which was heretofore given by former owner for purpose of erecting a schoolhouse thereon." The same language is used in the next deed dated October 1st, 1854, except the

omission of the word "heretofore" and the addition of words at the end, "for the accommodation of the neighborhood." In the next deed dated November 1st, 1854, the language is the same as the deed in Book V-8, page 513, except the omission of the word "thereon" at the end. In the next deed dated March 9th, 1855, the language reads as follows: "excepting therefrom a lot on which a schoolhouse stood, heretofore given and granted by former owners for the purpose of erecting a schoolhouse for that neighborhood." The next deed in the same year contains identical recital as the last above. Another deed in the same year had substantially the same language, it leaves out the word "that," and adds the words, "and building." In the deed from Edward Pierson, Sheriff, to Samuel Gordon, dated April 27th, 1857, the language is, "except thereout and from a lot of land where schoolhouse stood." This deed was the foreclosure of a mortgage dated September 30th, 1850. The deed from Samuel Gordon to James Smith Loyd dated September 25th, 1865, contains the same recital as in the deed to F. Celestin Ramsin.

Defendant granted to North Jersey Telephone & Telegraph Company the right to erect poles along the road fronting the farm. The paper giving such right is dated August 23rd, 1901, and recorded in the office of the Register of the County of Union in Deed Book 379 on page 81, a copy thereof is attached. The North Jersey Telephone & Telegraph Company assigned its right, title, interest and benefit, to the Northeastern Telephone & Telegraph Company by an instrument dated June 3rd, 1903, and recorded in Book 421 of Deeds for Union County on page 44.

Agreed State of Facts.

Mr. Dobbins, the plaintiff's attorney, employed the Fidelity Title Company to examine the title and issue a policy of insurance thereon. Objection was first made by the Title Company to the schoolhouse exception and telephone grant. Subsequently affidavits were submitted to the Title Company by the defendant upon the strength of which the Title Company agreed to waive its objection to the schoolhouse grant and to guarantee against the same and communicated that fact to the attorney of Mrs. Ramsin and also to the attorney of Mrs. Reutler, on January 20th, 1912.

Negotiations and the time for closing the title were continued until the 17th day of April, 1912, when by agreement with Mr. Dobbins, the attorney of the plaintiff, the parties all appeared at the office of the Title Company. At that time the defendant was ready to deliver a deed and accept the mortgage called for in the agreement for sale. The attorney for the plaintiff informed the defendant and her attorney that the title was not satisfactory to the plaintiff and refused to take the title. Thereafter negotiations were continued for the purpose of removing the objections urged by the plaintiff through her attorney. In order to remove these objections in part, by mutual agreement between the attorneys of the parties a bill in chancery was filed on behalf of the plaintiff in this suit for specific performance and to quiet whatever claims there might be by reason of the schoolhouse provision. The bill was filed July 11th, 1912. The defendants were Eugenia Ramsin, The Township of Linden and the Linden School District. The Township filed a disclaimer. By agreement, time for answering by Ramsin was extended indefinitely and no answer was filed on her behalf.

The chancery suit was subsequently, to wit, on the 27th day of September, 1915, discontinued on the motion of the substituted solicitor of Mrs. Reutler. While the chancery suit was pending, correspondence was had with the attorney of Mrs. Ramsin and with the attorney for the Board of Education of Linden Township, questioning the legal right to secure relief with regard to the schoolhouse lot in an action of that character. The plaintiff commenced these proceedings on the first day of October, 1915. The right of the public, if any, by reason of the schoolhouse clause, has not been surrendered by any known instrument in writing. The grant to the telephone company and the assignment thereof hereinabove referred to, have not been formally reconveyed or released. It is admitted that Ramsin and her predecessors in title have been in the full uninterrupted, peaceable, notorious and undisputed possession of the whole of the farm for more than seventy years past, and that such lands have been used as farm lands.

It is further admitted that there has been no actual use of any part of the farm for school purposes, nor has there been any school building erected thereon for a period of not less than seventy years past, and that the rights under the telephone grant have never been exercised and no poles for telephone or telegraph purposes have been erected, and that no franchise has been granted to the telephone company by the Township of Linden.

Copies of the following papers are attached as part of this agreed state of the case:

1. Bill of complaint in chancery suit.

2. Contract for sale. (See complaint in this case.)

3. Grant Eugenia Ramsin to North Jersey Telephone & Telegraph Company.

4. Assignment North Jersey Telephone & Telegraph Company to Northeastern Telephone & Telegraph Company.

FOSTER M. VOORHEES,
Attorney of Plaintiff.

CLARK McK. WHITTEMORE,
Attorney of Defendant.

May Term, 1916.
Union Circuit Court.

IN CHANCERY OF NEW JERSEY.

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

Humbly complaining, showeth unto your Honor your oratrix, Dorothy Reutler, of the Township of Linden, County of Union:

1. That on the fifteenth day of April, one thousand nine hundred and eleven, Eugenia Ramsin was seized in her own right of an absolute, indefeasible estate of inheritance, in fee simple, in and to that lot, tract and parcel of land and premises, situate, lying and being in the Township of Linden, County of Union and State of New Jersey, consisting of a farm located on the road between Rahway and Elizabeth, containing forty-seven and three-quarter (47¾) acres, more or less.

That Eugenia Ramsin being so seized and possessed of said lands and premises, did on the fifteenth day of April, one thousand nine hundred and eleven, enter into an agreement with your oratrix, in and by which agreement the said Eugenia Ramsin did agree to sell and convey unto

your oratrix, for the sum of four hundred and fifty ($450) dollars per acre, and your oratrix did agree to buy from the said Eugenia Ramsin the said lands and premises and to pay therefor the sum of four hundred and fifty ($450) dollars per acre, which said consideration price was to be paid as follows:

The sum of fifteen hundred ($1500) dollars on the fifteenth day of April, one thousand nine hundred and eleven, in addition to the sum of one hundred ($100) dollars previously paid on the twenty-ninth day of March, one thousand nine hundred and eleven, and four hundred ($400) dollars previously paid on the twelfth day of April, one thousand nine hundred and eleven, paid under a prior and temporary agreement of sale, on the balance of said purchase price to be paid when the deed to said property was delivered, except the sum of ten thousand ($10,000) dollars of said purchase money, which was to be paid by your oratrix by the execution and delivery by your oratrix to the said Eugenia Ramsin, of a bond and purchase money mortgage covering said property, in the sum of ten thousand ($10,000) dollars, which sum was to bear interest at the rate of five per cent. per annum, payable semi-annually, with the principal due and payable three years from the date of said mortgage, which said mortgage was to contain the usual thirty day interest and tax default clause.

2. And your oratrix further shows that in and by the said agreement, it was stipulated that the tenant on the property was to vacate the same on the third day of November, one thousand nine hundred and eleven, and that from said last date your oratrix could enter in and upon the

said lands and premises and from thence take the rents, issues and profits to her use.

It was further agreed that the deed to said premises should be delivered and received at the office of Charles H. Angleman, in the City of Rahway, on the second day of October, one thousand nine hundred and eleven, the conveyance of said lands and premises to be by deed of warranty, free from all encumbrances; and it was thereby further agreed that the covenants and agreements contained in said agreement were to bind the heirs, executors and administrators of the respective parties (a true copy of which agreement is hereto annexed and marked Schedule "A" and forms part of this bill of complaint).

3. And your oratrix further shows that a survey was made of said premises agreeable to said contract of purchase and a description of said property by metes and bounds prepared, which description was agreed to be the one by which said lands were to be conveyed; that a copy of said description is hereto annexed and made part of this bill of complaint.

4. And your oratrix further shows that in accordance with the agreement above set forth, payments on account of said purchase price were made as follows:

The sum of one hundred dollars was paid on the twenty-ninth day of March, one thousand nine hundred and eleven; four hundred dollars on the twelfth day of April, one thousand nine hundred and eleven; fifteen hundred dollars on the fifteenth day of April, one thousand nine hundred and eleven.

5. And your oratrix further shows that there appears of record in the Register's office of the

County of Essex and in the Register's office of the County of Union, in several deeds covering transfers of the property sought to be purchased, the following clause: "Except the school house and a small piece of land it now stands on and what belongs to it which has been given to the public by a deed;" that said deed referred to is not of record in either Essex or Union counties and that the municipality of the Township of Linden and the Linden School District, or either of them, has not been in possession of said lot or tract of land, or any part thereof, for more than fifty years last past; that the aforesaid exception is a cloud upon the premises so agreed to be conveyed to your oratrix, all of which your oratrix was ignorant of at the date of the making of said agreement; that by reason of the foregoing exception and part therein referred to the Township of Linden and the Linden School District, the municipality and school district within which said land is located, may claim some rights thereunder.

6. And your oratrix further shows that the said closing time of said contract, being the second day of October, one thousand nine hundred and eleven, was adjourned from time to time, for the purpose of permitting the said Eugenia Ramsin to remove the clouds upon the title and perfect her title, that she might be able to convey such title to said lands to your oratrix, as was provided for in said contract of purchase, until finally the seventeenth day of April one thousand nine hundred and twelve, was fixed as the time, at eleven o'clock in the forenoon of that day, in the office of the Fidelity Trust Company, in the City of Elizabeth, as the place of the said delivery of the said deed and the payment of the

balance of the purchase price, pursuant to the said terms of agreement.

7. And your oratrix further shows that on said last mentioned date, your oratrix attended at the office of the Fidelity Trust Company aforesaid, at the hour named, and tendered herself as ready, able and willing to comply with the performance of said contract on her part to be performed, and requested of the defendant a conveyance of said property pursuant to the terms thereof and in particular that she would clear off the record of the school house grant above set forth.

8. And your oratrix further shows that on more than one date fixed for the closing of the title, the said Eugenia Ramsin admitted the fact of said encumbrances but averred that she would be able in a short time to comply with the terms of her said contract of sale and to give such warranty deed free and clear of all encumbrances as therein provided for.

9. And your oratrix further shows that at all times she has been ready and willing to pay the balance of said purchase price to the said Eugenia Ramsin should she comply with the terms of said contract, and make your oratrix such warranty deed free and clear of all encumbrances as therein provided. And that repeatedly your oratrix has applied to her, the said Eugenia Ramsin, offering to pay said balance of the purchase money and requesting her to remove the clouds upon the title and perfect her title that she might be able to convey to your oratrix a good and marketable title to said lands such as is provided for in said contract of sale. But your oratrix expressly charges that she, the said Eugenia Ramsin, refuses so to do and has failed

and neglected to remove the said cloud from the said title.

10. And your oratrix further shows that the Township of Linden and the Linden School District, or either of them, may claim some right or title to some part of the premises above described and that your oratrix charges that the said Township of Linden and the Linden School District, or either of them, have no valid title or interest in said premises.

11. And your oratrix further charges that the said premises are not free and clear of encumbrances. Notwithstanding your oratrix further shows that the said Eugenia Ramsin refuses unto your oratrix the moneys by her so paid, or to pay to your oratrix the expense of examining the title and the survey of the said premises. And your oratrix further shows that she, the said Eugenia Ramsin, is still in possession of the said premises described in the said contract of sale.

Wherefore inasmuch as your oratrix is without full and adequate remedy in the courts of law and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable.

To the end, wherefore, that the said Eugenia Ramsin, the Township of Linden and the Linden School District, may true answer make to the premises but without oath the oath hereby being expressly waived, and that a decree may be made in this honorable court directing the specific performance of the agreement of a contract by the said Eugenia Ramsin and decreeing that the said Eugenia Ramsin execute and deliver unto your oratrix, a deed of conveyance for the said lands and premises in fee simple, free from

encumbrances according to the terms of said agreement, further decreeing that the said Eugenia Ramsin receive payment as the balance of the contract price, together with the other consideration mentioned in said contract, and further decreeing that the municipality of the Township of Linden and the Linden School District have no interest in or incumbrance on said land or any part thereof. May it please your Honor, the premises considered, to grant unto your oratrix, the State's Writ of Subpoena, issuing out of and under the seal of this honorable court, commanding the said Eugenia Ramsin, the Township of Linden and the Linden School District, under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable court, then and there to answer all and singular the said premises and to stand to and abide and perform such order or decree therein, as to your Honor shall seem meet and shall be agreeable to equity and good conscience. And your oratrix, as in duty bound, will ever pray, etc.

FRANCIS V. DOBBINS,
Solicitor for and of
Counsel with Complainant.

SCHEDULE "A"

ARTICLES OF AGREEMENT, made the fifteenth day of April, in the year one thousand nine hundred and eleven, between Eugenia Ramsin, of the Township of Linden, in the County of Union and State of New Jersey, party of the first part, and Dorothy Reutler, of the Township of Linden, in the County of Union and State of New Jersey, party of the second part:

WITNESSETH, that the said party of the first part, for and in consideration of the sum of four hundred and fifty dollars per acre for the farm hereinafter described, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that she, the said party of the first part, will well and sufficiently convey to the said party of the second part, her heirs and assigns, by Deed of Warranty free from all encumbrances except only as hereinafter stated, on or before the second day of October next ensuing the date hereof, all that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Linden, in the County of Union and State of New Jersey, which said tract or parcel of land and premises to be conveyed consists of a farm with the buildings thereon, located on the road from Rahway to Elizabeth in said Township and supposed to contain forty-seven and three-quarters acres (47¾A), more or less, as stated in deed made to party of the first part. But it is agreed that the exact acreage is to be ascertained by a survey of said farm to be made by Jacob L. Bauer, C. E., and the price to be paid for the number of acres ascertained by said engineer from said survey, at the rate of four hundred and fifty dollars ($450) per acre.

AND the said Dorothy Reutler, for herself, her heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns, that she, the said party of the second part, will pay and satisfy, or cause

to be paid and satisfied, unto the said party of the first part, the sum of four hundred and fifty dollars per acre for said farm, as and for the purchase money of the foregoing described land and premises in the following manner that is to say: the sum of four hundred dollars paid on April 12, 1911, the sum of one hundred dollars having been paid on March 29, 1911, the sum of fifteen hundred dollars ($1500) on execution of this contract, and the balance of said purchase money to be paid when the deed is delivered, except the sum of ten thousand dollars ($10,000) of said purchase money, which is to be paid by said Dorothy Reutler, executing to said Eugenia Ramsin a purchase money bond and mortgage on said lands above described for said sum of ten thousand dollars, with interest at the rate of five (5) per cent. per annum, payable semi-annually, payable three years from date of same and to contain the usual thirty day interest and tax default clause. It is further agreed that above lands is sold subject to the lease of the present tenant, Charles Ramsin, who is to vacate on the third day of November, 1911. It is further agreed that party of first part is to have two weeks after deed is delivered to move and vacate the house and buildings she now occupies. It is further agreed that after deed is delivered party of second part is to have the privilege of tearing down and removing any of the buildings now on said property, except the dwelling house now occupied by party of the first part, but this can be repaired and added to if party of second part shall so desire. It is further agreed that party of second part after deed is delivered shall have the right and privilege to cut off all the standing woods or timber she may desire

without interference of party of first part on account of the mortgage she may hold thereon, and that each of the parties hereto will pay one-half of the taxes assessed for year 1911.

And It Is Further Agreed, by the parties to these presents, that the said party of the second part, her heirs and assigns, may enter into and upon the said land and premises and from thence take the rents, issues and profits to her and their use, from the date possession is to be surrendered by said Charles Ramsin and said party of first part as above stated.

And It Is Further Agreed, by the parties hereto, that the said deed shall be delivered and received at the office of C. H. Angleman, Rahway, N. J., between the hours of nine in the forenoon and eleven o'clock in the forenoon on the said second day of October next ensuing the date hereof. It is further agreed if party of second part shall fail to fulfil or carry out her agreements and covenants as above stated, the sum of two thousand dollars so paid by her shall be forfeited to party of first part and this is made not in nature of a penalty, but for the essence of time allowed party of second part to pay balance of purchase money.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of two thousand dollars, which they hereby fix and settle as liquidated damages therefor.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

EUGENIA RAMSIN, (S)
DOROTHY REUTLER. (S)

Signed, Sealed and Delivered
in the presence of

The words "within thirty days from date" erased and "on execution" inserted before execution.

The words "on the signing of this agreement," erased and "paid on April 12, 1911" inserted before execution.

Premises in the Township of Linden and City of Rahway, in the County of Union and State of New Jersey.

Beginning at a stake standing in the northerly line of Barnet street or road to Tremley Point, said stake being at the southwesterly corner of premises now or formerly belonging to R. M. Montgomery; thence along the line of said R. M. Montgomery north 9° 49′ east 1672.7 feet to an iron pipe being an angle in the line of said R. M. Montgomery; thence still along his line north 82° 55′ west 255.6 feet to a stake corner to lands of the Rinehart property; thence along the line of Rinehart property south 38° 12′ west 620.35 feet to a cross on a large rock; thence still along the line of said Rinehart property north 53° 27′ west 656.75 feet to a stake corner to lands formerly of James Dunn distant south 20° 32′ west 128.45 feet from a post distant 182.36 feet southeasterly from a stake in the easterly side of Edgar Road; thence along the lands of said James Dunn (formerly) south 20° 32′ west 1998.1

feet to a stake in the northerly side of said Barnet street or highway from Rahway to Tremley Point; thence along said highway north 76° 3′ east 133.25 feet to a cross on the bridge over a small brook or creek; thence still along the northerly side of said highway north 77° 32′ east 229.7 feet to a stake; thence still along said highway north 75° 14′ east 350.1 feet to a stake; thence still along said highway north 76° 29′ east 359.15 feet to a stake standing in a lane; thence still along said highway north 86° 36′ east 540.75 feet to the point or place of beginning.

This description being taken from a survey made by J. L. Bauer, October 9th, 1911.

Being and intended to be the same premises conveyed to F. Celestin Ramsin by J. Smith Loyd, by deed dated February 4th, 1867 and recorded in Book 22 of Deeds, page 663. The said F. Celestin Ramsin having departed this life testate on or about July 20th, 1896, having devised said premises to Eugenia Ramsin his wife in and by his last will and testament, dated April 2d, 1885, and proved in the Union County Surrogate's Office, July 31st, 1896, in Book O of Wills, page 130.

TELEPHONE GRANT.

North Jersey Telephone & Telegraph Company
No. Linden, New Jersey. Aug. 23rd, 1900.

Received of the North Jersey Telephone & Telegraph Company Five Dollars ($5.00) for which I hereby grant to the company, its successors and assigns, the right to construct and maintain a telephone and telegraph line including the necessary poles, wires and guys along the highway known as Tremley road adjoining my property located between the properties of R.

Assignment of Grant.

A. Shotwell on the east and Mr. James Dunn on the west in the Town of Linden, County of Union, State of New Jersey, and to trim the trees from time to time so that they shall not come in contact with the wires.

Stub Guy and Anchor.

Five Dollars ($5.00).

(Signed) EUGENIA RAMSIN, (L. S.)
Owner.

W. A. ROBINSON,
Witness.

W. J. S.

Approved F. M. Anderson, Supt. of Wayleaves.

Proof by subscribing witness Mar. 8th, 1901.

Recorded March 22nd, 1901, Book 379, page 81.

ASSIGNMENT OF GRANT.

KNOW ALL MEN BY THESE PRESENTS, That North Jersey Telephone and Telegraph Company, a corporation of the State of New Jersey, for and in consideration of the sum of One Dollar and other valuable consideration to it paid, the receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over and does by these presents sell, assign, transfer and set over unto the Northeastern Telephone and Telegraph Company, also a corporation of the State of New Jersey, all the right, title, interest and benefit of the said North Jersey Telephone and Telegraph Company in, to and under the following described instruments, duly made, executed and delivered to said latter Company and recorded in the Clerk's office of the County of Union, New Jersey.

34. A grant dated August 23rd, 1900, executed by Eugenia Ramsin and recorded in said

Clerk's office March 22nd, 1901, in Book 379, page 81.

Dated June 3rd, 1903.

Proved June 12th, 1903.

Recorded September 10, 1903, Book 421, page 44.

With the agreed state of facts the attorneys for the respective parties each filed with the Court briefs, of which the following are copies:

Plaintiff's Memorandum.

Plaintiff sues to recover Two Thousand Dollars ($2,000) from defendant which was paid in installments, under a written agreement, on account of purchase price of defendant's farm. The facts are agreed upon by counsel.

I.

Defendant is unable to deliver warranty deed conveying the premises free from all encumbrances, in accordance with the agreement for the sale.

The agreement for sale contains the following language:

> "The said party of the first part, will well and sufficiently convey to the said party of the second part, her heirs and assigns, by Deed of Warranty *free from all* encumbrance except only as hereinafter stated."

No specific exceptions are recited. The exception referred to manifestly means the acreage. This is apparent from the language used, to wit:

> "But it is agreed that the exact acreage is to be ascertained by a survey of said

farm to be made by Jacob L. Bauer, C. E., and the price to be paid is to be for the number of acres ascertained by said engineer from said survey, at the rate of Four Hundred and Fifty Dollars ($450) per acre."

II.

The plaintiff respectfully contends that there are two (2) encumbrances against the property, to wit,

(a). A grant by a prior owner of a lot of land of the farm for the purpose of erecting a school house thereon for the accommodation of the neighborhood.

(b). A grant made August 23, 1900, by the defendant to the North Jersey Telephone and Telegraph Co., permitting the construction and maintenance of a telephone and telegraph line along defendant's land.

III.

In Vol. 22 Cyc. at pp. 72 and 73.

"An encumbrance is said to import every right to or interest in the land, which may subsist in another, to the (diminution) of the value of the land, but consistent with the power to pass the fee by a conveyance." Citing Foster *v.* Scott, 136 N. Y. 577, 582; 18 L. R. A. 543 (citing Bouvier L. Dict.; 2 Greenleaf ev. No. 242; 3 Washburn Real Property, 659 No. 14); see also cases cited.

and in

Demars v. *Koehler,* 62 N. J. L. 203, at pp. 204 and 205, the learned Chief Justice writing for the Court of Errors and Appeals said:

"Prof. Greenleaf declares that a breach of the covenant against encumbrances is

shown when the proofs establish that a 'third person has a right to or an interest in the land conveyed, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance.' (Citing) 2 Greenleaf Evidence No. 242. This definition of encumbrance is substantially that given by Chief Justice Parsons in Prescott *v.* Trueman, 4 Mass. 627. In was approved in Mitchell *v.* Warner, 5 Conn. 497, and adopted by Chief Justice Green in Carter *v.* Denman's Executor, 3 Zab. 260, 272. The diminution of value which is thus made a test of an encumbrance is not, however, to be understood as limited to cases when the thing granted is, by reason of some outstanding right or interest in a third person, of less pecuniary worth, but also extends to and embraces cases where the grantee, by reason of such an outstanding right or interest, *does not acquire by the grant the complete dominion over the thing granted which the grant apparently gives but is or may be deprived thereby of the whole or some part of its use or possession.* The diminution of pecuniary value is important in the admeasurement of damages for the breach of this covenant but does not form the test whether an outstanding right or interest is an encumbrance or not. *If the thing granted be or be liable to be diminished by the existence of an outstanding right or interest, so that the grantee does not acquire the complete dominion which the grant purports to convey, then, although the diminution of pecuniary worth may not appear and the damages may be only nominal, such right or interest is an encumbrance.*"

IV.

The School House Clause.

From 1805 (the first recorded mention of the school house clause in a recorded deed), to 1867 (the last deed of record), being deed of defendant's testator, the school house clause appears in the same language with only slight variations in each of twelve (12) different deeds. By these deeds, the plaintiff respectfully contends, the public has acquired a right to, or an interest in a lot which is a portion of the farm agreed to be conveyed. The defendant is precluded from denying the existence of this right or interest of the public. All the deeds under which she holds title recognize the existence of a grant for the erection of a school house for the accommodation of the neighborhood. The acceptance of the deed with this clause by F. Celestin Ramsin (who devised the lands to the defendant) is conclusive upon the defendant of the assent to, and acknowledgment of, the public use to which the land is subject.

See *State, C. R. R. Co.* v. *City of Elizabeth,* 37 N. J. L. 432, at pp. 433 and 434.

GREEN, *J.*

> "The evidence produced by the prosecutors in this cause, precludes them from denying the existence of the street, or the rights of the public to travel upon it. Several deeds offered by them, and under which they claim title, recognize the existence of Wall street, and the lands thereby conveyed are expressly bounded by it. Two of these deeds, both made and recorded in 1865, referred to the 'Map of Wetmore's addition to Elizabethport' and expressly state that the boundaries of the property conveyed, em-

> brace portions of Wall, Bond and Division streets, as laid down on said map, which portions are conveyed subject to being and remaining public highways until vacated by lawful authority. The making of such deeds by the land owners, is conclusive evidence against them of the dedication of the street to public use, either by the grantors themselves, or by those under whom they claim. And the acceptance of the deeds by the prosecutors is equally conclusive of their assent to, and acknowledgment of the public use to which the land is subject."

It is true no grantee is mentioned, but for this purpose no special grantee need be in existence at the time of the grant to accept the gift. See *Hoboken Land & Impt. Co.* v. *Mayor, etc.*, 36 N. J. L. 540, at p. 547. It is also true that land dedicated or granted for public use, places the same beyond the control of the donor, and proof of a formal acceptance or public user is not necessary. See *Hoboken Land and Impt. Co., supra,* at p. 545, citing numerous cases. The lot was dedicated many years ago but the right of the public to appropriate public lands for public use *whenever their wants or convenience may require it,* is a continuing right to be exercised when the judgment of the public authorities may deem it advisable to do so, and the lapse of time will not impair that right. *Hoboken Land & Impt. Co.* case, *supra,* at p. 545.

See also *Freeholders of Camden* v. *Sharpless,* 83 N. J. L. 443 at p. 445 (citing *South Amboy & N. Y.* v. *L. B. R. R.,* 37 Vroom 523).

In *Atlantic City* v. *Groff*, 64 N. J. L. 527.

Head Note.

1:—"Dedication by an owner of land to public use as a street whenever the municipal authorities should choose so to use it, cannot be retracted, but is irrevocable and proof of formal acceptance of the *locus in quo*, as a public street, or public user is not necessary."

See also *U. S. R. & C. Co.* v. *Crucible Steel Co.*, 95 Atl. 243, at p. 251.

In *Hoboken Land and Impt. Co.* v. *Mayor*, *supra*, p. 549. The Court held that municipal authorities have no power to release or discharge the public right unless authorized to do so by legislative authority. *Nor will lapse of time, however long the public user is suspended in abeyance, though coupled with an user by the owner*, which might otherwise be adverse make title by prescription against the public (citing *Mayor of Jersey City* v. *Morris Canal; Cross* v. *Morristown*, 3 C. E. Green 305). The legislature alone has the power to release the dedicated lands and discharge the public servitude when it once has attached.

An *acceptance* was not necessary to create the encumbrance. See *Hohokus* v. *Erie R. R.*, 65 N. J. L. 353 at p. 362 (1900).

"An acceptance by the public authorities is not essential to conclude the owners from the power of retraction, when his intention to permanently abandon his property and dedicate it to public uses is ever unequivocally manifested. In that event the right of the public to appropriate the lands to the public use, *at any future* time when their wants or convenience require it immediately

attached. Citing Trustees of M. E. Ch. *v.* Hoboken, 4 Vroom 13, 14; Den *v.* Dummer, Spenc. 86; Mayor of J. C. *v.* Morris Canal and Banking Co., 1 Beas 547.

The local municipal government within the limits of which the dedicated lands lie, by virtue of their representing the public, may maintain actions to vindicate the public right of possession. Price *v.* Inhabitants of Pfd., 11 Vroom 608; Hoboken Ld. & Impt. Co. *v.* Hoboken, 7 *Id.* 540.

The above case is cited with approval in *Darling* v. *Mayor,* 73 N. J. E. 318 at p. 322.

It is true that a long time has elapsed since the dedication of the lot, but the proper municipal authorities have lost no rights.

See *Price* v. *Inhabitants of Plainfield,* 40 N. J. L. 640 at p. 614 (1878).

"It is finally urged that the court erred in charging that the public lost no right by the continued and exclusive possession of the defendant. It is insisted that, while the maxim '*nullum tempus occurrit regi,*' is applicable to the state itself, it cannot be applied to subordinate corporations, although acting as public agents.

Notwithstanding the contrariety of opinion which seems to exist elsewhere, the rule upon this subject, in this state, is settled by too many and too forcible decisions to be easily shaken. The rule is the opposite of the one for which the defendants contend. A city *never* loses its right to protect the right of the public in property in which there is a public easement by reason of an adverse possession. Unauthorized acts of exclusive possession by any party upon a

street or public square, is a nuisance which no time will legalize without statutory aid."

The situation with respect to the school house is an unusual one and it is not entirely beyond probability that somewhere there is in existence an unrecorded deed which would definitely locate the lot in question, and the municipal authorities could claim it. The present situation does not permit the owner to convey free from the school house encumbrance, unless the legislature or proper authorities with delegated power take appropriate action.

V.

The Telephone Co. Grant.

In August, 1900, the defendant in writing and under seal for the stated consideration of Five Dollars ($5.00) granted to the North Jersey Telephone and Telegraph Co. the right to construct and maintain a telephone and telegraph line including the necessary poles, wires and guys along the highway adjoining her property, and to trim trees. There can be no doubt that the right of a telephone company to erect a telephone line within the limits of a public highway, upon land the fee of which is owned by private persons, imposes an additional servitude upon the fee. And this right can only be acquired against the consent of the owner through the power of eminent domain which would result in suitable compensation. See *Nicoll* v. *Telephone Co.*, 62 N. J. L. 733. There can be no doubt that the Telephone Co. has an absolute grant giving to it an interest in the land equivalent to one placed by a deed. A grant similar in nature to the one in the case at bar where the right to lay petroleum pipes and maintain and remove

the same is discussed in the case of *Standard Oil Co.* v. *Buchi,* 66 Atl. 427, at p. 430, where PITNEY, *Adv. M.,* said:

> "Nor is it, in its essential nature a license, nor can it be reduced in its nature in that respect. It by its terms granted a permanent right to lay the pipe, to maintain the same, and to remove the same. It gave an interest in the land quite as positive and as permanent as that in which a deed is given granting the right to lay a line of water pipes or *to erect a line of telephone poles across the grantor's land,* where the circumstances indicate that the work done thereunder was to be permanent."

A right existing *by grant* is not forfeited or extinguished by non-user alone. See *Riehle* v. *Heulings,* 38 N. J. E. 20 at p. 23.

It may be contended that the instrument delivered to the Telephone Co. was a mere license and therefore could be extinguished. Discussing such licenses the Court said:

> In *Veghte* v. *Raritan Water Power Co.,* 19 N. J. E. 142 at p. 156.
>
> "An easement will not be extinguished by mere non-user for 20 years; it will, if the non-user is accompanied by acts *which show an intention of abandonment.* Otherwise, it requires adverse possession, as well as non-user, to effect the extinguishment; as, if the land used for a way had been built upon, enclosed by an impassable wall, or cultivated in such way as to render the use of it impracticable.
>
> Some hold, that a way acquired by prescription will be extinguished by non-user alone, while it requires adverse possession

in case of a grant. I do not find any decision founded on this distinction, and it would seem unfounded as prescription is based upon the presumption of a grant. Citing, 3 Kent 448; Angell on Water courses No. 252; Washb. on Easements, 550, No. 1; Ward *v.* Ward, 7 Exch. 838; Jennison *v.* Walker, 11 Gray 423; Bannon *v.* Angier, 2 Allen 128; Arnold *v.* Stevens, 24 Pick. 106; Shields *v.* Arndt., 3 Green's C. R. 234.

Even as a licensee the telephone company's rights are not extinguished.

(A) Twenty years have not elapsed since the date of the grant.

(B) The Telephone Company have not abandoned their rights. This is manifested by the exercise thereof in an assignment recorded three years after the original grant. It is common knowledge that large utility corporations acquire rights many years in advance, which are utilized when the exigencies of their business demand it. See *Morris and E. R. Co.* v. *Mayor of Jersey City,* 44 Atl. 938.

"The lands were, apparently, acquired by the company a considerable time ago, but as yet no step has been taken by it looking to their subjection to railroad users. They are not within the present or proposed lines of the company's right of way. Nor are they at all necessary for the enjoyment of its franchise. They are simply held as a matter of convenience, so that the company may hereafter utilize them for yard purposes, if the exigencies of its business shall make it advisable to do so."

The Court of Errors and Appeals in *Raritan Water P. Co.* v. *Veghte,* 21 N. J. E., 463, at p. 480 said:

"Abandonment is a question of intention. Non-user is a fact in determining it, but is not, even for 20 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. Washb. on Easement, 551-6; Crossley *v.* Lightowler, Law R. 3 Eq. 279; Ward *v.* Ward, 14 E. L. & E. 413; Queen *v.* Chorley, 12 Q. B. 515; Stoker *v.* Singers, S. E. & B. 31."

Some suggestion may be offered by the defendant to the effect that the language of the telephone grant merely contemplates the use of the highway, and that the defendant is precluded from asserting any rights in the highway because the description in the deeds of record under which she holds title recites that her lands are bounded by the highway. This matter has been disposed of by judicial expression in this State, and such position by the defendant is untenable. See *Beach* v. *Hudson River Land Co.,* 65 N. J. E., 426, at pp. 434-435.

Pitney, *V. C.*

"The universal practice is, and always has been, in New Jersey, to include in a conveyance, without excepting or noting the same, all highways which cross or lie upon the land conveyed, and where it does not appear by the description that a highway is included the presumption is that the title goes to the centre of any highway adjoining the premises conveyed."

This case was affirmed by the Court of Errors and Appeals in 68 N. J. E., 656.

VI.

It is quite apparent that the school house clause and the grant to the Telephone Co. are interests and outstanding rights in the land which would prevent the plaintiff if she acquired title, from exercising a complete dominion over the farm purported to be conveyed. Even if the diminution of pecuniary worth does not appear and damages are only nominal, it is respectfully submitted according to the Demars Case cited, *supra,* they are encumbrances.

The defendant failing to perform, plaintiff respectfully contends that she is entitled to the monies paid under the agreement, and she respectfully asks for judgment as prayed for in the complaint.

FOSTER M. VOORHEES,
Attorney for Plaintiff.

Brief for Defendant

HISTORY.

Contract was made April 15, 1911, and $2,000 paid.

Plaintiff's attorney employed Fidelity to search and guarantee title.

Fidelity objected to school house exception and telephone grant.

Affidavits were submitted, and Fidelity agreed to guaranty against school house question and that fact was communicated to the attorney for each party Jan. 12, 1912.

Negotiations between parties were continued till April 17, 1912.

On that date parties met at Fidelity office.

Defendant was then prepared to deliver deed and accept mortgage.

Plaintiff refused to take title on the ground that same was not satisfactory.

Negotiations were continued for the purpose of removing objections.

By mutual agreement plaintiff started suit in Chancery by bill for specific performance, and to quiet title, IN ORDER TO REMOVE OBJECTIONS IN PART. The bill was filed July 11, 1912.

An indefinite extension of time to answer was given to defendant.

The township of Linden filed a disclaimer.

The suit was dismissed by plaintiff on September 27, 1915, and three days later, October 1, 1915, this suit was started.

There is no evidence that tender was made by the plaintiff at any time, nor that the negotiations for disposing of the two questions were broken off, nor is there evidenec that defendant refused or was unable to perform.

POINT 1.

On above state of facts plaintiff should be nonsuited for the following reasons:

1st: She has failed to prove performance or readiness to perform on her part.

2d: She has failed to prove default on the part of the defendant.

Granting for the moment that the objections are such as to require their being eliminated in order to comply with the contract, the time for performance by the defendant had not elapsed, because the time fixed for the carrying out of the contract was extended by the subsequent conduct of the parties for the very purpose of disposing of these

two questions, and the action for disposing of them was taken by the plaintiff herself, by mutual agreement with the defendant, and continued by means of the chancery suit until three days before this suit was started, when without notice to defendant, plaintiff discountinued the chancery suit, and started this suit to recover the $2,000 deposit card.

The case is either for damages on a breach of contract or for a return of the money paid, on a recission by the plaintiff.

The pleadings do not make it clear which position the plaintiff seeks to occupy, but in either case the action is premature.

If it is an action for damages for breach of contract there must be proof of a tender of performance by the vendee. *Shinn et al.* vs. *Roberts,* 20 N. J. Law 435 (444); *Shinn* vs. *Haines,* 21 N. J. Law 340; *Long* vs. *Hartwell,* 34 N. J. Law (127), and a failure to perform by the vendor.

As to the first there is no proof of tender; nor was any tender made.

As to the second, there has been as yet no failure to perform, for the time for performance had not elapsed at the time of bringing this action, it having been extended by the agreement of the parties.

Lyons vs. *Wait,* 51 N. J. Equity 60.

The plaintiff cannot justify her action by saying that the defendant hadn't a good title. She might acquire it.

Conover vs. *Tindall,* 20 N. J. Law 513.

As there has been no tender of performance by the plaintiff and as the time for performance had not elapsed because of the conduct of the parties, the plaintiff cannot maintain an action for damages.

But the course of the plaintiff's conduct, together with the nature of the claim, makes it clear that the suit is founded on an attempted recission of the contract for failure to perform.

Notice of an intention to rescind is necessary before suit at law.

Lyons vs. *Wait,* 51 N. J. Equity 60 (p. 68).

Bayard vs. *Holmes,* 33 N. J. Law 119.

McTague vs. *Sea Isle City Bldg. Assn.,* (57 N. J. Law 427), 1894. Garrison, J. (for Court of E. & A.) p. 428.

"An executory contract that contains no stipulation for its recission and that has not been induced by fraud, may, in general, be rescinded by one party only when the other expressly refuses to perform, or has rendered himself incapable of performing it, or has otherwise evinced his abandonment of it. Mere delay in the execution of a contract whose terms would be satisfied by performance within a reasonable time does not of itself entitle the other party to rescind.

The damages resulting from an unreasonable delay may be recovered in an action on the contract; but money paid under a specific arrangement cannot be gotten back unless the conduct of the defendant warrants the belief that the special contract is abrogated.

429. "The conduct of both parties down to the time of this suit was brought showed that in the mind of each the original undertaking was in force. The repeated demands of the plaintiff for his deeds under the special contract with the association were repeated affirmations of the existence of such a contract; at no time did he give to these demands any character or force inconsistent with the original

scheme under which he had parted with his money.

"The case must rest upon the actual conduct of the parties prior to suit brought, concerning which it is sufficient to say that it is consistent alone with the notion that, in the contemplation of each, the other was bound by the rules that made up the original agreement between them. In such a state of the proofs, the plaintiff could not elect to treat the special contract as rescinded and sue on the common counts for the money he had paid under it."

Not only was no notice given, but the defendant was justified in believing that the methods adopted by the plaintiff, by mutual consent, for disposing of the objections to the title, were satisfactory to her, and she was not required to do anything more than was being done until notice was given her that the burden voluntarily assumed by the plaintiff, according to agreement between them, of clearing up the points, was no longer satisfactory thereafter, and until a reasonable time had to clear up the questions.

This applies especially to the question of the school lots, but the same course of conduct creates the same situation in regard to the telephone grant. No demand was made on her to dispose of that, it was not mentioned in the bill of complaint in the chancery suit, and the defendant had the right to assume that the plaintiff was not insisting on its being disposed of, but would waive it.

Both points would be cleared up by a grant to defendant and perhaps in other ways, and the defendant was entitled to reasonable time to clear them up after plaintiff abandoned her efforts to do the same. The plaintiff was thereupon not entitled to rescind at the time of bringing this action.

Plaintiff has not proved performance, nor tender of performance.

No notice of intention to rescind was given.

The plaintiff is therefore not entitled to maintain this suit and should be non-suited.

POINT 2.

The exception of the school lot mentioned in the deed, under which the defendant holds title, does not constitute such a defect that the defendant is unable to perform the contract.

Statement of the facts:

The contract provides that "in consideration of $450 per acre for the farm hereinafter described * * * the said party of the first part will well and sufficiently convey to the said party of the second part * * * free from all encumbrances except only as hereinafter stated * * * all that lot, tract or parcel of land and premises, hereinafter particularly described * * * which said tract or parcel of land and premises to be conveyed consists of a farm with buildings thereon, located on the road from Rahway to Elizabeth in said township and supposed to contain 47¾ acres more or less as stated in deed made to party of the first part."

But it is agreed that the exact acreage is to be ascertained by survey * * * and the price to be paid for the number of acres ascertained * * * from said survey at the rate of $450 per acre.

There is no evidence that there is a shortage in the acreage by reason of the exception or otherwise, nor is any objection made on that account. It is admitted that the defendant and her predecessors in title have been in the full, uninterrupted, peaceable, notorious and undisputed possession of the whole farm for more than seventy years past.

It is further admitted that there has been no actual use of any part of the farm for school purposes, nor has there been any school building erected thereon for a period of not less than seventy years past.

The specific description in the deed to the defendant's husband is:

> "First, lying on the northerly side of the road leading from Rahway to Trembly's Point containing by estimation forty-seven and seventy-two hundredths (47 72/100) acres of land be the same more or less and being bounded westerly by land belonging to the estate of Enoch M. Shotwell, deceased, northwesterly and northeasterly by land of John Shotwell, northeasterly by land of Aaron Shotwell and southerly by the highway aforesaid always excepting thereout and therefrom a lot of land whereon a school house stood which was heretofore given and granted by the former owner of the land for the purpose of erecting and building a school house thereon for the accommodation of the neighborhood."

Prior deeds for this tract contained substantially the same exception, back to 1805.

The right of the public, if any, by reason of the school house clause has not been surrendered by any known instrument in writing. There is nothing to show that the grant when made was a grant to the public. It is described as land granted for a school house for that neighborhood. This language might just as easily mean a private as a public school. In fact, in 1805, there were no public schools, nor was there any law by which a public body could take title to land for school purposes. All the schools were private schools, and this was

undoubtedly a private school supported by the people of that neighborhood.

The location of the excepted tract is not shown, nor is there any evidence that it is on or off the farm of the defendant described in the contract.

Argument on Point 2.

To recover at law for a breach of such a contract, as the one in question, the plaintiff must show that the title tendered was not good at law.

Meyer vs. *Madreperla,* 68 N. J. Law 258 (268) E. & A.

Has the plaintiff shown that the title tendered was not good? She has shown that the deed to the grantor contained an exception. But she does not show that such exception was in the farm covered by the contract. That farm was apparently well known to the parties. Its area was not known, but that was provided for by the survey, and the price per acre according to the survey. The farm was all in the possession of the defendant, and had been for seventy years past in her possession and that of her predecessors in title. Does the exception lie within that farm as occupied by defendant? The description does not disclose that fact. THE DESCRIPTION OF THE EXCEPTION IS SO VAGUE AS TO MAKE THE EXCEPTION VOID.

Thayer vs. *Torrey,* 37 N. J. Law 339 (344).

The proof does not show where it is located and the burden of proof is on the plaintiff.

See *Meyer* vs. *Madreperla,* (*supra*).

The proof shows that the defendant and her predecessors in title have had full, uninterrupted, peaceable, notorious and undisputed possession of the whole farm for seventy years past.

If this grant for a school was a private grant, the possession of defendant is sufficient to make her title good.

Even if it could be construed as a public grant a presumption of a grant arises to defendant from the possession.

> "In this country the prevailing doctrine is that an exclusive and uninterrupted enjoyment for twenty years creates a presumption *juris et de jure,* and is conclusive evidence of title, whenever, by possibility a right may be acquired by grant.
>
> "In the class of legal presumptions established by judicial decisions which have become part of the common law of the land, and are imperative rules of law against the operation of which no averment or evidence is received, Prof. Greenleaf classes the presumption of a grant arising from an exclusive and uninterrupted enjoyment for the period of prescription. * * * In this state the law may be considered settled in accordance with the prevailing doctrine in the courts of this country."
>
> *Lehigh Valley* vs. *McFarlan,* 43 N. J. Eq. 605 (pp. 619 and 620). (Errors and Appeals 1881).
>
> Followed in *Custer* vs. *Rugel,* 54 N. J. Law, 503.

This presumption is distinguished from the right which the defendant might have by a period of adverse possession. It is a rule of evidence and requires the plaintiff in this case to prove that there is no grant to the defendant.

See *Meyer* vs. *Madreperla, supra.* (p. 265).

It is not sufficient rebuttal to say that the right of the public, if any, by reason of the school house clause has not been surrendered by any known in-

strument in writing. There is the legal presumption of the grant to the defendant who has been in possession more than twenty years, and though the defendant does not know of the existence of a grant, she is not required to know it. There must be proof that it does not exist to overcome the presumption.

It may well be that the deed for the school house lot if there ever was one, when produced, would show that this exception was not on the farm, or that it contained a clause by which the lot reverted to the holders of the farm out of which it came, on abandonment by the public, as frequently happens. We don't know what it would show, but the point is that neither that deed nor anything else does show that title to any part of the farm is outstanding now, and the plaintiff must show that fact in order to prevail in this action. The case is almost identical with the Meyer case cited above.

POINT 3.

The telephone grant along the public street is not such a defect as to prevent the defendant from performing or to justify the plaintiff in suing for damages for failure to perform or to rescind the contract.

The contract describes the property to be conveyed as a farm with buildings thereon located on the road from Rahway to Elizabeth in said township and supposed to contain 47¾ acres, more or less, as stated in the deed made to the party of the first part. The deed referred to describes the property as lying on the northerly side of the road leading from Rahway to Trembley's Point, bounded westerly by Shotwell, northwesterly and northeasterly by Shotwell and southerly by the highway

aforesaid. It is apparent that the description in the contract of the property to be conveyed does not specifically include the highway. If the land to the center of the highway was included in the contract it must be through a legal presumption arising that the grantor intended to convey to the center of the highway.

In *Salter* vs. *Jones,* 10 Vroom, 469, it is declared that a deed conveying a lot of land which describes its boundaries as running along the side of a street, will, by legal presumption (in the absence of words excluding the street) be held to embrace the lands lying in the street to the center line.

In the case of *Commissioners* against *Johnson,* 36 Eq., p. 211, this doctrine, stated in *Salter* vs. *Jones,* is explained, and its limitations shown by the following language: (See p. 214.)

> "But such effect can only be given to the deed of the grantor who owns not only the lot expressly conveyed by it, but also the land adjacent included as a street. It has never yet been held that where the land conveyed as adjacent to a street is owned by one person and the adjacent land described as a street is owned by another, that a deed made by the first will pass the land of the other."

This question was again before the court in *Humphries* vs. *Eastlack,* 63 Eq., p. 136, in which the court commented on *Salter* vs. *Jones* as follows:

> "This declaration must rest upon the assumption that there has been some showing that the grantor in the deed on which the presumption is to arise, had title to the center line of the street."

In the case of *Ocean City Hotel Company* vs. *Sooy*, 77 N. J. Law, 527, the Court of Errors said:

> "It is obvious that the mere fact that a street was referred to as a boundary and is delineated upon a map, indicated nothing as to the title of the land covered by the street, for the title to the street might well be in a third party and yet the street could properly be delineated on a map and referred to in a conveyance between different parties,"

and in that case the court held that the conveyance could only include so much of the street as the grantor owned.

In the case of *Beach* vs. *Hudson River Land Co.*, 65 Eq. 426, the language quoted by the plaintiff in his brief was *dicta* without any citation of authorities, but was a reiteration of the doctrine established by *Salter* vs. *Jones* and the affirmance of the case by the Court of Errors goes no farther than the opinion of the Vice Chancellor below.

It is safe to say that the rule of law as established by the cases above mentioned is, that where a contract is made to convey the lands bounded by a public street, there is a presumption that the contract requires the grantor to convey the land to the center of such street, if the grantor has title to such land, but there is no presumption that he will convey the land to the center of the street if he does not own it.

If the defendant did not own any land in the public street, no presumption will arise that she intended to convey to the center line thereof. Nor is there any implied representation that she owned to the center line.

If the failure to convey any part of the street would not constitute a breach of the contract, how

can the failure to convey a fee title in half the street be construed as a breach of the contract? The law undoubtedly is that a presumption arises in such a case as this to convey whatever the grantor has to the center line of the street and no more. In this case the defendant apparently has the title subject to an easement given to the Telephone Company. This was all she had at the time the contract was made. If she conveys that she is fully performing her contract and this she has offered to do.

The plaintiff is therefore not entitled to damages for failure to perform, nor entitled to rescind because of the exceptions mentioned in the deeds, as to the school house lot, nor because of the telephone grant, and the verdict should be against her.

Respectfully submitted,

CLARK McK. WHITTEMORE,
ABRAM H. CORNISH,
Attorneys for Defendant.

Plaintiff's Memorandum in Reply.

1.

No formal tender was necessary.

The defendant's title is bad. She cannot give a "Deed of warranty, free from all encumbrance." Under the circumstances a formal tender in this case is unnecessary, because the defendant was unable to perform her contract. Despite the defects she still maintains that the title is good. Under such circumstances a tender would be a vain and idle ceremony, which the law does not exact, but on the contrary excuses.

In 38 Cyc. 134-135.

"A formal tender is unnecessary if the party to whom performance is due be absent from the place of performance, in those cases where his presence is necessary; nor is a formal tender necessary if, at the time for performance the party to whom performance is due fails or refuses to perform on his part, unless a request which he has no right to make is complied with, or if he is unable to perform or does or suffers anything to be done with the thing to be delivered by him which renders certain a failure of performance on his part when the day arrives. Similarly a tender is waived where the tenderee makes any declaration which amounts to a repudiation of the contract, *or takes any position which would render a tender so long as the position taken by him is maintained, a vain and idle ceremony;* * * *"*

And in the case of *Rockland* vs. *Leary,* 203 N. Y. 469 at pp. 483 and 484.

"No 'good and sufficient deed' could be given unless all the heirs united therein, and hence, the refusal by one was the same as a refusal by all. (Citing *Blood* vs. *Goodrich,* 9 Wend. 68.) After such refusal there was no necessity of making a tender, for the law does not require a *vain thing to be done. Moreover, strict* tender *was unnecessary on account of the outstanding right of dower and because two of the heirs were infants."*

And the case of

Eisler vs. *Halperin,* 98 Atl. 245.

"The rule is elementary that, in the absence of any qualifying conditions in the contract of sale (and there were none in this case), the

purchaser is entiled to a good title. If the title be not such as the purchaser is entitled to under his contract, he may, after a proper tender, *or without it in cases where it is waived or excused, rescind the contract and recover back in an action at law what he has paid on it.* 29 Enc. Law (2d Ed.) 619; *Meyer* vs. *Madreperla,* 68 N. J. Law, 258, 266, 53 Atl. 477, 86 Am. St. Rep. 536. The principle is recognized in this state by such cases as *Weimer* vs. *Fath,* 43 N. J. Law, 1; *Buttoro* vs. *Whalen,* supra; *Gerbert* vs. *Trustees,* 59 N. J. Law, 160, 35 Atl. 1121, 69 L. R. A. 764, 59 Am. St. Rep. 578; and *Mangonaro* vs. *Kare,* 84 N. J. Law 408, 87 Atl. 94. We have in this state a line of cases holding that equity will not decree the specific performance of such a contract if it will result in compelling the purchaser to take a doubtful title. *Dobbs* vs. *Norcross,* 24 N. J. Eq. 327, a decision of Chancellor Runyon, is a leading example. Recent cases in this court are *Van Riper* vs. *Wickersham,* 77 N. J. Eq. 232, 76 Atl. 1020, 30 L. R. A. (N. S.) 25, Ann. Cas 1912A, 319, and *Doutney* vs. *Lambie,* 78 N. J. Eq. 277, 78 Atl. 746. There may be some cases where equity would refuse relief to a vendor on account of doubtful features of title that nevertheless would not support a recission by vendee and a suit for recovery back of purchase money paid; *but, if there be a substantial defect, the vendee may rescind and recover back his payments and interest if the title* has not passed. Illustrative cases are *Moore vs. Appleby,* 108 N. Y. 237, 15 N. E. 377 (lack of proper parties in a partition suit); *Fruhauf* vs. *Bendheim,* 127 N. Y. 587, 28 N. E. 417 (outstanding privilege of renew-

ing a lease); and *Simon* vs. *Vanderveer,* 155 N. Y. 377, 49 N. E. 1043, 63 Am. St. Rep. 683 (filed *lis pendens* and complaint stating a good cause of action, although unfounded in fact)."

2.

The Defendant Abandoned the Contract.

She has practically conceded that defects in the title exist. In attempting to forfeit as liquidated damages, the two thousand ($2,000) dollars paid on account, and claiming that the plaintiffs committed the breach in failing to tender the balance of the purchase price she assumes an inconsistent attitude by arguing that there was a mutual extension of time for performance. The facts do not support this contention. The answer of the defendant does not set forth the defense of a mutual extension of performance.

And as was said in the case of

Krah vs. *Wassmer,* 5 Buch. (75 N. J. E. 109, at p. 113, *Affd.* 78 N. J. E. 605).

"The parties are bound by statements made by the defendants in their answer; insofar as they are admission or admissions without substantial variation of the charges in the bill."

The answer distinctly asserts in four separate defenses, and in a counter claim that the plaintiff has been guilty of a breach in failing to tender the balance of the purchase price. Time was made of the essence of the contract. By reason of *this* (if the answer is to be taken as true) the two thousand ($2,000) dollar deposit is retained. (See second defense). The objection to the telephone grant was never disposed of. The Fidelity Trust Com-

pany never agreed to guarantee against it, and the defect was *never waived.* The Chancery suit to dispose of the cloud on title of the school house lot and to enforce specific performance was questioned as to its efficacy by the attorneys therein.

Mrs. Ramsin never did anything directly or indirectly towards eliminating the defects, either by suit, deed or application to the proper authorities for the release of the interest of the public in the school house lot.

Defendant by maintaining under points two and three that no substantial defects exist evidences her position. She refuses to give title as agreed and completely abandons any effort towards clearing the defects for which she claims now an extension of performance. The contract was dated April 15th, 1911, the *closing* was set for October 2d, 1911. Adjournment was regularly had to April 17th, 1912. *After this date* there was no regular adjournment or set time agreed upon for performance because the defendant claimed an alleged legal tender on April 17th, 1912, at which time the plaintiff refused to accept title with the defects as they exist. The time for performance was therefore not extended, and the answer substantiates this because the deposit was forfeited as liquidated damages. Time was of the essence of the contract according to the defendant when the matter of retaining the two thousand ($2,000) dollars presented itself. Having done nothing in four and one-half years she claims an *extension of performance* refuted by all the facts. The McTague case quoted by the defendant is respectfully submitted for consideration by the plaintiff.

> "An executory contract that contains no stipulation for its recission and that has not been induced by fraud, may, in general, be re-

scinded by one party only when the other expressly refuses to perform, or has rendered himself incapable of performing it, *or has otherwise evinced his abandonment of it.* Mere delay in the execution of a contract whose terms would be satisfied *by performance within a reasonable time* does not of itself entitle the other party to rescind.

"The damages resulting from an unreasonable delay may be recovered in an action on the contract; but money paid under a specific arrangement cannot be gotten back *unless the conduct of the defendant warrants the belief that the special contract is abrogated.*

429. "The conduct of both parties down to the time of this suit was brought showed that in the mind of each the original undertaking was in force. The repeated demands of the plaintiff for his deeds under the special contract with the association were repeated affirmations of the existence of such a contract; at no time did he give to these demands any character or force inconsistent with the original scheme under which he had parted with his money.

"The case must rest upon the actual conduct of the parties prior to suit brought, concerning which it is sufficient to say that it is consistent only with the notion, that, in the contemplation of each, the other was bound by the rules that made up the original agreement between them. In such a state of the proofs, the plaintiff could not elect to treat the special contract as rescinded and sue on the common counts for the money he had paid under it."

(a) Defendant's abandonment has been evinced.

(b) The conduct of the defendant warranted the belief that the special contract was abrogated.

(c) A reasonable time for performance has elapsed in a contract where time was of the essence thereof and nothing was done in the four and one-half years.

3.

The School House Clause.

There can be no doubt that the school house lot of land was in the farm covered by the contract. The exception is in all the deeds. By reason of the uncertainty of the exact location and size of the school house lot *on the farm* the defect is such that the purchase price cannot be diminished.

The contract provides for a deed of warranty free from all encumbrance, but the defendant, it is respectfully submitted, cannot even deliver a "good and sufficient" title.

The arguments of the necessity for the existence of a special grantee and the presumption of title by prescription are met in the plaintiff's memorandum.

The defendant was charged with notice of every matter affecting her estate which appeared in the deeds of her chain of title.

See *Roll* vs. *Rea,* 50 N. J. L. 264 at 268 *Affd.* 57 N. J. L. 647.

4.

The Telephone Grant.

The facts in this case come clearly within the universal rule quoted in plaintiff's brief. The defendant attempted to give title to the Ramsin farm

adjoining a highway. Title ordinarily should carry the fee *unencumbered* to the center of the highway. This defendant has impaired by the easement granted to the telephone company.

It is respectfully submitted that judgment should be for the plaintiff as prayed for.

FOSTER M. VOORHEES,
Attorney for Plaintiff.

Supplementary Brief of Plaintiff.

1.

Plaintiff's extension of time to answer the bill in Chancery was for a reasonable and not an unlimited time within which defendant might perform.

The granting of further time was not a complete waiver of plaintiff's right to the conveyance which she was entitled to under the agreement. It was only a friendly act to enable defendant to perform and was so accepted by the defendant. The fact that it was granted and accepted of itself shows that the plaintiff wanted and the defendant intended to give the required deed. It was plaintiff's right to say when she would withdraw from the stipulation and not the defendant's to say when she should cease to be bound thereby.

In addition to the admissions made by *the answer, which* preclude the possibility of a nonsuit on account of the existence of an alleged mutual extension of performance, appearing on the plaintiff's own case, there is the additional circumstance on the direct case of the defendant's *unreasonable delay.* The plaintiff on a motion for a nonsuit is entitled to the benefit of all the inferences

favorable to her case from all the facts, and is entitled to the consideration of the element of what is an *unreasonable delay* in the performance of the contract. (See *Weston* vs. *Benecke*, 82 Atl. 878, at p. 880). The unreasonable delay clearly establishes the *abandonment of contract.*

The extension was founded on no consideration which would estop the plaintiff. The abandonment calls for her explanation of the defects, and what she did to remedy them, especially the phone grant concerning which no bill in Chancery was filed. When we reach the defects the defense urges the validity of the title and the forfeiture of the deposit as liquidated damages, thereby eliminating the contention of a mutual extension and the ground for non suit. After four years of defendant's neglect or inability plaintiff was justified in withdrawing from the stipulation and asking for a return of the deposit.

When suit is instituted the plaintiff is met by the defenses and counter claim in the answer, that are binding admissions, the efficacy of which has in no way been decreased by the Practice Act or any construction thereof. Nor can the defendant assert her right to plead inconsistent defenses when in fact the defense of an extension of performance is *not pleaded.*

Interest is Due Plaintiff.

The extension of time was to enable the defendant to perform. She did not perform within a reasonable time. The deposit was really returnable on the 17th day of April, 1912. The demand for its return was deferred for defendant's accommodation and not that of the plaintiff. Plaintiff should not be penalized by loss of interest because defendant either neglected or was unable to do

what both intended and what defendant attempted to do. There was nothing in the extension from which it could be fairly implied that upon failure of the defendant the plaintiff would not demand a repayment of the deposit, and default having really been made on the 17th day of April, 1912, interest should be charged from that date.

Respectfully,

FOSTER M. VOORHEES,
Attorney for Plaintiff.

After considering the matters set forth in the Pleadings, Agreed State of Facts and Briefs, the court rendered the following opinion:

Opinion of the Court.

The defendant by her agreement with the plaintiff, dated April 15th, 1911, contracted to convey by deed of warranty free from encumbrance, certain lands in Linden Township, Union County, New Jersey. Time for closing title was extended until April 17th, 1912. At that time defendant was ready to deliver a deed and accept the mortgage called for by the agreement. The plaintiff refused to accept title because of an exception mentioned in the deed, of a school house lot, and also because of a grant to a telephone company for land in the street.

Thereafter there were negotiations between the parties in an endeavor to remove the objections but these were without result.

Plaintiff now seeks to recover $2,000 paid on account of the purchase price, with interest on the same.

Opinion.

In view of the defendant's answer, and the fact that she does now, and always has contended, that she could deliver good title, plaintiff may maintain her action without first making a tender. Such procedure would be unnecessary and fruitless. This brings us then, to the decisions of the real questions involved, namely, whether the school house exception, and the telephone grant, are encumbrances, and whether plaintiff was obliged to take a deed subject thereto.

(A) *Telephone Grant.*

It is well settled in this State that a deed conveying a lot of land, which describes its boundaries as running along the side of a street, will by legal presumption (in the absence of words excluding the street) be held to embrace the lands lying in the street to the center line. *Slater* vs. *Jones,* 39 N. J. Law, 469.

But such effect can only be given to a deed when the lot owner also *owns* the land adjacent included as a street.

Commissioners vs. *Johnson,* 36 N. J. Eq., 211.

Humphries vs. *Eastlake,* 63 N. J. Eq., 136.

In the case at bar, there is not only such a presumption, but it also appears that the defendant actually exercised ownership, by making a grant or conveyance to the Telephone Company of lands in the street.

Defendant's contention, however, is, that under a contract of sale, the vendor is not obliged to convey the land to the center of the street, but only so much thereof as still remains under her control; that having made a grant to the Telephone Company she then conveys to the purchaser land to the

middle of the street, minus what has already been granted to the Telephone Company.

Carried to its logical conclusion, the legal presumption could readily be destroyed entirely, for if the land must be taken subject to one grant, it must be taken subject to many, and in the last analysis may be entirely exhausted, so that nothing will be left.

The presumption is that the land to the middle of the street is taken, so that if there is a vacation of the street, the land will revert and will be useful for other purposes. Land so reverting subject to various grants, would have little or no use after such reversion.

When the contract for sale was made, with no mention of the telephone grant, the purchaser had a right to assume that he would get with the property, *all* the land to the middle of the street, not part of it.

I am therefore of opinion, that the telephone grant was an encumbrance, the existence of which gave the purchaser a right to refuse to take the deed.

(B) *School House Lot.*

The property was to be conveyed free from encumbrance. It appears, however, that in every deed in the chain of title from 1805 down, there appears the following clause: "Always excepting thereout and therefrom a lot of land whereon a school house stood which was heretofore given and granted by the former owner of the land for the purpose of erecting and building a school house thereon for the accommodation of the neighborhood."

This action being in a court of law, and not in equity, the question is whether a *good* title can be

given, not whether a *marketable* one can be granted.

Defendant contends that if there was a grant, it was a private one, overcome by adverse possession; that it could not have been a public grant because there were no public schools previous to 1805, when the grant was made.

The purpose of the grant was for the *"Accommodation of the neighborhood,"*—clearly for general uses, and not for private purposes. And while there were no public schools, in the sense in which we now use the term, there was, evidently, a desire for education in that neighborhood, and a school house was erected, to meet the community requirements, on land granted for that purpose.

If the grant was to the governing body, it would be *public* in character. I know of no reason why the governing body of the township could not accept a deed for land for such use. It was not inconsistent with the purposes of government, even though no duty rested upon the body to furnish schools or education.

In this connection it is also important to remember, that each conveyance down to and including the last, recognizes the school house lot grant, although for over seventy years they have been in possession of the land. If adverse possession had overcome the private grant, there would have been no reason for recognizing it during all this period.

There may have been a dedication, which is often spoken of as a grant, which does not require that there be a grantee *in esse* at the time of the dedication to give it effect; neither is it essential that the right of use be vested in a corporate body.

Dedications for school uses are generally recognized, partly because such uses are public uses.

Postea.

So that if there was no direct grant to the corporate body, there was a dedication, such as would be binding upon the land, and which could not be defeated by adverse possession.

Such a dedication would bind the owners, and would account for their continued recognition of the "grant," because it was public in character.

The existence of this encumbrance also justified plaintiff in refusing to accept a deed subject thereto.

Judgment will be entered for the plaintiff and interest will be allowed from April 17th, 1912, being the time to which the matter was continued by mutual consent of the parties, and at which time the deed should have been delivered free from encumbrance, or the purchase money returned.

Whereupon the following postea was entered:

Postea.

This case was tried before Judge George S. Silzer, without a jury, on the fifth day of May, Nineteen Hundred and Sixteen, at the Union County Circuit Court, and was submitted on an agreed state of facts and briefs. The Court rendered a judgment against the defendant and in favor of the plaintiff, for the sum of two thousand dollars ($2,000), together with the sum of five hundred and sixty-six dollars ($566) interest, making in the aggregate the sum of two thousand five hundred and sixty-six dollars ($2,566).

Dated Elizabeth, N. J., January 5, 1917.

GEO. S. SILZER,
Judge.

Whereupon judgment was entered as set forth in the judgment record above.