INDEX.

Witnesses for Plaintiff.

Witnesses for Defendant.

EXHIBITS.

Summons.

THE STATE OF NEW JERSEY TO LUDWIG BILOW:

YOU ARE SUMMONED to answer the annexed complaint of Catharine O'Brien in an action at law in the Supreme Court wherein said Catharine O'Brien demands of you possession of a tract of land with the appurtenances situate in the Townships of Branchburg and Hillsborough, in the County of Somerset, and particularly described in said complaint. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and of the annexed complaint, judgment will be entered against you and you will be turned out of possession of said land.

(L. S.)

WITNESS, Honorable Thomas J. Brogan, Chief Justice of the Supreme Court, at Trenton, this 12th day of April, Nineteen Hundred and Thirty-seven.

FRED L. BLOODGOOD,
Clerk.

HERR & HEATH,
Attorneys.

10 20 30 40

Complaint.

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

CATHARINE O'BRIEN, Plaintiff, *vs.* LUDWIG BILOW, Defendant.	Action at Law. Complaint.

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COUNT ONE.

20 The plaintiff, residing in the Township of Branchburg, County of Somerset and State of New Jersey, demands of Ludwig Bilow, the defendant herein, possession of premises situate in the Townships of Branchburg and Hillsborough, County of Somerset and State of New Jersey, described as follows: Beginning at a large tree now or formerly on the east bank of Neshanic Brook near where said brook intersects the South Branch River; thence running along the east bank 30 of said brook to the place where it intersects the south bank of the South Branch River; thence in an easterly direction along the south bank of the South Branch River to a point therein marking the dividing line between the farm now owned by the defendant and the farm now owned by the Township of Hillsborough, known as the Poor Farm; thence at right angles across the South Branch River to the north bank thereof and the lands of the plaintiff; thence in a westerly 40 direction along the northerly bank of the South

Branch River to a point approximately seventy-two feet easterly from the northeast corner of the bridge crossing said South Branch River on the road leading to Montgomery; thence in a southerly direction in line with the east bank of Neshanic Brook across the South Branch River to the point or place of beginning; and also the sum of Five hundred ($500) dollars for mesne profits and damages.

The plaintiff says that her right to possession and her title to the lands claimed vested at the expiration of thirty years actual uninterrupted possession in herself and her other direct predecessors and/or occupiers of the title through whom she claims, which date fixed on or before May 30, 1935, and which right has continued since then until the present time, and that the defendant wrongfully deprives her of the possession thereof and has continued so to do since on or about the 15th day of June, 1935, when the defendant wrongfully and wilfully removed the plaintiff's fence around the aforesaid property, or a portion thereof, and claimed right to possession of the same himself, to the plaintiff's damage in the amount of Five hundred ($500) dollars.

COUNT TWO.

The plaintiff complains of the defendant in tort and says that the defendant, his agents or servants, on or about the 15th day of June, 1935, broke and entered the close of the plaintiff in the Township of Branchburg and in the Township of Hillsborough, both in the County of Somerset and State of New Jersey, and then and there did take down a certain fence, being a wire fence, which fence belonged to the plaintiff and thereby caused the plaintiff great and considerable damage and

wrong and required her to spend a considerable sum of money in caring for cattle, or fencing in cattle, feeding upon the property of the plaintiff, all of which was to the plaintiff's damage in the amount of Five hundred ($500) dollars.

The plaintiff demands damages on this count in the sum of Five hundred ($500) dollars, together with costs.

10

COUNT THREE.

The plaintiff repeats the allegations in count two and makes them a part of this count.

The defendant, his agents or servants, after committing the trespass alleged in count two took and carried away the fence which was then valued at approximately Twenty-five ($25) dollars.

The plaintiff demands damages, therefore, on this count in the sum of Twenty-five ($25) dollars together with costs, and also the sum of Five hundred ($500) dollars mesne profits and damages.

20

HERR & HEATH,
Attorneys for Plaintiff.

(Service acknowledged.)

30

Demand for Bill of Particulars.

[SAME TITLE.]

To Catherine O'Brien, plaintiff, and Herr & Heath, Esquires, Attorneys for the Plaintiff:

PLEASE TAKE NOTICE that Ludwig Bilow, the defendant in the above entitled cause, demands within ten days from the date of service hereof, a

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bill of particulars of the plaintiff's claim as set forth in her complaint, as follows:

1. State whether title is claimed in plaintiff by virtue of a Statute, and if so, please state the chapter, section and year of said statute.

10

2. State whether the alleged possession of plaintiff and her other direct predecessors and/or occupiers of the title through whom she claims was permissive or hostile, (a) in its inception, (b) in its continuance.

3. If said possession was permissive state by whom, and to whom, said permission was given, and when given, and the nature of said permission.

20

4. State with particularity the items and amounts of damage claimed under Count One of the Complaint.

5. State whether title of plaintiff claimed in Count Two is founded upon the same basis as in Count One, and if not state upon what basis it is founded.

6. State with particularity the items and amounts of damage claimed under Count Two.

30

McDonough & McDonough,
Attorneys for Defendant.

(Service acknowledged.)

40

Bill of Particulars.

[Same Title.]

The plaintiff, answering the demand for bill of particulars requested by the defendant, says:

10 1. Title will be claimed by whatever right the plaintiff may prove by the facts alleged in the complaint.

2. The answer to this question is a matter of defense and not a proper subject of demand for particulars.

3. See above.

20 4. The damage consists in the loss of the use of the premises which it is alleged the plaintiff was entitled to occupy together with the expenses and costs which the plaintiff was required to spend to prevent the cattle, either owned by the plaintiff or pastured on her meadow, from wandering away from the pasture and/or trespassing on others and caring for the cattle and fencing them in, and such other loss as may be proved at trial, together with any punitive damages which may be awarded.

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5. The plaintiff will claim title by whatever right, title or interest she may be able to prove under the allegations in the complaint.

6. See answer to question 4.

Herr & Heath,
Attorneys for Plaintiff.

40 (Service acknowledged.)

Amended Answer to Demand for Bill of Particulars.

[Same Title.]

The plaintiff, answering the demand for bill of particulars requested by the defendant, says that:

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1. The title is claimed by the plaintiff by virtue of Chapter 188 of the Laws of 1922, and all acts of which said law is an amendment and all supplements thereto; said original act being entitled "An Act for the limitation of suits respecting titles to land" (Revision of 1877, page 598).

2. Plaintiff's possession has been actually from its inception and during its continuance.

3. Refused.

20

4. The damage consists in the loss of the use of the premises which it is alleged the plaintiff was entitled to occupy, together with the expenses and costs which the plaintiff was required to spend to prevent the cattle, either owned by the plaintiff or pastured on her meadow, from wandering away from the pasture and/or trespassing on others and caring for the cattle and fencing them in, and such other loss as may be proved at trial, together with any punitive damages which may be awarded.

30

5. The title claimed in Count Two is the same as in Count One.

6. See answer to question 4.

Herr & Heath,
Attorneys for Plaintiff.

(Service acknowledged.)

40

Notice of Motion.

(Filed June 7, 1937.)

[Same Title.]

To Catherine O'Brien, Plaintiff, and Herr & Heath, Esquires, Attorneys for Plaintiff:

10 Please take notice that we shall apply to the Honorable Rulif V. Lawrence, Judge of the Circuit Court of the County of Somerset, sitting as one of the Commissioners of the New Jersey Supreme Court, at his chambers in the court house in Freehold, in the County of Monmouth and State of New Jersey, on Saturday, the 29th day of May, 1937, at the hour of ten o'clock, daylight saving time, in the forenoon, or as soon thereafter as counsel can be heard, on an order to strike out 20 the complaint filed by you in the above stated cause of action, for the following reasons:

1. That said complaint fails to state a lawful right of possession in the plaintiff to the lands described in the complaint and for this and other reasons does not disclose a cause of action.

2. That said complaint lacks certainty in that the complaint fails to state with certainty whether 30 it is alleged that the defendant deprived the plaintiff of the possession of the whole or a portion of the premises described in the complaint, and if a portion, fails to describe said portion with certainty and as a result thereof defendant will be embarrassed and hindered in his answer.

3. For misjoinder of causes of action in that the causes of action set forth in count two and count three of the complaint are not the proper 40 subjects of joinder with an action for recovery

of lands as set forth in count one of the complaint.

And we shall apply for an order to strike out counts two and three of the complaint filed by you as superfluous in that the damages claimed in said counts are dependent upon the right to possession of the lands claimed in count one and are actionable, if at all, as damages under count one and in their present state will only serve to confuse, embarrass and hinder the defendant in his answer.

Dated—May 20th, 1937.

McDonough & McDonough,
Attorneys of Defendant.

(Service acknowledged.)

Order.

(Filed June 7, 1937.)

[Same Title.]

This matter coming on to be heard on motion of counsel for defendant to strike the complaint and in the presence of counsel for plaintiff; and the Court having read and considered the complaint and heard and considered the argument of respective counsel; and being of the opinion that the following course of procedure should be taken: that the defendant shall plead the general issue and serve a demand for bill of particulars of the complaint upon the plaintiff, or her attorneys, and in the event that the bill of particulars served in pursuance of said demand, taken with the complaint, should fail to properly state a cause of

action that the defendant shall then be at liberty to again move to strike the complaint, and in the event that the complaint, taken with the bill of particulars, shall properly state a cause of action, but being of such nature as to warrant a different plea than the general issue, or as to warrant a counterclaim, then the defendant shall be at liberty to change his plea and/or file a counterclaim to the above entitled cause of action,

It is, therefore, on this 5th day of June 1937, ORDERED that the present motion to strike the complaint be and the same is hereby denied; and that the defendant may now file a plea to the general issue and serve a demand for bill of particulars of the complaint upon the plaintiff, and in the event that the bill of particulars served in pursuance of said demand, taken with the complaint, shall fail to properly state a cause of action, that the defendant shall then be at liberty to again move to strike the complaint, and in the event that the complaint, taken with the bill of particulars, served in pursuance of such demand shall be of such a nature that the defendant desires to file a different plea and/or a counterclaim, then and in that event the defendant in the above cause shall be at liberty to file a different plea and/or a counterclaim.

RULIF V. LAWRENCE,
C. C. J., as S. C. C.

Answer.

(Filed June 22, 1937.)

[Same Title.]

The defendant, Ludwig Bilow, appears and defends this action and says that he is not guilty of the injury whereof the said Catherine O'Brien hath complained in her declaration, nor of any part thereof. 10

McDonough & McDonough,
Attorneys for Defendant.

(Service acknowledged.)

Demand for Bill of Particulars. 20

[Same Title.]

To Catherine O'Brien, plaintiff, and Herr & Heath, Esquires, Attorneys for Plaintiff:

Please take notice that Ludwig Bilow, the defendant in the above entitled cause, demands within twenty days from the date of service hereof a bill of particulars of the plaintiff's claim and title as set forth in her complaint pursuant to the following: 30

1. State whether the land claimed is cultivated land, and if cultivated state the manner of cultivation of the same.

2. State whether the alleged possession of plaintiff and her other direct predecessors and/or occupiers of the title through whom she claims, was permissive or hostile and adversary, (a) in its inception, (b) in its continuance. 40

3. If it is claimed that the possession was hostile and adversary, state the nature of the possession and the use of which the same was put by the plaintiff and her other direct predecessors and/or occupiers of the title and state whether possession claimed was exclusive of defendant and his predecessors.

4. If said possession was permissive state by whom, and to whom said permission was given, and when given, and the nature of said permission.

5. State whether or not it is claimed that privity of title to the premises claimed exists between the plaintiff and her other direct predecessors and/or occupiers of the title through whom she claims. If the answer is yes please state with particularity the deed or other instrument of title establishing such privity and annex hereto an abstract of the same giving the book and page of the recording of the same.

6. State in whom the record title to the premises claimed and the land adjoining the same on the north is now vested and if vested in another person or persons and the plaintiff please state whether or not such other person or persons will agree to be joined as a party plaintiff to this action.

7. Please annex an abstract of such documentary evidence of title as the plaintiff may intend to give in evidence on the trial and if any of such documents may by law be recorded please state where they are recorded and the book and page of recording, and if not recorded then annex copies of such documentary evidence with the name or names of the subscribing witness or witnesses, if any.

Answers to Demand for Bill of Particulars.

8. State with particularity the items and amount claimed for each item of damage claimed in the complaint.

9. State whether it is claimed that defendant hath deprived the plaintiff of a whole or a portion of the premises claimed and if a portion describe with particularity the portion of which it is claimed defendant deprived the plaintiff of possession. 10

10. State whether or not it is claimed defendant is in possession of the premises claimed and if it is claimed that defendant is in possession please state the nature of defendant's possession and the use to which the same is now being put by the defendant.

20

McDonough & McDonough,
Attorneys for Defendant.

(Service acknowledged.)

Answers to Demand for Bill of Particulars.

[Same Title.]

30

To Ludwig Bilow, defendant, and McDonough & McDonough, Esquires, Attorneys for Defendant:

The plaintiff, answering the demand for bill of particulars propounded by the defendant, says that:

1. Cultivated land used for meadow purposes.

2. (a) Adverse. (b) Adverse. 40

Answers to Demand for Bill of Particulars.

3. The premises have always been used for cultivated purposes and possession has been exclusive.

4. ——

5. Yes. Warranty deed from George G. Brokaw and Frances A. Brokaw, his wife, to John O'Brien and Catharine O'Brien, his wife, dated September 25, 1907 and recorded in the Somerset County Clerk's Office in Book G No. 11 of Deeds, page 473. Proof of death of John O'Brien.

6. Within defendant's knowledge.

7. (1) Warranty deed from George G. Brokaw and Frances A. Brokaw, his wife, to John O'Brien and Catharine O'Brien, his wife, recorded in Book G No. 11 of Deeds for Somerset County, page 473. (2) Warranty deed from Alexander B. Brokaw and Julia C., his wife, to George G. Brokaw, recorded in Book C No. 11 of Deeds for Somerset County, page 401. (3) Warranty deed from Lemirah Suydam to Alexander B. Brokaw and George G. Brokaw, recorded in Book L No. 10 of Deeds for Somerset County, page 198.

8. This is a continual damage and the plaintiff is unable to set the exact amount which will be claimed at the time of trial.

9. The whole.

10. This is within the knowledge of the defendant.

HERR & HEATH,
Attorneys for Plaintiff.

(Service acknowledged.)

Notice of Motion.

(Filed October 13, 1937.)

[Same Title.]

To Catherine O'Brien, plaintiff, and Herr & Heath, Esquires, Attorneys for Plaintiff:

Please take notice that we shall apply to the Honorable Rulif V. Lawrence, Judge of the Circuit Court of the County of Somerset, sitting as one of the Commissioners of the New Jersey Supreme Court, at his chambers in the court house in Freehold, in the County of Monmouth and State of New Jersey, on Saturday, the second day of October, 1937, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the complaint filed by you in the above stated cause of action for the following reasons: 10 20

1. That said complaint taken together with the bill of particulars served upon defendant by plaintiff in accordance with the order of the Court of June 5th, 1937, fails to state a lawful right of possession in the plaintiff to the lands described in the complaint.

2. That said complaint taken together with the bill of particulars served upon defendant by plaintiff in accordance with the order of the Court of June 5th, 1937, fails to allege that defendant is in possession of the premises claimed and in that respect fails to disclose a cause of action. 30

3. That the claim of privity set forth in the bill of particulars served in pursuance of the aforesaid order is sham and untrue in fact in that none of the instruments under which privity is claimed cover the premises claimed in this action.

McDonough & McDonough,
Attorneys for Defendant. 40

(Service acknowledged.)

Opinion.

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

10 CATHERINE O'BRIEN,
Plaintiff,
vs.
LUDWIG BILOW,
Defendant.

Action at Law. In Ejectment. On defendant's motion to strike complaint as sham.

20 For the motion, MCDONOUGH & MCDONOUGH (CHARLES A. REID, JR.).

Opposed, HERR & HEATH (W. EDDY HEATH).

LAWRENCE, C. C. J.:

This is an ejectment suit. A count in the complaint also sounds in trespass to land. Plaintiff seeks to establish her right, by adverse possession for over thirty years, pursuant to P. L. 1922, p. 30 315, Chap. 188 (Cum. Sup. Comp. Stats., p. 1816) to land partly meadow and in part the bed of a stream known as South Branch River, in the Township of Branchburg, Somerset County, between the southerly boundary of a farm property owned and occupied by her, and to which she acquired title (with her husband, who has since died) on September 25, 1907, and the northerly line of land of defendant. The paper title of neither of the parties, it appears, actually in- 40 cludes the *locus in quo,* although defendant con-

cedes that by implication each owns to the center of the stream. Plaintiff claims, however, that for over thirty years she and her predecessors in title maintained a fence on the south side of the river along defendant's north line, with an enclosure on the east and west, within which they were accustomed to water cattle and to use for other purposes, as appurtenant to the property, in carrying on their farming operations, which use had been open, notorious, continuous and in hostile manner to those owning the farm to which defendant now has title. When the latter purchased, he is alleged to have torn down the fence and, denying plaintiff's right to continue to use the disputed area, precipitated the present litigation.

Defendant now moves to strike the complaint as sham on the ground that in the bill of particulars served by plaintiff she sets forth her title deed to her property and those of her predecessors which clearly disclose that the southerly boundary line runs only to the northerly side of the stream and does not extend across it to the south side, which is the northerly line of defendant's land. For this reason it was urged on the argument of the motion that plaintiff shows no title, express or implied, to the *locus in quo* and could not have acquired it by adverse possession as alleged, since she is not permitted to tack on the possession of prior owners of her property and the use of *locus in quo* as appurtenant thereto and so enable her to take advantage of the statute; this upon the theory that the continuity of the use was broken at the time of each conveyance, with reversion to the original grantor. The right of user, therefore, it was argued, never became appurtenant to plaintiff's land. It was also urged that the com-

plaint taken with the bill of particulars failed to disclose plaintiff's possession of the disputed area or a lawful right to it.

The argument suggests a misconception of the rule relating to title acquired by adverse possession. In Spottiswoode *v.* Morris and Essex Railroad Co., 61 N. J. L., 322; 40 Atl., 505; aff. 63 N. J. L., 667; 44 Atl., 1100, it was said: "The plaintiff made title under G. From time to time the first fences were erected there was an adverse possession on the part of G. and those who succeeded to his title down to 1891, upwards of fifty-five years", and it was held that title by adverse possession was acquired through G. and those who succeeded to his estate, and that such title vested in the plaintiff. See also Gordon *v.* Lumberville Delaware Bridge Co., 108 N. J. L., 261; 158 Atl., 388; and Miller *v.* Penna-Reading Seashore Lines, Inc., 117 N. J. L., 152, 155; 187 Atl., 332. The statute itself provides that (excepting as to woodlands or uncultivated tracts—plaintiff's bill of particulars states that the meadow portion of the *locus in quo* was used in the customary way in connection with the farm) possession for a period of thirty years uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner it might have commenced or have been continued, shall vest a full and competent right and title in every actual possessor or occupier of lands, tenements or other real estate, and shall be a good and sufficient bar to all claims that may be made, or actions commenced, by any person or persons whatsoever, for the recovery of any such lands, tenements or other real estate. While plaintiff rests her case on the statute to which reference is made, it may be that the statute barring entry by

any one other than the person who has acquired title by twenty years adverse possession might also have been invoked, for it is to be observed that plaintiff claims title to the land within the boundaries described, including the bed of the stream, and not a mere easement.

In the circumstances, it is not perceived that there is anything in the bill of particulars supporting the argument that the complaint is sham, nor, indeed, that it is frivolous. The title deeds themselves merely indicate plaintiff's ownership of the property—and of her predecessors—adjacent to the *locus in quo*. They have no other significance, it would seem. The other grounds advanced on the argument have been considered and found without substance. The motion to strike the complaint will be denied.

In disposing of the motion, which was submitted to me as a supreme court commissioner, it is to be said that the case is at issue and on the calendar for trial at the present term of the Somerset County Circuit Court, with the result that the motion properly should have come before me as judge of that court on the reservation in defendant's answer to move to strike the complaint at or before trial. As no point was made of it on the argument, I have considered it as before me as such judge.

Order Denying Motion to Strike.

[Same Title.]

This matter coming on to be heard on the ninth day of October, 1937, in the presence of Herr & Heath, Esquires, attorneys for the plaintiff, and in the presence of McDonough & McDonough, Es-

quires, attorneys for the defendant, on notice of motion to strike the complaint filed in the above entitled cause, which motion was made after the filing of answer in the above entitled cause in accordance with the right reserved to the defendant so to do by the Order of this court under date of June 5th, 1937, as by reference to said Order will particularly appear, and the court being of the opinion that said motion should be denied;

It is, thereupon, on this 20th day of November, 1937, Ordered that said motion be denied; *nunc pro tunc* as of October 13, 1937.

Rulif V. Lawrence,
Judge.

Let the above Order be filed as of time.

Rulif V. Lawrence,
Judge.

Postea.

[Same Title.]

This case was tried before the Honorable Newton H. Porter, Circuit Court Judge, with a jury at the Somerset Circuit on October 26th and 27th, 1937.

The jury rendered a general verdict of guilty and for One dollar damages against the defendant and in favor of the plaintiff, and the jury being polled at the demand of the attorney for the defendant they each individually rendered a general verdict of guilty and for One dollar damages against the defendant and in favor of the plaintiff.

Newton H. Porter,
Judge.

Judgment.

Whereupon it is adjudged that the plaintiff Catherine O'Brien do recover of the said defendant Ludwig Bilow the possession of the premises mentioned and described in the complaint, together with the sum of One dollar damages, together with her costs which have been taxed at the sum of Seventy-three dollars and eighty-two cents. 10

Damages $1.00.

Costs $73.82.

Judgment entered and signed November 8, 1937.

THOMAS J. BROGAN,
Chief Justice.

Notice of Appeal. 20

(Filed April 4, 1938.)

[SAME TITLE.]

To Catherine O'Brien, Plaintiff, Herr & Heath, Esquires, her Attorneys, or to Whom it May Concern:

TAKE NOTICE that Ludwig Bilow, defendant, appeals from the Order of June 5th, 1937, of the above entitled Court in this cause, which Order denied the defendant's motion to strike the complaint in this cause; and that said defendant appeals from the Order of November 20th, 1937, of the above entitled Court, which said Order denied defendant's motion to strike the complaint in the above entitled cause *nunc pro tunc* as of October 13th, 1937, and that said defendant appeals from the whole of the judgment entered in this cause in the above entitled Court to the Court of Errors 30 40

and Appeals of New Jersey in the Last Resort in All Causes.

Dated: March 23rd, 1938.

McDonough & McDonough,
Attorneys for the Defendant.

10

(Service acknowledged.)

Grounds of Appeal.

(Filed May 5, 1938.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

20

Catherine O'Brien, Plaintiff-Respondent, *vs.* Ludwig Bilow, Defendant-Appellant.	Action at Law. (In Ejectment.) On Appeal from the New Jersey Supreme Court. Grounds of Appeal.

30

To Herr & Heath, Esqs., Attorneys for Plaintiff-Respondent.

Sirs:

The above named defendant-appellant, Ludwig Bilow, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above cause:

40

Grounds of Appeal.

(1) The Circuit Court Judge sitting as a Supreme Court Commissioner erred in his order of June 5th, 1937, in which he denied the defendant's motion to strike the complaint, in that:

(a) The complaint was founded on Section one of "An act for the limitation of suits respecting title to lands" (Revision of 1877, page 598 as amended by Chapter 188, P. L. 1922) which statute has no application to the state of facts set forth in the complaint. 10

(b) The tract described in the complaint appears on the face of the complaint to be an uncultivated tract and therefore it is not within the purview of the statute.

(c) The complaint failed to show adverse possession on the part of the plaintiff. 20

(d) The complaint failed to show that the defendant was in possession of the premises claimed in the complaint.

(e) The complaint failed to allege privity between plaintiff and prior occupants of the premises described in the complaint.

(f) The complaint lacked certainty in that it does not state with certainty whether plaintiff was deprived of the possession of the whole or of a portion of the premises described in the complaint. 30

(g) And for divers other reasons the said complaint failed to show a cause of action.

(h) The Supreme Court Commissioner erred in said order in compelling the defendant to plead to a defective complaint and erred by compelling the defendant to demand 40

a bill of particulars which were to become a part of the complaint and by compelling the defendant to plead to the complaint before the service of the said bill of particulars which were to become a part of the complaint, all of which was contrary to the practice of the court and greatly prejudicial to the defendant.

(2) The learned trial judge erred in his order of November 20th, 1937, which order denied *nunc pro tunc* as of October 13th, 1937, the motion of defendant to strike the complaint in that said complaint taken together with the bill of particulars served in pursuance of the order of the Supreme Court Commissioner of June 5th, 1937:

(a) Failed to disclose a cause of action because the statute on which the same is founded has no application to the period of possession claimed therein;

(b) Failed to disclose a cause of action because it does not show that defendant is in possession of the premises claimed;

(c) Failed to disclose a cause of action because the premises described therein appear on the face of the complaint to be uncultivated;

(d) That said complaint taken together with said bill of particulars is sham insofar as it alleges privity between the plaintiff and the prior occupants of the premises described in the complaint because none of the instruments under which privity is claimed covered the said premises;

(e) And for divers other reasons the court erred in denying said motion.

Grounds of Appeal.

(3) Because at the trial the court, over the objection of the defendant, permitted the witness John O'Brien to testify to a conversation with two men said by him to be taking down a fence (Transcript, pages 13 to 15 inclusive).

(4) Because at the trial the court, over the objection of the defendant, permitted the witness John O'Brien to answer the following question: 10

"Q. Now, for what purpose was the land adjacent to the fence; from the fence to northerly used?" (Transcript, page 16).

(5) Because at the trial the court, over the objection of the defendant, permitted the witness John O'Brien to testify to the usage to which the pasture on the northerly side of the river was put and, specifically, to answer the following question: 20

"Q. And kept in condition for that purpose?" (Transcript, page 17).

(6) Because at the trial the court, upon the objection of the plaintiff, refused to permit the witness George G. Brokaw to answer the following question propounded by the defendant:

"Q. You didn't intend to convey or pass on to O'Brien the property over to the south bank?" (Transcript, page 27). 30

(7) Because at the trial the court, upon the objection of the plaintiff, refused to permit the witness George G. Brokaw to answer the following question propounded by defendant:

"Q. Did your father ever make any claim to the land lying on the north bank?" (Transcript, page 27). 40

Grounds of Appeal.

(8) The learned trial judge erred in refusing to grant the non-suit on a motion made therefor by the defendant at the close of the plaintiff's case in that:

(a) The statute on which the plaintiff relies has no application to the period of possession claimed.

10

(b) There was no testimony of adverse possession.

(c) There was no testimony of possession.

(d) There was no testimony that plaintiff was deprived of possession.

(e) There was no testimony that defendant was in possession of the premises claimed.

20

(f) There was no testimony of privity between plaintiff and prior occupants of the premises claimed.

(g) The tract claimed was an uncultivated tract and hence not within the purview of the statute.

(h) No possession for the statutory period was shown.

(i) And for divers other reasons the court erred in denying said motion.

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(9) Because at the trial the court, upon the objection of the plaintiff, refused to permit the witness John Covert to answer the following question propounded by the defendant;

"Q. And did Mr. O'Brien at any time while you were on what is now the Bilow farm make any claim of title to the land between the north bank of the river and the south bank of the river?" (Transcript, page 46).

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(10) Because at the trial the court refused to permit the witness John Covert, upon the objection of the plaintiff, to answer the following question propounded by the defendant:

"Q. Did they pay for that gravel?" (Transcript, page 50).

10

(11) Because at the trial the court struck out the testimony of the witness John Covert relating to gravel taken from the river (Pages 50 and 51 of the Transcript).

(12) Because at the trial the court permitted the witness John Covert, over the objection of the defendant, to answer the following question propounded by the plaintiff:

20

"Q. So that the new boundary line was established by putting the fence on the south side?", and the following question asked at the same time as the last mentioned question "He told you that didn't he?" (Transcript, page 56).

(13) Because at the trial the court, upon the objection of the plaintiff, refused to permit the witness John Covert to answer the following question propounded by defendant:

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"Q. Mr. Covert, was the intention of building that fence to waive your father's title to the land on the bank?" (Transcript, page 57).

(14) Because at the trial the court propounded the following question to the witness George G. Brokaw over the objection of defendant:

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"The court: No, it hasn't anything to do with farms. This is a water line fence usually acts as the boundary between properties. Does it or doesn't it?" (Transcript, page 63).

10 (15) Because at the trial the court permitted the witness Ludwig Bilow, over the objection of the defendant, to answer the following question propounded by the plaintiff:

"Q. And the fence running along here?" (Transcript, page 75).

(16) Because at the trial the court, over the objection of the defendant, permitted the witness 20 Ludwig Bilow to answer the following question propounded by the plaintiff and to answer the line of questions following the same which will be found on pages 76, 77 and 78 of the Transcript.

"Q. But so far as having a fence up there is concerned, if Mr. O'Brien will put it up it's perfectly all right with you, isn't it?"

(17) Because at the trial the court, upon the objection of the plaintiff, refused to permit the 30 witness John O'Brien to answer the following question propounded by the defendant:

"Q. As a matter of fact, didn't Mr. Bilow about a year ago this time meet you on the bridge, in November and offer to let you put a fence on part of his property and didn't you as the result of that discontinue a suit then pending against him?" (Transcript, page 89).

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Grounds of Appeal.

(18) Because at the close of the testimony the court refused, on the motion of defendant, to direct a verdict in favor of the defendant on the following grounds:

(a) The statute on which the plaintiff relies has no application to the period of possession claimed. 10

(b) There was no testimony of adverse possession.

(c) There was no testimony of possession.

(d) There was no testimony that plaintiff was deprived of possession.

(e) There was no testimony that defendant was in possession of the premises claimed. 20

(f) There was no testimony of privity between plaintiff and prior occupants of the premises claimed.

(g) The premises claimed was an uncultivated tract and hence not within the purview of the statute.

(h) No possession for the statutory period was shown. 30

(i) And for divers other reasons the court erred in denying said motion.

(19) Because the learned trial court denied the request of the defendant to charge the jury as requested in the second request:

"Plaintiff in her complaint states that the thirty years unbroken adverse possession accrued on or before May 30, 1935. Since 40

plaintiff's testimony admits that she herself did not adversely possess the premises claimed for thirty years prior to that date, she must, in order to maintain this action show that those before her and through whom she claims possessed the premises adversely and continuously for a sufficient number of years to make up the thirty year period to May 30, 1935. In addition to that she must show that those whose possession she relies on to make up the thirty year period, intended to acquire title by adverse possession and have passed on, one to the other and finally to her the rights which they were acquiring; in other words she must show privity between the several occupants of the premises claimed. If no privity is found to exist between the successive occupants, and the last occupant has not held adversely for the full statutory period of thirty years, the bar is not complete, as the law presumes that the land returns to the true owner at each change of possession, when there is no privity between the several occupants."

(20) Because the learned trial court denied the request of the defendant to charge the jury as requested in the third request:

"You must also determine whether the premises claimed are of the type specified in the statute on which this action is based. That statute expressly excepts uncultivated tracts. It is for you to determine whether the premises in question are uncultivated. If you find as a fact that they are uncultivated then the plaintiff's case fails, and your verdict should be 'not guilty'."

(21) Because the learned trial court charged the jury "and the south side of the river is the northerly boundary of the defendant's land" (Transcript, page 93).

(22) Because the learned trial court charged the jury "In other words the river is not included in their deed. And you are not concerned with whether or not, by implication, the ownership may go to the center line of that stream. But the dispute here is with respect to a strip of land along the river on the Bilow side of the river, between it and a fence that admittedly was there for some time. And the plaintiff says that for over thirty years she was in possession of that disputed strip of land, that she occupied it adversely to the title owner and that occupancy has been open, notorious, actual, continued, visible, distinct and hostile to the title owner for all of those years" (Transcript, pages 93 and 94).

(23) Because the learned trial judge charged the jury "She says by one of her witnesses that that fence was there over forty-one years ago and was continuously there since, and how much longer she doesn't know" (Transcript, page 94).

(24) Because the learned trial court charged the jury "And she says that that fence was maintained equally by the two owners; that it was down at times because of the water conditions, freshets or ice in the river carrying it down, but that it substantially had been there during this period of years under the conditions that she claims" (Transcript, page 94).

(25) Because the learned trial court charged the jury "And she says that that situation ob-

tained until the 15th of June, 1935, at which time Mr. Bilow became the owner of the farm across the river, and he caused that fence to be removed, and that as the result thereof the cattle pastured on the O'Brien farm wandered out across the river" (Transcript, page 94).

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(26) Because the learned trial court charged the jury "Since then there has been no fence there, I take it, and so she, Mrs. O'Brien, comes here, through her witnesses, to ask that she be awarded the possession in this suit of that disputed land, that Mr. Bilow now has possession of and claims as his, because her deed covers it; his deed going to that fence and not to the edge of the river, and she says she is entitled to it because what had begun wrongfully originally, has, because of the lapse of years, ripened in a right and that because she has had the possession of this property for this period of years is now the owner of it" (Transcript, page 95).

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(27) Because the learned trial court charged the jury "Now, of course, Mr. Marcus may have been there as a tenant and Mr. Bilow may still have had men there doing work" (Transcript, page 97).

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(28) Because the learned trial judge charged the jury "But can there be any question that this is cultivated land? It is a farm used for farming purposes; and just because a river flows through it doesn't take it out of the class of cultivated land and so I say to you as a matter of law that this is the kind of land that the Statute contemplated. It is cultivated land" (Transcript, page 102).

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(29) Because the learned trial court charged the jury "Where proprietors of adjoining land, such as the O'Brien property and the Bilow property or their predecessors in title, as the case may be, agreed between themselves on the boundary line or the fence and did not put it exactly where the deeds call for it, they are holding it adversely, each against the other, with respect to any lands that are enclosed in that fence or otherwise. That is quite different from a license or permission to use land. Of course, if a person gives permission to another to use, there would be no wrongful possession in that event. There would be no wrongful taking in the first instance. I repeat, if they agreed to divide the course of the border line between their land, that gives neither any permission or use, but on the question of the significance of the fence if there was ever one there or whether it was there and the fact that they divided the course between them does not defeat the running of the Statute with which we are concerned" (Transcript, pages 102 and 103).

(30) Because the learned trial court refused at the request of the jury to have the stenographer read the testimony of the witness John Covert.

(31) Because the learned trial court instructed the jury in answer to a question by juror No. 3 "Is there any diagram belonging to either party" and the statement made by a juror "We don't understand how many chains or links—" instructed the jury as follows:

> "The court: No, I don't either. But that isn't the point. The point is with respect to the disputed property. I told you that in my

charge; that which lays between the fence and the river. You are not concerned whether four chains and seventeen links or seventeen chains and four links. It is the disputed property; no question about what it is. You don't need to know the extent of the area of it. It won't help you in your determination of what they are entitled to or not. It may be a square mile or a square inch, it doesn't make any difference in the presentation of the case whether it is a large area or a small area".

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(32) Because the judgment is contrary to law.

(33) Because the verdict is contrary to the weight of the evidence.

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(34) Because there was no evidence to support the verdict of the jury.

(35) Because the court had no jurisdiction over the case.

McDonough & McDonough,
Attorneys for defendant-appellant.

Charles A. Reid, Jr.,
Of Counsel.

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(Service acknowledged.)

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Notice of Argument.

[Same Title.]

To Herr & Heath, Esquires, Attorneys of Plaintiff-Respondent, Or To Whom It May Concern:

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Sirs:

Please take notice of argument of the appeal in this cause, before the New Jersey Court of Errors and Appeals, to be held at the State House Annex, in the City of Trenton, on the Third Tuesday of October next, at eleven o'clock in the forenoon, or as soon thereafter as the said court can attend to the same.

Yours respectfully, 20

McDonough & McDonough,
Attorneys of Defendant-Appellant.

Sat below:

On the Motions to Strike, Lawrence, C. C. J.
At the trial, Porter, C. C. J.

(Service acknowledged.)

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Testimony.

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

CATHERINE O'BRIEN, Plaintiff, *vs.* LUDWIG BILOW, Defendant.	Action at Law.

10

Somerville, N. J., October 26, 1937.

Before:

HON. NEWTON H. PORTER, Judge, and a jury.

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Appearances:

HERR & HEATH, Esqs., for the Plaintiff.

McDONOUGH & McDONOUGH, Esqs., by CHARLES A. REID, JR., Esq., for the Defendant.

A jury being found satisfactory were duly sworn.

Thereupon Mr. Heath opened to the jury in behalf of the plaintiff.

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Thereupon Mr. Reid opened to the jury in behalf of the defendant.

CHARLES AGANS, sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Herr:

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Q. Mr. Agans, where do you reside? A. Now?
Q. Yes. A. Neshanic.

Q. And where did you reside in 1897? A. I was on the Township farm.

Q. And where was the Township farm located at that time? A. Alongside of Mr. Covert's farm.

Q. On the down stream side of the farm? A. Yes.

Q. And did it immediately join the farm of Mr. Covert? A. Yes. 10

Q. And when you speak of Mr. Covert's farm, you mean the farm now owned by the defendant in this case? A. Yes.

Q. Was there a fence between the Covert farm running approximately parallel with the river? A. Yes, on the south side.

Q. And where did that fence run from and to? A. It adjoined the line of the Township farm and ran up the river. 20

Q. And did it run up the river toward the road? A. Yes, toward the bridge.

The Court: What is the name of that river?

The Witness: One is the Raritan and the other what empties in the Raritan is the Neshanic.

Q. What did the fence do when it reached the Neshanic River? A. Stopped there as far as I know; didn't cross the Neshanic. 30

Q. It stopped at the entrance to the Neshanic River? A. Yes.

Q. Now, how did it run along the Raritan River? A. Ran along into the bank on the grade.

Q. About how many feet from it? A. I would not say. I seen the fence was there and that's all there was to it for me.

Q. When did you first see the fence was there? A. I first saw it working on the Township farm. 40

Q. And what year was that? A. 1897.

Q. And how long did you continue there? A. Twelve years.

Q. So you were there from 1897 up to 1909. Now, did you have occasion to go by on the roadway adjacent? A. Oh yes, quite often. I had to water my cows down there at the river the first year I was there. I could see the fence.

Q. I am speaking now of the time subsequent to your removal from the Township farm. Did you go back to that vicinity again? A. Yes, on the farm right below it; on Judge Schenck's farm.

Q. How long were you there? A. One year.

Q. That was during the year 1910? A. Yes.

Q. And what did you notice about the fence during that year? A. We mowed the meadow what adjoined up there that fall. The fence was there then.

Q. The same as it was when you were there in 1897? A. Yes; after that I don't know.

Q. I show you a picture marked P-1 for identification and ask you to look at it. Do you recognize the fence as there in the picture? A. Yes.

Q. And is that the fence you have been describing to the jury? A. As far as I know, same fence, to the best of my knowledge.

Q. And the body of water that shows in the left center of the picture, what's the name of that river? The main body of water? A. That's the Raritan River.

Q. And what's the other stream shown entering it? A. Neshanic.

Q. And the road is; or would be at the bottom of the picture if it were shown; is that correct? A. Yes, sir.

The Court: Which river is that? (Indicating.)

The Witness: That's the Neshanic and that's the Raritan. (Indicating.)

Mr. Herr: I offer the picture.

The Court: Let it be received.

(Marked as Exhibit P-1.)

Q. Now, during these years, Mr. Agans, whose cattle occupied the space between the fence and the river, the Raritan River? A. O'Brien's, when I was there. 10

Q. And who had the O'Brien farm that time? A. Why, his father when I lived there.

Q. When you first moved there and prior to that, was Williamson on the farm? A. He was there, but I don't remember.

Q. But whoever had it, their cattle was up between the fence and the river? A. I suppose, yes. 20

Q. Did you have a talk with the then owner of the farm on the fence side of the river? A. With Mr. Covert?

Q. Yes. A. I did.

Q. And did you talk with him about the fence? A. I asked him what it was there for.

Mr. Reid: I object.

The Court: That is Mr. Covert?

Mr. Herr: He is a predecessor in title of the defendant. 30

Mr. Reid: There is no testimony that the defendant was present.

The Court: Objection sustained.

Mr. Herr: This is a case where title of real estate is involved in which the real record of demands made by predecessor in title comes into play. I am now asking this witness for a conversation between him and the predecessor in title of the defendant. 40

The Court: Have you any ruling on that point? Can you give me any case? I don't know that the ruling is any different in a case involving title to property than it is in any other.

(Thereupon various cases were handed to the Court.)

The Court: Have you seen this case?

Mr. Reid: I assume that is a case covering the rule of possession.

The Court: This is a case Justice DePue, a similar case, where he ruled as I have just ruled, and Justice DePue points out that it is erroneous. That is good enough law for me.

Mr. Reid: I think, if your Honor please, we are losing sight of the fact this is not a boundary dispute.

The Court: That isn't a boundary dispute either, I don't think. Let me point out the paragraph that is applicable to this situation. It seems to me this is directly in point and it seems to relax the rule.

Mr. Reid: The facts in this case, if your Honor please, would indicate that the metes and bounds contained in the deed were variable, subject to such interpretation that parole evidence as to where they were would be admissible.

The Court: I am familiar with the exception to your rule. I understand you can go back to show declaration about a line, where a monument was or a line. This was not based on where a line ran. This was a case based on adverse possession. I suppose what he is seeking to show is a state-

ment made by Mr. Covert; for that reason I don't think it applies. I will allow it and that case is authority for it as I read it.

Mr. Reid: Exception.

The Court: You may now ask it, Mr. Herr.

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Q. You had a conversation with Mr. Covert about the fence? A. Yes, I spoke to him about it.

Q. And what did Mr. Covert say to you?

Mr. Reid: Object again unless the date can be fixed.

Mr. Herr: Yes, I will be very happy to do that.

Q. What date was it, approximately, as near as you can remember, Mr. Agans? A. Well, it was the first year I was there. 20

The Court: Where, Judge Schenck's or the Township farm.

The Witness: Township farm.

Q. That would be 1897?

Mr. Reid: Is Mr. Covert now alive?

The Witness: I don't think he is.

Mr. Reid: I object to it again on the ground he is not available to refute any testimony. It's objectionable as a conversation with a deceased person. 30

The Court: I will allow it.

Mr. Reid: Exception.

The Court: What was the conversation?

The Witness: What I asked him?

The Court: Yes.

The Witness: I asked him, how come he had that fence there. He said it was on ac- 40

count of keeping his neighbors' cows from coming up on the field, meadow. I said, you are heading yours off getting water? No, he said, they go up in there in the Neshanic River and drink. That's all I know about the fence.

10

Q. What time did you move on the Township farm; what month of the year? A. The first day of April. I had moved in March on account of the other man went away five days before the first.

Q. And the fence shown in the picture was there on the first day of April in 1897 and to your knowledge for twelve years? A. Yes.

Mr. Herr: That's all.

20

Cross examination by Mr. Reid:

Q. Mr. Agans, you testified on direct examination that John O'Brien's father was owner of the farm on the other side when you first went there? A. Yes, sir.

Q. You are sure about that, are you? A. Yes, sir, he wasn't married then when I first went there.

Q. When you first moved there in 1897? A. Yes.

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Q. You are just as sure of that as you are of the rest of your testimony?

Mr. Herr: I object to that.

The Court: I will allow it.

Q. Are you just as sure about that fact as you are of all the remainder of your testimony? A. Yes, sir.

Mr. Reid: No further questions.

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(Witness excused.)

JOHN O'BRIEN, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Herr:

Q. Mr. O'Brien, you are the son of the plaintiff in this action? A. I am.

Q. Where do you live? A. Neshanic Station. 10

Q. Are you acquainted with the location of this property that's in dispute? A. Yes, sir.

Q. What direction does the Raritan River flow at that point? A. From west to east.

Q. East and west? A. East and west.

Q. Which side of the river is your mother's property on? A. On the north side.

Q. On which side is the defendant's? A. On the south side.

The Court: Of the road? 20

The Witness: Yes.

Q. Your mother's property is on what side? A. North side.

Q. Does your property touch the Neshanic River other than at a point where this property is in dispute? A. No.

Q. And how about the defendant's property? A. It's on the other side of the river.

Q. Does it run for some distance along his property? A. The river? 30

Q. Yes, the Neshanic River? A. Yes, runs all the way along.

Q. When did your mother acquire this property? A. In 1907.

Q. Was the fence there when she purchased it? A. Yes.

Q. And who did she purchase it from? A. From George Brokaw.

Q. Was your father living at that time? A. Yes. 40

Q. He has since died? A. Yes.

Q. And which George Brokaw did she purchase the property from? A. George G. Brokaw of Neshanic.

Q. Were you with your parents at the time of the purchase? A. I was at the lawyer's office when it was settled, yes. When he first made the down payment, I wasn't.

Q. When did you first see the fence in question? A. Why, I imagine about October 1st of 1907.

Q. And to your knowledge, how long did that fence continue in that particular location?

Mr. Reid: I object.

The Court: On what ground?

Mr. Reid: I don't think that question is explicit. Do you mean subsequent to October 1st?

Mr. Herr: I withdraw the question.

Q. I show you a picture marked P-1 and ask you to examine it and tell me whether or not you were familiar with the fence shown in that picture? A. I am.

Q. And was that fence there at the time your folks moved on the farm? A. Yes, sir.

Q. And has it been there ever since? A. Yes, sir.

Q. Did you have any trouble about the fence from the time you moved there in 1907 to date? A. No, sir, not until it was taken down.

Q. And when was it taken down? A. June 15, 1935, I think.

Q. And who was the owner of the property on the southerly side of the stream at that time? A. I understand Mr. Bilow.

Q. Now, as the result of the fence being taken down, what occurred? A. You mean, how did I find out it was down?

Q. Yes. A. Why, Mr. Bergen called me up and told me my cows were up there, so I got one of the boys and we went on up and found out the cows were there. I couldn't understand how the cows got there. So I said, I suppose there is one of the wires broke.

The Court: Who do you mean, up there? 10
The Witness: At Mr. Bergen's place.

Q. Where is the Bergen place in connection with the defendant's farm? A. That's the next farm to Mr. Bilow's farm now.

Q. Next farm south? A. Yes, on the south. Well, we got the cows together and we drove them down the road and I went ahead and got over the river and opened the bars and as I opened the bars I seen two men on the other side of the river 20 taking the wire fence down. So I drove the cows in and I turned the car around and went back over the bridge and took my shoes and stockings off and went over the river.

Q. Over which river? A. Over the Neshanic River.

Q. That put you on whose farm? A. Mr. Bilow's.

Q. That's the defendant? A. Yes. I walked up to him and said you are taking our fence down. 30 What are you taking my fence down for?

Mr. Reid: I object.
The Court: I will allow it.
Mr. Reid: Exception.
The Court: Go ahead.
Mr. Reid: Object again unless it is shown who the conversation was with.
The Court: Two men who were working there taking the fence down. 40

Mr. Reid: Who are they?

The Court: I don't know, you may cross examine him at the proper time. Maybe you will find out and maybe you won't, I don't know.

10 A. (Continued) So they said, our boss told us to take the fence down. He doesn't want it here. He wants to make a park. I said, that's my piece of wire. He said, you get the hell off of the place or there will be trouble. One had an axe in his hand and the other had a bar, so rather than have trouble I walked off the place and came down and saw Mr. Heath.

Q. Now, who had been maintaining that fence? A. Well, for the last six—five or six years back 20 I put the whole fence up because he had no cows there at all.

Q. There were no cows of the defendant's? A. No, not on the Covert side and I put the whole fence up all the way from the Neshanic Brook or River, all the way down to the poor house.

Q. That would have been from the years 1929 to 1935? A. Yes. He only put half of it up until six years before.

Q. From the time you moved to the farm in 30 1907 and 1929, who put up the fence? A. Between the two of us. Both of us put the fence up.

Q. That is the man that then owned the defendant's farm? A. And myself.

Q. And you people put up half and half? A. Yes.

Q. And that is the custom among farmers to maintain fences half and half?

Mr. Reid: I object.

The Court: Strike it out.

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Q. Do you know the custom among farmers about maintaining fences?

Mr. Reid: I object.

The Court: Sustained, I don't think we are concerned with the custom. You mean it was six years ago from now that you put it all up?

The Witness: No, six years from the time this man took the fence down. Different ones have had it, they didn't have any cows there and I put the whole fence up.

Q. But you did from the period of 1907 to 1929 maintain half of the fence? A. Yes.

Q. Now, for what purpose was the land adjacent to the fence; from the fence to northerly used?

Mr. Reid: I object to that. This, of course, must be confined to the description contained in the complaint which runs between to the two banks. Now, if the fence has been put in above the bank, we are not concerned and that last is not an issue. The description leads along the bank.

Mr. Herr: No, we don't go above the bank. We just embrace the bank.

Mr. Reid: I believe the question was dealing with the land between the fence and the bank.

Mr. Herr: Yes, there is a bank that runs from the fence down to the bank.

The Court: I will allow it.

Mr. Reid: Exception.

Mr. Herr: Read the question.

A. For cows, pasture.

Q. And on the northerly side of the river was there a pasture? A. Yes.

Q. And how big a pasture? A. It was eighteen acres.

Q. From the period when your parents took possession of the farm up to 1935 what was that pasture used for to your knowledge? A. For pasture of cows.

Q. And kept in condition for that purpose?

Mr. Reid: I object to that as immaterial. That doesn't involve the line in dispute.

The Court: I think it does. That is what they are talking about.

Mr. Reid: They are talking about the meadow on the north side of the river.

The Court: It only shows the reason for it. I think there is no objection to that.

Mr. Reid: Exception.

A. The woods were cut.

The Court: What's the answer?

The Witness: I gave my answer.

The Court: You shook your head.

Q. You cut the wood? A. Yes.

Q. And during the period for grazing this particular bank and the adjacent pasture were used generally by your cows? A. Yes, and boarders. We took in boarders too.

Q. You sometimes put boarder cows in there? A. Yes.

Q. For that purpose you used the entire meadow, including the portion enclosed in this fence? A. Yes.

Q. And that's the portion described in the complaint in this case? A. Yes.

Mr. Herr: Take the witness.

Cross examination by Mr. Reid:

Q. In your conversation with these two men you mentioned, Mr. O'Brien, as I understand it, you told them they were your posts and wire? A. Yes.

Q. And you had put them up there? A. Yes.

Q. And then you testified on direct examination prior to that, that that fence contained in that picture marked Exhibit P-1 was there from the time you went on the property and continually until Bilow took it down? A. That's impossible because the posts rot and the wires break. The trees are up there with wires in them also.

Q. The fence was not up there at all times? A. No, because Mr. Covert's end was down more than my end. He was on the lower end of it.

Q. And when you received this complaint from Mr. Bergen, you testified you had a conversation with Mr. Bergen? A. I did.

Q. And didn't you, in answer to his demand to keep your cows home say, that's Bilow's fence and it's his duty to maintain it? A. Say that again?

Q. Didn't you answer the Bergen demand that you keep your cows home say to Bergen that that fence belonged to the man on the other side of the river and it's his duty to keep it up? A. No, sir.

Q. You deny it? A. Yes.

Mr. Reid: That's all.

Re-direct examination by Mr. Herr:

Q. Mr. Reid asked you about the same fence being there continuously. A. Yes.

Q. Naturally you had to renew it? A. Yes.

Mr. Reid: I object as leading.
The Court: Objection sustained.

Q. But was the line of the fence there continuously? A. Yes.

Mr. Reid: Objected to as leading.
10 The Court: He has already said that, as I understand it, in his direct examination.
Mr. Herr: That's all.

Re-cross examination by Mr. Reid:

Q. As a matter of fact, that fence was down at times? A. That end toward Mr. Covert's, yes, because that river overflowed.

Q. But the other end always kept up? A. Never went out the upper end and there's trees
20 along there that were tacked to the wire, Mr. Covert didn't have trees and the wires stayed there.

Q. That picture you have here shows a stake fence, doesn't it? A. Yes, just a stake fence.

Q. Now, you are telling me about a wire fence on trees? A. That's Mr. Covert's end of it; here are the trees down here. (Indicating.)

Q. When you say that's his end of it; do you mean his fence? A. He always put that in here.
30 (Indicating.)

Q. He put it up? A. Yes, until he got off the place and after he got off the place I had to put the whole fence up for over five or six years.

Q. But previous to that you put that fence up? A. No, he put one end of it up and I put the other end of it up.

Q. But you never at any time continuously for thirty years maintained the entire fence, did you? A. Yes, about five or six years.

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Q. For five or six years? A. Yes.

Q. But not for thirty? A. Not for thirty, no.

Mr. Reid: That's all.

Further re-direct examination by Mr. Herr: 10

Q. Who was on the poor farm when you moved there? A. Mr. Agans.

Q. And how long did he continue on the poor farm? A. I think he was there three years, if I am not mistaken.

Mr. Herr: That's all.

(Witness excused.)

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George G. Brokaw, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Herr:

Q. Mr. Brokaw, where do you reside? A. Neshanic Station.

Q. Are you acquainted with the property here in dispute? A. I was thirty years ago; I don't remember much about it. 30

Q. Did you own the so-called O'Brien farm thirty years ago? A. I owned all that land up the river, all the way from the mill.

Q. At the time you owned the O'Brien farm, you owned the farm to the south? A. To the south?

Q. Yes. A. Why, the poor house farm was over there and Covert's and Bergen's, I think. Bergen didn't live there that time. None of them did as far as that goes. 40

Q. Did the Covert farm immediately join your farm? A. Well, the river was between it.

Q. And where did the fence run?

Mr. Reid: I object to that unless he specifies as to what fence.

10 A. I can't tell.

The Court: He says he can't tell.

Mr. Reid: Withdraw my objection.

The Witness: I never had any bother there with any fence. I pastured cattle there.

Q. Do you remember where the fence was? A. I remember a fence was there. Stakes with a couple barbed-wire but I can't tell where it 20 started or where it stopped.

Q. See if that can refresh your memory. Take a look at P-1, please— A. Yes, that fence shows there.

Q. Now, is that the way the fence was? A. I won't say; I don't know; but a fence was there. I don't see why they would change it.

Mr. Reid: I move the last part be stricken out.

30 The Court: Strike it out.

Q. Where did you get the farm, Mr. Brokaw? A. I bought it of a lady down in South Jersey, I think by the name of Suydam. She was mortgagee, I think twenty-eight hundred dollars, if I am right.

Q. Now, did you buy it from her or did you buy it from your father? A. Oh, no, my father and I bought it together.

40 Q. And how long did you have it? A. Together?

Q. Yes. A. Up till he got sick of it; I forget how long it was now; a year or two; eighteen months.

Q. Now, did you have your attention called to this line fence back in 1935? Did you have your mind called to that fence back in 1935? A. What do you mean?

Q. I mean, were you talked to at that time about this particular fence? A. By who?

Q. Well, by anyone? A. I can't say.

Q. You know your signature when you see it, would you, Mr. Brokaw? A. Yes.

Mr. Reid: I object to any intent of impeaching this witness.

The Court: He isn't impeaching him yet.

A. Yes, that's my signature, sure.

Q. You were asked about the property in '35, weren't you? A. I don't remember; I don't know.

Q. What is your knowledge of that fence from the time you owned the farm, Mr. Brokaw, up to 1935?

Mr. Reid: I object, if your Honor please; he already testified as to his knowledge.

The Court: I will allow it.

A. The fence over the river were two barbed wires. A stake fence, as I remember it; that's thirty years ago.

Q. Well, just refresh your memory, Mr. Brokaw, by reading the last part of that; the last paragraph?

Mr. Reid: May I see that?

The Court: Yes, just a minute, Mr. Brokaw. Let Counsel see it.

(Mr. Reid reads the document.)

Mr. Reid: May I have your Honor's indulgence for a couple of minutes?

The Court: Yes.

Mr. Reid: I object to any reference to it on the ground his testimony at this point is that he doesn't remember signing it. And on the further ground that it is an attempt to impeach the plaintiff's witness.

The Court: I think not. This is an attempt to refresh the witness' mind about an affidavit he made.

Mr. Herr: That is correct.

Mr. Reid: He testified he doesn't remember making the affidavit.

The Court: He may change his mind when he has read it.

Mr. Reid: I assume he is now going to read it to himself.

The Court: Of course. Don't read it out loud. Read it and see whether that refreshes your recollection about having made that affidavit and the contents of it, having in mind the paragraph Counsel pointed out to you.

The Witness: That's paragraph number four?

The Court: I don't know. I never saw it.

Mr. Herr: That's correct, Mr. Brokaw.

A. Well, I couldn't have read that over very good. I have no recollection of that. I have got to tell the truth about it; I have no recollection of it.

The Court: That doesn't refresh your recollection, is that it?

The Witness: Mr. O'Brien may have submitted to me——

Q. Read the rest of it; read the full page? A. No, I don't remember.

The Court: All right.
Mr. Herr: Take the witness.

Cross examination by Mr. Reid:

10

Q. Mr. Brokaw, you testified you were owner just prior to O'Brien of the present O'Brien farm? A. Yes.

Q. Did you ever make any claim of any land beyond the north bank of the river? A. No, I never did.

Q. You never made any claim of the premises now in dispute lying between the banks? A. Never did.

Q. And you didn't intend to convey or pass on to O'Brien any land lying out there, did you? A. What's that?

20

Q. You didn't intend to convey or pass on to O'Brien the property over to the south bank?

Mr. Herr: That's objected to.
The Court: Sustained.

Q. Wasn't there, Mr. Brokaw, a conveyance from your father to you? A. I think so. We owned it together and I think you will see it shows on record.

30

Q. So there was a deed from your father and mother to you? A. I think there was.

Q. Were you on the farm when your father was there; both there at the same time? A. No, we didn't live continually there. We lived on up the road a couple of miles.

Q. Did your father ever make any claim to the land lying on the north bank?

40

Mr. Herr: I object.
The Court: Objection sustained.
Mr. Reid: Exception. That's all.

(Witness excused.)

10

HAROLD O'BRIEN, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Herr:

Q. Mr. O'Brien, you are the grandson of the plaintiff? A. I am his son.

The Court: The plaintiff is Catherine O'Brien; is that your grandmother?
The Witness: Right.

20

Q. Do you live on this farm? A. I do.
Q. And have lived on it how long? A. Twenty-five years.
Q. Does your father operate it? A. He has.
Q. How old are you? A. Twenty-five.

The Court: You were born there, were you?
The Witness: Right.

30

Q. How far back do you remember this particular fence?

Mr. Reid: I object to that; he hasn't yet testified he remembers it, as a matter of fact. Leading question.
The Court: All right; I will allow it. (To the witness): Do you remember the fence?
The Witness: Yes, I do.

40

The Court: And for how long can you recall it? For how many years?

The Witness: Oh, as long as I remember back I can remember there always being a fence there.

Q. How many years would that be? A. About seventeen years. 10

Q. And you as a boy, I suppose, had the duty of driving cattle down there and routing them out again? A. That's right.

Q. And the land adjacent to the fence and from the fence northerly over across the river was used for what purpose? A. For pasturing cows.

Q. Now, when was the fence taken down? A. June 15, 1935.

Q. Do you know who took it down? A. Well, I seen two men. My Dad went over there; that's the time I was over here when I brought the cows back to our property. 20

Q. And has the fence been up from June, 1935 to the present time? A. No, it hasn't.

Q. And have you been deprived of the use of the river there for your cattle? A. Yes.

Q. What provision did you make to take care of watering cattle? A. We had to build our own fence on our side of the river.

Q. And then approximately how much time did you spend in that? A. Well, it took at least a couple of days. 30

Q. And two or three wire fence? A. Two in one place and three in another.

Q. And it is strung to trees or to posts? A. Both.

Q. And about how many posts? A. In the longest stretch there was about ten posts and the shortest one five or six. 40

Q. Now, did you purchase these posts or cut them on the farm? A. Well, we purchased some and cut some on the farm.

Q. And do you know the value of those that you purchased? A. No, I don't.

Q. Do you know the value of those you cut on the farm? A. No, I don't.

Q. What was the reasonable value of the labor in the erecting the fence, if you know?

Mr. Reid: I object.

The Court: If he knows, I will allow him to answer.

Mr. Reid: Exception.

A. I was working for my Dad in the printing shop and I was getting thirty dollars a week, so whatever my time was worth; ought to pay a dollar an hour at least anyway.

Mr. Reid: I move, if your Honor please, that be stricken. I don't suppose there's any duty to hire a printer.

Mr. Herr: A son.

The Court: Strike it out.

Q. What was wages in that vicinity for farm hands per day? A. Three and a half a day.

Q. And you were two days? A. Yes.

Q. One man or two? A. Two.

Mr. Herr: That's all.

The Court: You mean it took two men, two days?

The Witness: I had my brother with me and he is a man.

The Court: You and your brother are two men?

The Witness: Right.

The Court: And it took you two days?
The Witness: Practically two days.
The Court: Cross examine.

Cross examination by Mr. Reid:

Q. I show you a picture, Harold, is that your father's farm over here or your mother's farm? A. Right. 10

Q. It is looking from the bridge up the river? A. Yes.

Q. And this fence that you cross is a couple of wires strung along here? A. That's right.

Q. There's a stake stuck in the bank? A. Yes.

Q. And another stake stuck here? (Indicating.) A. Yes.

Q. Stakes and trees? A. Yes.

Q. How long does that go beyond here? (Indicating.) A. Goes down as far as that tree. 20

Q. That's one stretch of it; that's about half the length of your property; less than half the length of your property? A. Yes.

Q. And with the exception of these stakes stuck in the bank here they are ordinary wooden stakes? A. Some are wooden, yes.

Q. And with the exception of these two stakes all that fence is a couple of strands of wire tacked to trees? A. In that one place where I showed you, two wires there. 30

Q. And a couple of stakes? A. There's more than a couple of stakes. When this picture was taken, if I can recall it, it was when low water, just before this hard freshet had taken some of the stakes out, as you can see.

Q. When did you build this fence? A. Right after this fence was taken down to Mr. Bilow's property.

Q. And you have maintained it ever since? A. Yes. 40

Q. Was after this picture was taken in October, 1935? A. It should show the fence.

Q. Is that correct? A. The freshet washed the posts out and fence. I put that fence up three times.

The Court: If the photograph is correct it portrayed it at the time.

10

The Witness: I don't know what time it was taken.

The Court: If that photograph was taken in October it would be the correct representation of what it showed that time?

The Witness: Not necessarily.

The Court: Why?

The Witness: There had been a freshet there, as I can see.

20

Q. Let me make that clear to you. October a year ago; just about a year this time.

The Court: That would be 1936.

Q. 1936; supposing that picture were taken at that time, would that be a correct picture? A. Yes, it would.

Q. Well, do you see any fence there? Can you see a fence? A. There's a few stakes there I can see and I can see the wire. I can't see any stakes; I thought it was a stake there; there's no stakes there.

30

Q. The way you see the wire there is the way you built the fence? A. It's the way it was left from the water.

Q. So it's just a matter of a couple of wires strung between trees? A. No, as I told you, there were stakes in there right in the middle of the stream and high water seemed to cut the wire.

40

Q. But the fence was never at any time in the middle of the stream? A. It's in the middle but not the deepest part.

Q. Didn't you just tell me you stuck the stakes in the bank? A. No, I couldn't stick the stakes in that bank.

Q. Where did you put them? A. Right below the bank in the water. That's the reason it took us so long to get stakes in there. You practically need a pile driver to drive them in. You can't put a fence on the side of a bank. 10

Q. And how long did you say that took you? A. Two days.

Mr. Reid: Mark that for identification.

(Marked D-1 for identification.)

Mr. Reid: That's all. 20

Re-direct examination by Mr. Herr:

Q. Now, at this point in the river when you have a freshet what's the form and the speed of the river? A. It heads its course and speeds right where that fence is. Neshanic Brook comes right down in there. It immediately cuts the bank away every time we have it.

The Court: That's the Raritan there? (Indicating.) 30

The Witness: This is the Raritan River and the Neshanic shows right in that bank.

The Court: Are you sure that was the Raritan?

The Witness: Right.

The Court: I thought it was South Branch.

The Witness: That's right.

The Court: Which is it? 40

The Witness: It's Raritan River but it's the South Branch.

Re-cross examination by Mr. Reid:

10 Q. Harold, whose cows now drink out of the river? You have constructed your fence in such a way that they can drink? A. Yes, they can just get water.

Mr. Reid: That's all.

(Witness excused.)

The Court: We will adjourn until one-thirty.

20

After Recess.

Charles Williamson, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Herr:

Q. Mr. Williamson, are you acquainted with the premises in dispute here? A. I am.

Q. Speak up so I can hear. A. I am.

30 Q. And did you ever occupy or work on either farm? A. I did, on the O'Brien farm.

Q. And when did you work on the O'Brien farm? A. Well, I think it was possibly '96-'98.

Q. '96 to '98? A. As far as I can remember.

Q. Now, I show you P-1 and ask you to examine it, looking particularly at the fence that ran along the river. Was that fence or one similar thereto at that location? A. There was, very similar to that.

40 Q. That three years you worked there? A. Yes.

Charles Williamson, for Plaintiff—Cross.

Q. Now, did the cows from the O'Brien farm cross the river there to the opposite bank where the fence is? A. They did.

Q. And that took place during the whole three years you were there? A. It did.

Mr. Herr: That's all.

The Court: Cross examine. 10

Cross examination by Mr. Reid:

Q. Who owned the O'Brien farm between the years 1896 to 1898? A. Mrs. Cornelius Williamson.

The Court: Related to you?

The Witness: Distant. She was a widow. I ran the farm.

The Court: That's all. 20

(Witness excused.)

Mr. Herr: Will Counsel agree with me to stipulate in the record the change in title, and I will ask Mr. Heath who is familiar with the title to do that with Mr. Reid.

Mr. Reid: I am willing to stipulate that John O'Brien and Catherine O'Brien, his wife, received title to the farm on the north bank of the South Branch River by deed from George G. Brokaw and Frances A. 30 Brokaw, his wife, dated September 25, 1907, and recorded September 26, 1907 in Book G-11, of Deeds for Somerset County, page 473. And that George G. Brokaw, one of the grantors in the first mentioned deed received the aforesaid farm from Alex B. Brokaw and Julia C. Brokaw, his wife, by deed dated March 30, 1907 and recorded April 1, 1907 in Book C-11, page 40 and that Alex B. Brokaw, one of the grantors named 40

in the last mentioned deed received the aforesaid farm from Lemirah Suydam by deed dated April 1, 1905 and recorded April 3, 1905 in Book L-10 of Deeds for Somerset County, page 198.

I understand the stipulation also provides—relieves me of proving title to the farm on the south bank?

The Court: Do you want to stipulate that?

Mr. Heath: We don't care anything about that except your client owns it, I suppose.

Mr. Reid: Yes.

Mr. Heath: The stipulation is satisfactory as far as it goes. Unfortunately, I haven't at this moment the search here. I wanted to trace the title back to the time which has been testified to, 1897, I think; and can we stipulate that the predecessors in title of those mentioned in the deeds were the lawful owners of the tract to the bank in the same manner as these people were?

Mr. Reid: I don't care to go in anything further than 1900. They are claiming thirty years to March 20, 1935. I don't see the necessity of it, also the Bill of Particulars which I demanded limits their documentary title to these three deeds and I don't care to go any further back.

The Court: All right.

Mr. Heath: We rest.

The Court: I understand you have some motions before you put in your case.

Mr. Reid: Yes.

The Court: The jury will retire.

(Thereupon the jury retired to the jury room.)

The Court: You may state your motions, Mr. Reid.

Mr. Reid: The motion at this time, if your Honor please, is for a non-suit on the ground that the plaintiff has not presented a cause of action. Counsel in his opening stated that this action was based on an act concerning limitation of suits respecting titles to land, particularly the second which provides that thirty years actual possession of any land shall; —and so forth. That act, if your Honor please, was passed in 1922. It was approved March 11, 1922 and took effect immediately. There was no provision made in that act for a reasonable time in which to bring action that may be filed by the fact it took effect immediately. I submit to the Court the Statute and interpretation should apply, and it should be given an interpretation which would render it valid and that it has no effect until thirty years after its passage.

(Argument.)

The Court: I feel I would deny the motion on the ground of the unconstitutionality of the act and let him have his redress on appeal on that proposition. I don't conceive it my duty to declare acts unconstitutional.

Mr. Reid: I haven't said that the act is unconstitutional. I said your Honor should give it a constitutional interpretation.

The Court: It means the same thing.

(Further argument.)

The Court: I shall deny the motion, and you may have an exception.

Mr. Reid: I ask an exception.

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10 JOHN COVERT, sworn on behalf of the defendant, testifies as follows:

Direct examination by Mr. Reid:

Q. Mr. Covert, are you familiar with the farm now occupied by Ludwig Bilow? A. Yes.

Q. And under what circumstances did you become familiar with that farm? A. I lived there from 1895 to 1910.

Q. Your father was the owner, wasn't he? A.
20 That's right.

Q. During that time, Mr. Covert, did you observe the condition pertaining along the water front of that property? A. Yes.

Q. With particular reference to a fence? A. I built the fence; I helped build it.

Q. And where was that fence? A. There was half on the northerly side of the South Branch River and the other half was on the south side.

Q. And was there a stringer across the river?
30 A. There was a fence across the river.

Q. So it was half on the south side and half on the north side? A. Yes.

Q. Did that condition continue or was there a change made? A. There was a change made later by mutual agreement with Mr. O'Brien.

Mr. Herr: I object.

The Court: Strike it out.

Q. There was a change made? A. Yes.

40

Q. Now, will you tell the Court and Jury—at that time, Mr. Covert, was there any other water on your property besides the river? Was there a lake on your property? A. There was what we call a pool in the middle of the meadow, yes.

Q. Sort of a dead lake? A. Yes.

Q. And did you use that for the watering of cattle? A. Yes. 10

Q. Will you tell the Court and jury what condition occasioned the change in that fence?

Mr. Herr: I object.

The Court: I will allow that. He may answer.

A. The reason, because the fence across the river would wash out with every shower and then they would have to rebuild it to keep the cows from 20 coming through and so they decided to build the fence on one side of the river so they wouldn't have to put the fence across the river.

Q. And do you know whether or not they decided to build it on one side of the river through the result of an agreement? A. That was a mutual agreement.

Q. What was the agreement? A. Simply for Mr. O'Brien to come across and build the fence—— 30

The Court: Between whom and when? Don't give us your conclusion.

Mr. Herr: I would like to know whether that's the witness' conclusion or statement made by Mr. O'Brien.

The Court: Exactly what I am trying to find out from him when you interrupted me. (To the witness.) How do you know about any agreement; were you there?

The Witness: I talked with my father. 40

The Court: You were not present when any agreement was made?

The Witness: No.

The Court: Objection sustained.

Q. Your father was direct owner——

10 The Court: Then you get back to the question we had this morning.

Mr. Herr: This is a different question. Let's see what it is.

The Court: You may go ahead.

Q. And what did your father tell you concerning this fence?

Mr. Herr: That's objected to upon this ground; that question is only admissible 20 where the answer forthcoming is in derogation of the title of the person making the answer. Now then, if he intends this answer to be in derogation of his own title, I withdraw my objection.

The Court: He doesn't, evidently.

Mr. Herr: Then I press my objection because it doesn't come within the exception of the rule.

30 The Court: I will allow it. (To the witness): What did your father tell you about this?

Mr. Herr: That, of course, will open the door to bring in what our predecessors stated.

The Court: We will cross that bridge when we come to it. (To the witness): What did your father tell you?

The Witness: I asked him—this perhaps 40 happened after I left home—I asked my

father how it was Mr. O'Brien was building the fence on that side of the river; why, he said, it stopped us from having to keep the fence up across the river.

The Court: When was that?

The Witness: I left home 1910.

The Court: When was this conversation? 10

The Witness: I can't tell the exact date.

The Court: When was the fence built in the manner in which you have described? Can you give us that?

The Witness: Not the exact date.

The Court: You have taken your exception, Mr. Herr?

Mr. Herr: I want to call your Honor's attention to the law——

The Court: Now, don't argue any more 20 because I am not going to change my ruling.

Mr. Herr: I want to point out the difference between the two. You may be quite right about it. I understand you.

The Court: Can you tell me when that fence was built?

The Witness: I can't tell you the exact date.

The Court: Well, approximately.

The Witness: Approximately 1910. 30

Q. And did Mr. O'Brien at any time while you were on what is now the Bilow farm make any claim of title to the land between the north bank of the river and the south bank of the river?

Mr. Herr: That question is objected to.

The Court: Sustained. It's immaterial and irrelevant, I take it.

Mr. Reid: Your Honor fails to see the 40 open and notorious possession under the

claim of title. Now, the idea being he went in there aggressively and that he was claiming title. I think under that theory the question is proper.

The Court: I think not. Next question.

Mr. Reid: Exception.

10

Q. During the time that you were on the farm was there anything to prevent your cows from going down into the creek and consequently into the river?

Mr. Herr: I object unless the creek is specified.

The Court: Well, of course.

Mr. Reid: What is known as the Neshanic Creek.

20

Mr. Heath: Objected to.

The Court: I thought you are talking about the South Branch?

Mr. Reid: In the description contained in this complaint it refers to a creek.

The Court: All right, he may answer.

A. No.

The Court: Do you know, after this fence was built as you have described it, as far as you know, was there ever any change in that situation? That was the question you tried to put and I think I put it a little different.

30

Mr. Reid: I am not sure I heard it.

The Court: Well, never mind; he didn't understand it. Next question.

Q. Were there any times, Mr. Covert, that that fence was not there; when it was down? A. Yes, in the winter time the ice storms would come and wash the fence down every winter.

40

Q. So it wasn't there all the time? A. No.

Q. Were you ever prevented by Mr. O'Brien or by Mr. Brokaw or any of the predecessors in title to the farm on the north bank from going out into the river yourself? A. No.

Q. You were never refused the right to go upon that property? A. No. 10

Q. And you actually helped to maintain the fence yourself? A. Yes.

The Court: All of this was before 1910, I take it.

The Witness: I left the farm 1910.

The Court: You have had no acquaintanceship with it from then on?

The Witness: No.

20

Q. Do you, Mr. Covert, recognize that picture (showing him D-1 for Identification)? A. Well, it looks just like the river. I can't identify it on any particular picture.

Q. Can you identify the scene in that picture? Do you know what river it is?

Mr. Herr: Evidently if he can't identify the picture, he can't identify the scene in it.

The Court: It is another way of asking him the same question. 30

A. I never saw the picture before.

The Court: What is depicted in the picture?

The Witness: It's a picture of the river.

The Court: What river?

The Witness: (No response).

The Court: He doesn't know.

Mr. Reid: Cross examine.

40

Cross examination by Mr. Herr:

Q. Mr. Covert, I understand you to say a change in the fence was made in 1910? A. I said I didn't know the exact date. I said approximate.

Q. Now, take a look at this picture? A. Pictures all look alike to me.

10

Mr. Reid: I would like to ask this witness one more question, it is very important.

The Court: All right.

Further direct examination by Mr. Reid:

Q. Mr. Covert, was there any gravel taken out of that river? A. Yes.

Q. By whom? A. By the Branchburg Township.

20

Q. Did they pay for the gravel? A. Yes.

Mr. Herr: That's objected to; Branchburg Township has nothing to do with this issue.

The Court: I suppose it is evidence of possession; I will allow it.

Q. Who took the gravel out?

30

The Court: Branchburg Township. You mean the individual?

Mr. Reid: I didn't realize we had completed the answer.

Q. It was the road men of Branchburg Township? A. Yes.

Q. Did they pay for that gravel?

Mr. Herr: Objected to.

The Court: Objection sustained.

40

Q. Who did they pay? A. Paid my father.

Mr. Reid: That's all.

Cross examination by Mr. Herr:

Q. Now, were you present when the Township paid for the gravel? A. No. 10

Q. All you know is what you heard your father tell you? A. I heard the conversation.

Q. All you know is what your father told you? A. Yes.

Mr. Herr: I move that be stricken.

The Court: He said the conversation; what conversation do you mean?

The Witness: What conversation would be in a family?

The Court: I don't know. I wasn't there. 20 Strike it out. Next question.

Q. I understand the conversation——

The Court: The gravel is out.

Q. How old are you? A. Fifty.

Q. When were you born? A. 1887.

Q. What month? A. September.

Q. What date? A. First day.

Q. Now, what is the first you remember about 30 the fence down along the river? A. It would probably be approximately '98, perhaps.

Q. Now, then, I want to show you a picture marked P-1. Now, take a look at the picture, will you please? Now, first point to the stretch of the Raritan River, the bridge being at the bottom of the picture, the picture being taken from the bridge. A. Yes.

Q. See this fence line along down here (indicating)? A. Yes. 40

Q. When did you first see the fence along there like that? A. After I left home I saw it, after 1910.

Q. Well, suppose I should tell you that that picture was taken in 1908? A. It may be.

Q. Well, then, you are not too sure about when you first saw the fence there? A. I told the Judge approximately 1910.

Q. Who owned the O'Brien farm when the fence was changed? A. O'Brien—you mean when it was put on the south side of the river?

Q. Yes. A. O'Brien.

Q. Now, there can't be any mistake in your mind about that, can there? A. No.

Q. The fence was changed during the O'Brien ownership of the property? A. Yes.

Q. That is certain and definite, isn't it? A. I would say so, yes.

Q. Did you hear Mr. Williamson testify? A. No.

Q. That that fence was approximately as it appears in that picture in 1897? A. No, I didn't hear him.

Q. Did you hear Mr. Agans testify he was on the poor farm from 1897 to 1909; that the fence was there like that during all that period? A. There was a fence on that side of the river.

Q. Oh, there was? A. Yes, half on each side of the river.

Q. I see. Well, the river runs east and west, doesn't it? A. Yes.

Q. Now, was the fence on the upstream side, on your side of the river or the downstream? A. On the downstream.

Q. Well, this picture seems to show pretty clearly the upstream side, doesn't it? A. I don't know.

Q. Well, take a look at it. You see Neshanic Creek coming in there? A. Yes.

Q. That shows the fence right up to your property line? A. Yes.

Q. That's the upside? A. Yes.

Q. That's the side you say the fence belonged over on O'Brien's? A. Yes. 10

Q. Now, Mr. Covert, you left the farm when? A. 1910.

Q. And the fence hadn't been changed when you left, had it? A. I would not say.

Q. Well, now, think a moment about the testimony of Mr. Agans who was there from approximately '97 to approximately '09? A. That's right.

Q. And Mr. Williamson who worked on the farm for three years, approximately '96 on? A. Yes. 20

Q. And who say the fence was continuous down the south side of the river and always has been to their mind? A. Yes.

Q. Now, you still say part of the fence was on the north side and part on the south side? A. Yes.

Q. That's rather difficult to keep the fence over the river when the water cuts up, isn't it? A. Yes.

Q. And it's hard to keep a fence in a river? A. Hard to keep the fence crossing the river, yes.

Q. And the Neshanic Creek is rather deep, isn't it? A. No. 30

Q. At the point where the fence ends? A. No, it's shallow.

Q. Did you ever go swimming there? A. It's shallow, I know that, because I waded across and put the fence across there also.

Q. Was there a fence across the Neshanic and this fence continued across the Neshanic River? A. The fence was across the Neshanic——

40

Q. Answer my question. This fence shown in the photograph continued right across the Neshanic River to the highway? A. I know nothing about that fence.

Q. You said you waded across there. Did you wade across there? A. Yes.

10 Q. And did you wade across up by the fence? A. Yes.

Q. Well, then, there was a fence there? A. There was.

Q. And was that a continuation of the fence that was put up, you say, in 1910? A. I don't know whether it was a continuation of it or not.

Q. Well, the purpose of it was to keep your cows from getting out in the Raritan River; that was the purpose? A. Yes.

20 Q. And to the best of your knowledge you knew back forty-five years at that time it was put there for that purpose? A. No.

Q. Well, when was it put there? A. I said approximately 1910.

Q. And before that they were kept out from going down here by a criss-cross half way down? A. Yes.

Q. Now, there was a dead lake there in the field? A. Yes.

30 Q. Where the cows got water? A. Yes.

Q. There was the Neshanic River that bound the field? A. Yes.

Q. Now, you were not present when the fence was changed? A. No.

Q. Or if the whole of it was put on the south side of the river, were you? A. No.

Q. But your father did tell you that they made that change in the boundary line so to keep from putting the fence across? A. Yes.

40

Q. Now, there isn't any question about that, is there? A. No.

Q. So that the new boundary line was established by putting the fence on the south side?

Mr. Reid: Objected to.

Q. He told you that, didn't he? 10

Mr. Reid: Objected to.

The Court: I will allow that, what he told you.

Mr. Reid: He is using the words "boundary line".

The Court: Well, the fence, whatever it was.

A. It was agreed to build the fence on the south side of the river. 20

Q. Yes, and the purpose of building the fence was to fix the line between you two parties and keep his cows out of your place and keep your cows out of his? A. That's what they built the fence for.

Mr. Herr: That's all.

Re-direct examination by Mr. Reid:

Q. Mr. Covert, was the intention of building that fence to waive your father's title to the land on the bank? 30

Mr. Herr: Objected to.

The Court: Sustained.

Mr. Reid: If your Honor please, I think it's pertinent, the last question.

The Court: I think not. You may ask him what was said but not this witness' conclusion or surmise what the intention was. 40

Q. But your father did he tell you that the purpose of that fence was to prevent the intermingling of cattle?

Mr. Herr: Objected to.

The Court: He already answered that; to keep the cattle where they belonged for both sides, as I understand it. (To the witness) That's as you understand it, was it?

10

The Witness: Yes.

The Court: Keep your respective cattle from straying?

The Witness: Yes.

Mr. Reid: That's all.

(Witness excused.)

20

Charles Gustafsun, sworn on behalf of the defendant, testifies as follows:

Direct examination by Mr. Reid:

Q. Mr. Gustafsun, what do you do for a living? A. Work for it; what else would you do?

Q. What do you work at? A. Farming.

Q. And where do you farm? A. My own place.

30

Q. Did you ever do any farming on the farm owned by Mr. Covert? A. Yes, I farmed on shares for him for three years.

The Court: And when were those three years?

The Witness: I don't know; I don't remember; that's twelve or fifteen years ago.

The Court: Which farm was that, the Covert farm?

The Witness: Yes.

40

Q. And at the time that you farmed that property, were you familiar with the fence down by the river? A. Yes, it was down there after I stopped farming.

Q. And where was it?

The Court: He is not asking you where it was after you left; he is asking you while you were there? 10

The Witness: I had to fix it, half and half O'Brien's fence, half, and the fence was there.

Q. What side of the river was the fence on then? A. On what side of the river?

Q. Yes, on your side? A. Yes, over on Covert's side.

Q. You fixed half and O'Brien fixed half? A. Yes. 20

Q. Was that fence there all the time? A. No, part of the time it was down.

Q. Part of the time it was down? A. Yes.

Mr. Reid: Cross examine.

Cross examination by Mr. Herr:

Q. Whenever ice storms came down the river it took the fence down? A. It went down several times before that. 30

Q. It went down when high water was on? A. Yes, down, sure. No, it didn't go down so much then. When the ice went down, it went down there.

Q. It went down sometimes too? A. It was down.

Q. Beg pardon? A. Yes, it was down every once in a while. The cows knocked it down.

Q. And then you came out and put it up again? A. Yes. 40

Q. That happens on a farm quite often? A. Yes, sometimes it does.

Q. The pasture gets dry and cows began to want grass? A. Sometimes they do.

Q. You can't fix the years you were at the farm, can you? A. No, I don't know, I can't tell you.

The Court: He already said that.

Q. You maintained half of that fence the same as he maintained half of the fence, the other adjacent property owner? A. Well, I kept half of it and O'Brien kept the other half.

Q. That's the way it went all the way around the farm? A. Yes.

Mr. Herr: That's all.

(Witness excused.)

George C. Brokaw, recalled by the defense:

Direct examination by Mr. Reid:

Q. Mr. Brokaw, you live in Neshanic? A. Yes.

Q. Retired? A. Yes.

Q. Do you have any interest in this case at all? A. Not at all, no.

Q. You testified this morning for Mr. Heath that you formerly owned the farm now owned by Mr. O'Brien? A. Yes.

Q. And you conveyed it to him? A. Yes.

Q. Now, during the time that you held that farm, did you ever make any claim to the land lying between the north and south banks of the river? A. I answered that before, no; I had no claim.

George C. Brokaw, for Defendant (Recalled)—Cross.

Q. Then when you conveyed to O'Brien, did you give them anything that you didn't put in your deed? A. No.

Q. And your deed ran to the north side? A. Why, as you say, to the low water mark, I suppose. 10

Q. And you didn't by any other means convey to O'Brien the land laying between the north and south banks? A. No.

Q. Or pretend to convey it to them? A. No.

Q. Did you represent to them that you had any claim to it? A. I don't understand you.

Q. Mr. Brokaw, as you testified this morning, there was a conveyance from your father to you? A. Yes.

Q. Did your father or your mother to your 20 knowledge make any claim of ownership of the land laying between the north and south banks? A. No.

Q. Did they convey or pretend to convey the land between the north and south banks to you? A. No.

Mr. Reid: Cross examine.

Cross examination by Mr. Herr:

Q. What's the line fence? A. I always under- 30 stood it was the low water mark.

Q. Now, listen, I will ask the question. A. I am going to answer you too.

Mr. Reid: I object to the question as improper cross examination.

The Witness: I said I am not interested. Now, what difference does it make——

Mr. Herr: Or whether you made any claim or not.

40

The Witness: I have got two miles along there.

The Court: He asked you what the line fence was irrespective of high water, low water or any water. What is the line fence?

10 The Witness: I have always understood the low water mark.

The Court: Suppose there is no water anywhere around?

The Witness: Then there would be no river.

The Court: He isn't asking you about the river. He is asking you about the line fence irrespective of the river or lake.

The Witness: We always build——

20 The Court: I didn't ask you that. I asked you to define what the line fence is. What is a line fence as you understand it?

The Witness: The line between two neighbors.

Q. Does it usually mark the boundary line between the neighbors? A. Well, it's a straight line, a turn and you define the fence.

Q. I didn't ask you that.

30 Mr. Reid: I object to this; what difference does it make what he usually did.

Q. You are a farmer?

The Court: No, it hasn't anything to do with farms. This is a water line fence usually acts as the boundary between properties. Does it or doesn't it?

The Witness: Yes, it certainly does.

40 Mr. Reid: I object.

The Court: I will allow it. The answer is, it certainly does.

Q. There isn't any question about that in your mind, is there, George? A. No, I own quite some land up there and that's where that's always been.

Q. And you have always known what the line fence was? A. Yes.

Q. And you knew in June of 1935 what the line fence was, didn't you? A. I don't know why I should answer that; I don't know.

Mr. Reid: I object as improper. He has testified the fact taking place between 1905 and 1907.

The Court: I will allow it.

Q. You knew in 1907 when you owned this place what the line fence was? A. Why, certainly.

Q. How old are you, George? A. Old enough to be your father.

The Court: Mr. Brokaw, please, Mr. Herr; don't call him by his first name.

Q. Mr. Brokaw, how old are you? A. I don't have to tell you that.

The Court: Would you rather not?

The Witness: That's a personal question.

The Court: Would you rather not?

The Witness: Rather not.

The Court: All right, I sustain you.

Q. You knew in 1907 what the line fence was didn't you? A. Well, I knew fully as much then as I do now. I am forgetful now.

Q. Yes, that's what I thought. Now, you signed an affidavit in 1935 with respect to the line fence between these properties.

Mr. Reid: I object to that.

The Court: I will allow it.

10 Mr. Reid: Exception.

The Court: What is the answer? Repeat the question.

Q. (Question read) A. My signature was there but I had forgotten it, that's all. This slipped me.

Q. Well, Mr. Brokaw, when you affixed your signature? A. I affixed my signature. I am not going to perjure myself.

Q. Now, when you affixed your signature to that 20 affidavit in 1935 you were committing a perjury, were you? A. I don't know about that. I said I didn't remember, and off-hand, say, yes.

Q. Yes, now, I am refreshing your memory. Now, there's no question about this being your signature? A. Not in the least.

Q. And there's no question but what you signed is thus: "And has been a fence between the property for at least thirty years without interruption." That's over your signature? A. Right. I 30 am not going to read it again.

Q. Well, did you sign that? A. Yes.

Q. And you read it before you signed it? A. No.

Q. Well, now, Mr. Brokaw, are you accustomed to sign affidavits without knowing what is in it? A. Well, if there's any money involved, probably not.

Q. Where no money is involved, aren't you a man of principle that doesn't sign his name to 40 things— A. Just as much as you are.

Q. Without knowing what he is signing? A. That's my signature, yes.

Q. You did read the affidavit, didn't you? A. Yes.

Q. And you were present when the affidavit was dictated to the stenographer, weren't you? A. I won't say about that. 10

Q. And the affidavit that you signed, it was that this particular fence was a line fence, wasn't it? A. I never thought it was a line fence.

Q. But you signed an affidavit in '35 to that effect? A. The line fence was on the river. This crossed the river.

Q. Answer my question, please. You signed the affidavit to that effect in '35? A. You got the affidavit here, haven't you? 20

Q. Did you sign it or didn't you? A. Well, there's my signature.

Q. Then you did sign it? A. There's my signature.

Q. Now, you further state that "during the thirty years of my personal knowledge the owners of the so-called O'Brien farm have had use and occupancy of the full width of the South Branch River to a fence," didn't you? A. I don't recall that; I don't know. 30

Q. Well, you signed it, didn't you, George? Now, listen. You signed it?

Mr. Reid: I object.

The Court: Sustained.

Mr. Reid: It is irrelevant. He doesn't deny signing it at all.

Q. Now, as a matter of fact, George.——

The Court: Mr. Brokaw, please. 40

Q. —pardon me; Mr. Brokaw——

The Witness: I don't care.

The Court: I know, but I do, and the record must not have "George" in it.

Mr. Herr: Your Honor is perfectly correct.

10 The Court: I think so.

Q. Mr. Brokaw, Mr. Opie, a notary, read that affidavit to you? A. I don't know.

Q. Now, do you remember telling Mr. O'Brien at the time that his parents purchased this farm that that particular fence was the boundary line? A. Across the river?

Q. Yes. A. I never told him that, because I know it isn't.

20 Q. Mr. Brokaw, is your memory any better now than it was in 1935? A. No, I don't think it is.

Mr. Herr: That's all.

(Witness excused.)

William Bergen, sworn on behalf of the defendant, testifies as follows:

30 *Direct examination by Mr. Reid:*

Q. Mr. Bergen, you live on Clover Hill Road, Neshanic? A. Yes.

Q. And a neighbor of O'Brien's and Bilow's? A. Well, Mr. Bilow then Mr. O'Brien. There's a piece in between.

Q. And you are a farmer yourself? A. Yes.

Q. Did you in the spring of 1935 have a conversation with this man here, John O'Brien, with

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relation to the trespass of cows from his land upon yours? A. I did.

Q. And did you demand that he keep them home?

The Court: Don't lead the witness.

A. Yes. 10

Q. What was the conversation? A. I had the cows shut up and I told him if he wanted them back he would have to fix his fence.

Q. What did he say? A. He said it wasn't his fence; that it was Mr. Bilow's fence and go right over and see him about it.

Mr. Reid: Cross examine.

Cross examination by Mr. Herr: 20

Q. Now, Mr. Bergen, how long have you known Mr. Bilow? A. Mr. Bilow?

Q. Yes. A. '35-'37—about two years, little over.

Q. Does his property abut to yours? A. Yes.

Q. And the O'Brien doesn't? A. No, sir.

Q. So that you are the next door neighbor of Mr. Bilow's? A. That's right.

Q. Now, didn't you tell Mr. O'Brien that he might just as well forget about this fence because Bilow was a wealthy man and he was going to have the fence down whether or not? A. When was this? 30

Q. When you were talking to Mr. O'Brien? A. No.

Q. Well, when did you tell Mr. O'Brien that? A. When Mr. O'Brien was going over and see him about the fence, he said it was Mr. Bilow's fence. I said, I don't believe he wants any fence along the river. Well, I says, he will put it up there or put a fence up there because it belongs to him. 40

Q. You went on to tell him that Bilow was a wealthy man? A. Well, I suppose I may have.

Q. Yes, and you told him he might just as well give up his contest? A. Well, I don't know that I did tell him that, did I?

Q. Well, I am asking you. A. Well, when you
10 are arguing you say some things sometimes you don't remember. Unless you jot them down like when here in Court.

Q. Now, he didn't tell you whether it was half of the fence that was up to Bilow to keep up? A. Well, I knew whose fence it was because I was over there.

Q. That doesn't answer the question. He didn't tell you it was Bilow's half of the fence? A. The way he talked to me, it was Bilow's fence, the
20 whole thing.

Q. At that particular time Bilow had taken the fence down? A. No. It was ice that had taken part of the fence out. They hadn't fixed the fence from the spring.

Q. I understood the conversation was in June. A. Yes, and they hadn't put either fence up.

Q. Well, what time did they turn cattle out? A. That doesn't make any difference, and Mr. O'Brien just lets them run.

30 Q. All winter? A. Come up sometime this winter and you will see them out there.

The Court: Don't make a speech. Just answer the question.

A. (Continued) Well, I told you the fence was down.

The Court: You have answered it.

Q. As a matter of fact, you are inclined to talk;
40 now, do you really remember what you saw? A. Well, I don't jot it down like some people do.

Q. It would take an awful lot of writing, wouldn't it? A. (No response).

Mr. Herr: That's all.

Re-direct examination by Mr. Reid: 10

Q. Mr. Bergen, you testified that you were the next door neighbor to Mr. Bilow. Are you related to Mr. O'Brien? A. No, sir.

Q. Do you have any interest in this case at all? A. No, sir.

Mr. Reid: That's all.

(Witness excused.)

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LUDWIG BILOW, sworn on his own behalf as defendant, testifies as follows:

Direct examination by Mr. Reid:

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

Q. And you occupy the farm on the south bank of the river? A. Yes, sir.

Q. Did you on June 15, 1935, tear down a fence? 30
A. No, I haven't seen a fence there.

Q. Did anybody before you tear down a fence on that river? A. Not that I know of.

Q. Did you ever tell anybody to tear down a fence along that river? A. No, sir.

Q. Did you ever authorize by any other means any person to tear down a fence along that river? A. No, sir.

Q. Were you actually in possession of that farm on June 15? A. No, I don't think we were. 40

The Court: June, 1935?

Mr. Reid: 1935.

The Court: You understood that, June 15, 1935, were you actually in possession of the farm?

The Witness: Well, I think, I am not sure, but I think we closed the deed, we closed the deed on the 8th or 10th of June.

Q. But did you go into possession right away? A. No, sir.

Q. Did you go on the land? A. No, sir.

Q. How much later did you go on the land? A. Well, I have been about two or three times there, and then I had a trip prepared to go to Europe, so I didn't have much time to be on the farm.

Q. Did you have two men there? A No, sir.

Q. At any time? A. No, sir.

Q. Did you prior to the time of the purchasing of the farm make an inspection of it? Did you walk around it before you bought it? A. Well, I did walk around, yes. I walked around before I purchased the place.

Q. What month was that? A. Oh, that was the early part of May.

The Court: Of 1935?

The Witness: Yes, sir.

Q. Did you have anyone with you? A. I did have Mr. Doherty.

Q. And did you walk along the water front? A. And Mr. Marcus.

Q. And you walked along the water front? A. That's right.

Q. Was there any fence along the south bank? A. I haven't seen any.

Q. Well, you looked. If there was one there

would you have seen it? A. If there was one I would have seen it, and ask about——

Q. And Mr. Doherty was the man with you? A. That's right.

Q. Have you at any time prevented Mr. O'Brien from watering his cows in the river? A. No, sir.

Q. Did you ever instruct anybody to prevent that? A. Well, I wasn't there so I didn't tell anybody. 10

Q. As a matter of fact, there's nothing there to prevent? A. No.

Q. It's open territory? A. It's open territory is right.

Mr. Reid: Cross examine.

Cross examination by Mr Herr: 20

Q. Now, Mr. Bilow, if this fence belongs on the south side of the river you don't object to having it there, do you? A. No, if I needed a fence, I would put a fence up myself.

Q. Sure; and if—will you look at that photograph marked P-1, please. See the Raritan River there and the Neshanic River coming out there? A. Yes.

Q. And the fence running along here?

Mr. Reid: I object to that, if your Honor please, to questioning on this photograph which I believe was testified to as taken some time back. 30

The Court: Yes, I understand, I will allow it.

Mr. Reid: Exception.

A. Yes, I didn't see anything like that.

Q. I appreciate that, but you can see the fence there in the picture? A. Yes. 40

Q. Now, would you object to having that fence back up there now? A. No, sir.

Q. You would not object? A. I would object to it.

Q. It's perfectly all right to put it there?

The Court: No, he said he would object.

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A. If I have cattle I would put a fence there myself to stop my cattle to walk on anybody's property; as long as I haven't got anything there I don't see why I should go to work and put a fence there for the reason I have that River, the way I was told and the way our deed shows that the river is supposed to be the boundary line.

Q. But so far as having a fence up there is concerned, if Mr. O'Brien will put it up it's perfectly all right with you, isn't it? A. No, sir.

20

Mr. Reid: I object to this line of questions.

The Court: He has answered it twice. Let it stand.

Mr. Reid: Exception.

Q. Why do you object to a fence up there if Mr. O'Brien will put it up? A. The reason, if we come down and walk around, why should we climb through a fence?

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Q. And do you want to use all the ground between the fence and the river? A. That isn't the idea. We don't want to use any, we want to use all our ground we got.

Q. Yes, how many acres do you have there? A. The way I understand, it is seventy-two and three-quarters acres, if I am right.

Q. Yes, and this fence is quite aways from your house, isn't it? A. What fence are you talking about?

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Q. That shows in the picture there? A. Yes, it's down on the river.

Q. And then it's the northerly boundary line, approximately the boundary line of your property? A. Yes.

Mr. Reid: I object.

10

Q. And the only reason you don't want the fence there is you would have to fall over it to get to see the creek. A. I don't see there's a fence needed unless I have cattle.

Q. But that's the only objection you would have to a fence? A. If I have cattle I would want to see that they get water. If I am shutting off the water, what good is it. Having water and yet can't drink it?

Q. There's plenty of water in the Neshanic Creek? A. Yes, I understand, but—if we go to work and put a fence there and I come down with my cattle and the cattle need a drink, what will I do?

20

Q. Now, you just said a moment ago that you would like to have a fence there if you put cattle in there. A. Yes, I put up my own fence.

Q. Now, you say you don't want a fence there if you put cattle in there because they couldn't get to the river. Tell us the true reason why you don't want a fence there? A. I don't want a fence there as long as I haven't got any cattle. I can do as I please on my property.

30

Q. That's really the reason you don't want a fence there because you consider it your property? A. Yes, I paid for it.

Q. And that's the sole reason, isn't it? A. That's right.

Q. Your men were working on the farm the middle of June, 1935? A. Didn't have anybody working there.

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Q. No one working there? A. No, sir.

Q. Who was on the farm when you purchased it? A. Marcus was on the farm when I purchased the farm off of him.

Q. Yes, and Marcus told you your line ran to the river, didn't he? A. Marcus told me the line ran right on—now, wait, let me think for a minute; to the lower part of the river. He said the river belonged to the State and he said the line runs in as far as the lower part of the water. That's the way I understood. That's the way I understood this fellow Marcus.

Q. How far toward the river do you understand that your line ran? A. To the edge of the water.

Q. And that was both at the easterly part of the river and at the westerly end? A. That's right.

Q. Now, Mr. Covert has testified that the fence was put up on your property at the easterly side but you didn't understand that? A. No, I didn't know anything about that.

Q. Were you in Court this morning? A. Yes, I was here.

Mr. Herr: That's all.

(Witness excused.)

James E. Doherty, sworn on behalf of the defendant, testifies as follows:

Direct examination by Mr. Reid:

Q. Mr. Doherty, you are a member of the Bar of the State of New York? A. I am.

Q. Practicing attorney? A. Yes.

Q. Did you have occasion to visit the farm now owned by Mr. Bilow? A. I did.

Q. When was the first time you visited it? A. First time was very early in the month of May. I would say it was sometime between the 1st and 5th of May.

Q. What year? A. 1935. 10

Q. And did you at that time together with Mr. Bilow walk around the property? A. No, not at that time. We drove around. We drove around across the bridge there and we got off just before we got to the bridge; there's a bend of land there where the creek comes through and joins the river. Then we looked at the land in that location and it was all wet land there and then we got in the automobile again and we came along, drove along somewhere, we got around to the 20 front again.

Q. You got into the farm? A. We didn't go into the farm.

Q. You didn't that day? A. No.

Q. Did you subsequently to that? A. Yes, the 17th of May, 1935.

Q. Now, with reference to that day, did you examine the property along the water front? A. Yes.

Q. And was there a fence along the south bank? 30 A. There was not.

Q. Did you walk all along the south bank? A. From a tree where a fence separated the poor farm, I believe that's the easterly end of the property, from there all the way along to the creek and along the bank of the creek too.

Q. And did you see any fence at any point along there? A. Along the creek there was some wire but not a fence. There was a strand of wire and a broken stake. 40

The Court: What do you mean by creek, the smaller of the two streams?

The Witness: Yes, sir.

The Court: There were two streams there?

The Witness: Yes, that's right.

10

Q. Do you recognize that picture? A. Well, I don't recognize this so well because it seems to have been taken when the water was much lower than when I saw it. I don't recall seeing this in here, this land.

Q. Well, Neshanic Creek comes out near the bridge, does it not? A. That's right.

Q. Just slightly east of the bridge? A. That's right.

20 Q. And when you speak of a strand of wire along the creek, you mean that creek that empties out into the South Branch River at that point? A. That's right. That is pretty—I would say probably sixty feet in from the river, there were two trees; one tree had a piece of residue wire sticking out about that far. (Indicating.)

The Court: A foot?

The Witness: Approximately a foot on one side and probably seven and a half or

30 eight feet on the other. The bark of the tree had grown at least three-quarters of an inch around that piece of wire. On the next tree to the west of that there was perhaps twelve or fourteen feet of wire that had been wound up and was hanging on a staple that had been driven in the tree and that wire or residue of wire was hanging on that about twelve or fourteen feet long. The bark of that tree had grown completely

40 over that wire; and there was another tree

still to the west of that which had the marks of where something had been around the tree, and that's the only evidence there was of anything being up there at all on the bank of the large river.

Mr. Reid: I offer this picture; I understand Counsel does not object to it. 10

(Photograph marked D-1.)

Mr. Reid: Cross examine.

Cross examination by Mr. Herr:

Q. Mr. Doherty, you say you circled all around the farm? A. Yes.

Q. At what date was this? A. 17th of May, 1935.

Q. You covered every fence on the farm? A. 20 We walked first from the house down the pathway that led down to the river, to where they divided the pathway. From that we went—made by cows. Well, there were wagon paths there. I presume it could have been made by a number of things, wagons and cows or whatever went down that way. We then turned here to the east and we noticed that the Boy Scouts had a camp up in the woods there with a wooden stairway coming part way down, not all the way to the 30 bottom. We also noticed that they had a float; the float was made of two boilers with some apparatus fastened across them and they were quite close to this tree, extreme easterly end. Then we walked down along the river and down near the bridge there was quite a gravel pit where a lot of gravel had been taken out of and there was a lot of wood around there also, and then we started up along the creek bank and that was full of weeds and then we turned and came back then 40

a little way, and then we went through a place that seems to have been a water way at one time or a lake or something of that sort. And we went over then, over to the next farm and followed up along the side of that farm until we came to a little bit of a creek near the front of the property. There is sort of a glen there, quite a bit of woods there and a little creek, just a brook or whatever you might call it. Very slow stream twinkling through there which seemed to go in front of the property to inside of the road and then pass under a bridge leading from the roadway in. Then we went back to the roadway, we didn't go all the way over to what I think is the poor farm; I think that's what they call it; we didn't go all the way over there. We went back to the house and then from there we could see the fence. The fence isn't very far; the fence to the east end of the poor farm is not very far; it's only a matter, I would say, about six to eight feet in back from this road leading down to the river.

Q. What type of fence is that? A. That's a wire fence.

Q. Barbed wire? A. Barbed wire.

Q. Now, Mr. Doherty, how many times have you been on this farm since you were there in May, 1935? A. Twice.

Q. And when were these times? A. I was there in November of 1935 when Mr. Bilow came back from Europe; he came back, I think, the 20th of October, 1935, and went up there the following week and the next time I was up there was yesterday.

Q. You went over the wires and trees yesterday, didn't you? A. No, sir; I did not.

Q. You didn't go near it? A. I did go down to the river, yes.

Q. Now, you as a lawyer knew that wire on a line of trees there might easily indicate to one the tract boundary? A. No, sir; not where there is a natural boundary within fifty feet.

Q. But it indicated to you there had been a fence there? A. It indicated there had been a wire there; one wire at least. 10

Q. You didn't think it could be used to cover all our property? A. Well, it might have been at that.

Q. How far back from the water was it? A. About sixty feet.

Q. And it might have been used to cover all our property? A. Yes, the wire goes up quite high.

Re-direct examination by Mr. Reid:

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Q. Did you on your first visit to the farm draw up a contract for the sale of that farm to Mr. Bilow? A. Not the first visit. On the 17th of May, 1935, the second visit, the first time I was actually on the farm.

Q. And was any provision made in that agreement for the time of taking possession by the buyer?

Mr. Herr: Objected to.

Mr. Reid: I withdraw the question.

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Q. Do you have the agreement? A. I have it right here.

Mr. Herr: I may probably admit it if you will allow me to look at it.

(Mr. Herr looks at the agreement.)

Mr. Herr: I will admit it for what it is worth.

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Mr. Reid: I ask it be marked.

(Marked as Exhibit D-2.)

Q. Will you read the part in that agreement pertaining to the taking of possession by the buyer? A. It was provided by the instrument that title will close on or before June 14, 1935. Mr. Marcus had a child attending school and they didn't want to have difficulty with the child and he wanted to remain in possession until June 30th, so we made this agreement on the back of the original contract of purchase. If title closed before June 30th, 1935, the purchaser will rent the house on said premises to the seller for the period from the date of closing to June 30th, 1935 for the sum of one dollar. Dated May 17th, 1935, signed by Samuel Marcus and Ludwig Bilow.

Mr. Reid: That's all.
Mr. Herr: No questions.
Mr. Reid: Defense rests.

IN REBUTTAL.

JOHN O'BRIEN, re-called:

Direct examination by Mr. Herr:

Q. Mr. O'Brien, did you tell Mr. Bergen when you went over for your cows that it was Mr. Bilow's fence that was down? A. No, I didn't know the fence was really down. I didn't know what part was down or anything about it. When I got over there Mr. Bergen said your fence is down, and you may as well leave it down because this man has got money to fight it, and you may as well leave it down, don't bother with it.

Q. And at the time your parents purchased the farm in 1907, did Mr. George Brokaw point out the boundary along the river? A. He did, because we came from the south and didn't know where the property was really and then I had gotten the deed and read it over and on the other side of the river was a fence that he told me that my half was that end toward the poor fence and Mr. Covert's end was on this, the lower end.

Q. The right end? A. Yes.

Q. And did the fence as he pointed it out to you extend as approximately shown in that picture? A. Approximately has been there ever since we have been here.

Mr. Herr: That's all.

Cross examination by Mr. Reid:

Q. And your deed runs to the edge of the river? A. Yes, it calls to the edge of the river.

Q. Didn't you ask him to include in his conveyance the land between the north and south banks of the river? A. No.

Q. Did you go to Mr. Bilow to find out? A. I didn't know him.

Q. You knew where the house was? A. I didn't. I went over to his men and they told me to get the hell off the place.

Q. Did you ask them who owned it? A. Yes, and they told me, a man in Long Island who knows men who come down here——

Q. Did you ever go up to that house to see if Mr. Bilow was there? A. They told me he wasn't there, he is in Long Island.

Q. As a matter of fact, didn't Mr. Bilow about a year ago this time meet you on the bridge, in November and offer to let you put a fence on part

of his property and didn't you as the result of that discontinue a suit then pending against him?

Mr. Herr: I object.
The Court: Objection sustained.
Mr. Reid: Exception.
Mr. Reid: That's all.

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Re-direct examination by Mr. Herr:

Q. Now, the day following the day you went for your cows, did you talk to the man who sold the farm to Mr. Bilow? A. I came down here to Somerville and met Mr. Marcus and asked Mr. Marcus if he knew who got his farm. He told me, yes, there's a man named Bilow in Long Island who took possession of it three weeks before and that's where I got his address from.

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Mr. Herr: That's all.

(Witness excused.)

Mr. Herr: We rest.

(Deed dated September 25, 1907, marked as Exhibit D-3.)

(Deed dated March 30, 1907, marked as Exhibit D-4.)

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(Deed dated April 1, 1905, marked as Exhibit D-5.)

The Court: We will adjourn until tomorrow morning at ten o'clock.

(Thereupon the Court adjourned until October 27, 1937 at ten o'clock in the forenoon.)

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Somerville, N. J., October 27, 1937.

TRIAL RESUMED.

Mr. Reid: If your Honor please, the motion at this time is for a direction of verdict on the grounds set forth previously in my motion for a non-suit, which I repeat categorically.

The Court: You don't need to repeat them.

(Argument on the motion.)

The Court: I will deny your motion and you may have an exception.

Mr. Reid: Exception, please.

Mr. Heath: I wonder if we can admit without calling Mr. Crater and bring the deeds back up here to this deed from Samuel Marcus and Lena Marcus to Ludwig Bilow dated May 31, 1935, recorded June 1, 1935, Book number 27, page 385? We agreed last night that the deed was to go in, a certified copy.

The Court: The record is apparent as to when the defendant got title.

Mr. Heath: Except the testimony is that it was the 8th or 10th of June.

The Court: If I am correct, Mr. Doherty did say the deed was to be passed about the 14th of June and possession was had on the 30th, that the tenant moved out on the 30th of June as he wanted to keep his children there at school.

Mr. Heath: Apparently he got the deed ahead of that time.

Mr. Reid: I have no objection to the fact. As a matter of fact the title closed May 31st.

Mr. Heath: That's all.

There is some testimony by the defendant he didn't have possession that time and his men didn't tear down the fence.

The Court: Yes, that is right. All right. You may proceed to address the jury.

Thereupon Mr. Reid addressed the jury in behalf of the defendant.

Thereupon Mr. Heath addressed the jury in behalf of the plaintiff.

Thereupon the Court charged the jury as follows:

Charge of the Court.

PORTER, J., Ladies and gentlemen of the jury, this case that you have been called upon to try is one known in the law as an ejectment suit and it has to do with the possession of land, and the plaintiff is Catherine O'Brien and the defendant is Ludwig Bilow, and they admittedly are the owners of adjoining farms in this county out at Neshanic. And the farm of the plaintiff, according to the description in the deed, runs only to the north side of the river and does not extend across it to the south side, and the south side of the river is the northerly boundary of the defendant's land. In other words, the river is not included in their deed. And you are not concerned with whether or not, by implication, the ownership may go to the center line of that stream. But the dispute here is with respect to a strip of land along the river on the Bilow side of the river, between it and a fence that admittedly was there for some time. And the plaintiff says that for over thirty years she was in possession of that disputed strip of land, that she occupied it adversely to the title owner, and that that occupancy has been open, notorious, actual, continued, visible, distinct and hostile to the title owner for all of those years. She says by one of her witnesses that that fence was there over forty-one years ago and was continuously there since, and how much longer she doesn't know. And she says that that fence was maintained equally by the two owners; that it was down at times because of the water conditions, freshets or ice in the river carrying it down, but that it substantially had been there during this period of years under the conditions that she claims. And she says that that situation obtained until the 15th of June,

1935, at which time Mr. Bilow became the owner of the farm across the river, and he caused that fence to be removed, and that as the result thereof the cattle pastured on the O'Brien farm wandered out across the river. Because of that fact the attention of Mr. O'Brien, the son of the owner, was called to the fact that the fence no longer was there. He was obliged, with his son, to go and get the cattle and ascertain what had caused the escape of the cattle and found this situation and he says that he found two men there demolishing the fence on that day and he waded across the stream, and told you just the situation he found and of having a conversation with them, at which time he was told the boss had ordered it down, and ordered him away in forcible and boisterous language. Since then there has been no fence there, I take it, and so she, Mrs. O'Brien, comes here, through her witnesses, to ask that she be awarded the possession in this suit of that disputed land, that Mr. Bilow now has possession of and claims as his, because her deed covers it; his deed going to that fence and not to the edge of the river, and she says she is entitled to it because what had been wrongfully originally, has, because of the lapse of years, ripened in a right and that because she has had the possession of this property for this period of years is now the owner of it.

Mr. Bilow denies that there was a fence there when he became the owner of this property and denies that there had been for a considerable time before that, and he also denies, therefore, that he removed any fence because he obviously could not remove what was not there, and he and Mr. Doherty, a New York attorney who was representing him apparently at the time, looked at this

place and both of them say that in May, Mr. Doherty at least says in May, accompanied by Mr. Bilow, rode around the place and then later in May, I think perhaps the 17th—I have forgotten the date—he and Mr. Bilow and some one else, Mr. Marcus, I think, the then owner walked about the place and observed the boundaries and the conditions and Mr. Doherty says there was no fence there. There were some evidences of fences having been there, wire strands, particles of it, where it had been attached to trees the bark having grown over the wire or strands of wire as the case may be, I think in one instance the bark was said to have been three-quarters of an inch thick. Mr. Bilow says that he ordered no one to take down the fence. He had no two men working there; he knows nothing about that matter because he says, while he had title to the property before the 15th of June, as a matter of fact he didn't take possession of it; that Mr. Marcus had some children who were in school and he didn't wish them to be incommoded by having to change schools before the school year was over, and so he agreed when he bought the property, in writing, that Mr. Marcus was to stay there at a nominal rent as a tenant until the 30th of June.

Now, of course, Mr. Marcus may have been there as a tenant and Mr. Bilow may still have had men there doing work, but at any rate, that is Mr. Bilow's testimony about this matter, that he did not have any one there doing work, that he did not have the fence demolished, that he did not engage these men, if any were there, and furthermore as far as he knows there was no fence there to be demolished.

That raises questions of fact and you are the fact finders and on the question of fact and on the

question of the testimony that has been adduced before you Counsel have taken considerable time to argue and to review the testimony and they have both in my judgment done it very thoroughly and very completely and that relieves me from the necessity, it seems to me, of further going over the testimony other than I have already done in giving you, as I understand it, the salient position of the two sides. In what I have said, however, if I have misquoted the testimony in any particular, of course you must disregard such errors and depend on your recollection of what the testimony was. Likewise if Counsel may have misquoted the testimony in any particular, you will disregard their errors, depending on the testimony as you recall it, considering it all and drawing from it such inferences as might properly be drawn from it in order that you may decide the issue here as to whether or not it be true, as Mrs. O'Brien alleges, that she acquired the title to this disputed land by the possession of it, the dominion over it adversely, continuously, distinctly, notoriously, visibly for over thirty years. If she has satisfied you to that effect by the preponderance of the evidence, she is entitled to a verdict which will be a verdict for possession and nominal damages that she has suffered by the deprivation of the property by Mr. Bilow, if you find he has actually deprived her of what was hers. I say a nominal sum, which might be a dollar or six cents or any other nominal amount that you might find. She does not sue and does not ask for anything but that. You are not concerned with the wisdom of the law. You are not concerned with the Court's rulings on the questions of laws during the progress of this trial. You are not concerned with the motions that have

been made on behalf of the defendant, which were made out of your presence; sufficeth to say that the Court has decided that there is this question of fact and that makes necessary the submission of the case to you for your determination because that's your function and your sole function as fact finders, to find the facts. The Court has no function with respect to facts but only with respect to the law, and the Judge is the Judge of the law and you will take what the Court says about the law to be correct.

The Statute of this State provides, insofar as it is applicable to this case, "that thirty years' actual possession of any land, tenements or other real estate, excepting woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise; in whatever way or manner such possession may have commenced or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands and shall be a sufficient bar to all claims that may be made, or actions commenced by any person or persons whatsoever, for the recovery of any such lands, tenements or other real estate." That is the law and under that law Mrs. O'Brien says that she is entitled to the possession of this land because it is hers by right of adversely holding it for over a period of thirty years. The Courts have construed this Statute to mean that they must have obtained the possession adversely to the owner and where the Statute says, as I have read it, "That they must have obtained the possession in whatever way or manner such possession may have commenced", that means, and the decisions of our Courts have all been, that it means there must have been a wrongful taking in the first place. It

must have been adverse to the original owner, and so Mrs. O'Brien says that she had obtained it originally adversely to the lawful owner, she and those who owned it before her, but the continuity of possession is there for over the thirty years provided by the Statute by what we call privity of passing from one to the other.

The defendant says there is no such situation and no such privity and that raises a question also whether under the testimony of Mr. Brokaw, from whom the O'Briens obtained the property, there was a break or not in that privity or continuity. Paraphrasing the Statute, as was done by Mr. Justice Bodine in one of the decisions rendered by the Court of Errors and Appeals in this State, he used this language: "Actual possession, uninterruptedly continued thirty years, is that which the legislature has said vests title to lands, other than woodlands or uncultivated tracts". Now, of course woodland and uncultivated tracts are excepted from the provision of this Statute and the period of time which the law provides that the squatter may obtain title to those kinds of lands is sixty years. But can there be any question that this is cultivated land? It is a farm used for farming purposes; and just because a river flows through it doesn't take it out of the class of cultivated land and so I say to you as a matter of law that this is the kind of land that the Statute contemplated. It is cultivated land. Where proprietors of adjoining land, such as the O'Brien property and the Bilow property or their predecessors in title, as the case may be, agree between themselves on the boundary line or the fence and did not put it exactly where the deeds call for it, they are holding it adversely, each against the other, with respect to any lands that are enclosed

in that fence or otherwise. That is quite different from a license or permission to use land. Of course, if a person gives permission to another to use, there would be no wrongful possession in that event. There would be no wrongful taking in the first instance. I repeat, if they agreed to divide the course of the border line between their land, that gives neither any permission or use, but on the question of the significance of the fence if there was ever one there or whether it was there and the fact that they divided the course between them does not defeat the running of the Statute with which we are concerned.

This is an important case and it isn't a question of the value, intrinsic value or the convenience or otherwise of either party of having access to the river. However, they have the right, both of them, to ask you, as they are doing in this case, to settle this controversy; to say what the facts are. To say who does, as a matter of fact under the law as I have explained it to you, have the right of possession to that disputed land, and that is all you are concerned with. You must not be swayed by considerations of sympathy or how you would prefer to decide it if you were left to your own preference, but under the law, as I have explained it to you, and the facts as they have been recited here, you must come to a verdict. Whether Mr. Bilow is guilty or not of taking possession of property that belongs to Mrs. O'Brien; whether Mrs. O'Brien has the right of possession of that land; whether she has established her right by the testimony without fear and without favor. You must answer that question, and when you have done that you have performed your duty and that is all you are asked to do in this case. You may retire and the clerk will receive your verdict.

Thereupon the jury retires.

After some deliberation the jury returned to the Court Room and received further instructions from the Court.

The Court: Members of the jury, I have received a note from you which reads as follows: "Can we have Mr. Covert's testimony please." I am sorry to say that I cannot have the stenographer read that to you at this time, nor do I think it should be necessary for the reason that as I tried to tell you, when I gave the case to you for your deliberation, it is your job to remember what the testimony was and moreover, the respective attorneys took a considerable time to review the testimony, and I think that it was not only thoroughly but very well done. The upper Courts have frowned upon picking out one witness' testimony and reading it or referring to it to a jury in a situation of this kind because it over emphasizes that one piece of testimony or that one witness whereas you must take all of the testimony as a whole, not just take one bit of it. Therefore it has not been my practice over any of the years that I have been a Trial Judge to permit the jury after they have deliberated to have certain testimony read to them or have their recollection refreshed by just having one witness' testimony read. The only proper way, in my judgment, would be to have the court reporter read all of the testimony from beginning to end and that I am not allowing him to do. You don't ask for that, and if you did, you would not get it. So I am very sorry under the circumstances that I cannot, for the reasons I have indicated, accede to your request. Remember the testimony as best you can. There are twelve of you; reconsider it, remember what Mr. Covert said as best you can. You may now retire.

Juror No. 3: Is there any diagram belonging to either party?

The Court: Not that I ever heard of or saw.

A Juror: We don't understand how many chains or links——

The Court: No, I don't either. But that isn't the point. The point is with respect to the disputed property. I told you that in my charge; that which lays between the fence and the river. You are not concerned whether four chains and seventeen links or seventeen chains and four links. It is the disputed property; no question about what it is. You don't need to know the extent of the area of it. It won't help you in your determination of what they are entitled to or not. It may be a square mile or a square inch, it doesn't make any difference in the presentation of the case whether it is a large area or a small area. You may retire.

Thereupon the jury retired.

EXCEPTIONS.

Mr. Reid: I take an exception, if your Honor please, to the charge as given and to the refusal to charge requests in paragraph two, and paragraph three of the requests to charge, which I assume is in the record.

The Court: Let it be noted. Any exceptions Mr. Herr, or Mr. Heath?

Mr. Herr: I take exception to that part of your Honor's charge wherein your Honor stated substantially what had begun originally has because of the lapse of years, ripened in a right. Exception to that.

And I take an exception to the failure to charge each request.

The Court: Let it be noted.

Mr. Reid: I want to make an exception on the record to your Honor's statement that the land in dispute, is the land between the fence and the river on the ground that the complaint clearly embraces the only land described in the complaint is the land between the banks of the river.

The Court: All right; let it be noted.

REQUESTS TO CHARGE.

The plaintiff respectfully requests the Court to charge the jury as follows:

1. If the jury should find from the evidence that the person who was the former owner of the defendant's property by their acts in locating the line had fixed it definitely, and so induced the plaintiff and those from whom they derived their title to act upon such erroneous location, the defendant is bound by such location, and is by his acquiescence and the acquiescence of his predecessors in title now precluded from disputing the boundary line so fixed, if the acquiescence was for a period of more than twenty years.

7 New Jersey Miscellaneous, page 642, Supreme Court, Keilt *vs.* Lozier.

2. Where proprietors of adjoining lands agree upon, fix, and establish a boundary line between their respective tracts, and each occupies up to the boundary line, possession is mutually adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, will ripen into a perfect title.

2 Corpus Juris, page 137.

3. The very ground of title by adverse enjoinment is that the party against whom it is set up has so long permitted the adverse enjoinment, and failed to vindicate his rights, that the presumption of a grant is raised. The possession is adverse if it is open, visible, exclusive with the apparent intention of claiming ownership. 10

14 New Jersey Law.

The defendant respectfully requests your Honor to charge:

1. Plaintiff bases her title to the premises claimed by virtue of thirty years' unbroken adverse possession. The possession must be shown to be a hostile possession. If you find that the possession during that period or any part of that period was by permission, then the plaintiff has failed to show such possession as would create a title in her to the premises claimed, for possession by permission could not ripen into title. 20

2. Plaintiff in her complaint states that the thirty years' unbroken adverse possession accrued on or before May 30, 1935. Since plaintiff's testimony admits that she herself did not adversely possess the premises claimed for thirty years prior to that date, she must, in order to maintain this action show that those before her and through whom she claims possessed the premises adversely and continuously for a sufficient number of years to make up the thirty year period to May 30, 1935. In addition to that she must show that those whose possession she relies on to make up the thirty year period, intended to acquire title by adverse possession and have passed on, one to the other and finally to her the rights which they were ac- 30 40

Exhibit P-1.

(Photostat of River and Fence.)

(*Opposite* ☞)

Exhibit D-1.

(Photostat of Two Streams of Water.)

(*Opposite* ☞)

Exhibit D-2.

Agreement, dated May 17, 1935.

This Agreement made this 17th day of May 1935 Between Samuel Marcus and Lena Marcus, his wife, both residing at Hillsborough Township, New Jersey, hereinafter known as the Sellers and Ludwig Bilow residing at No. 109-46 Van Wyck Blvd., Richmond Hill, New York, hereinafter known as the Purchaser.

The Sellers hereby agree to sell and convey to the Purchaser and the Purchaser hereby agrees to purchase from the Seller, all that certain, farm, tract or parcel of land with the buildings and improvements thereon erected, situate, lying and being in the Township of Hillsborough, in the County of Somerset and State of New Jersey and more particularly bounded and described as follows:

Beginning at a stake standing in the middle of the public road leading from Neshanic to Clover Hill, also the corner of the Hillsborough Township Farm; thence running along the line of said farm, north 13¼°, west, 33 chains and 8 links to the southerly bank of the South Branch River; thence along said bank of said river the courses and distances thereof to Neshanic Creek and crossing said Creek to a stone or stake on the westerly side thereof near the bank and also near the bank of the said river; thence running on the westerly side of said creek, south, 64°, west, four (4) chains and 60 links to a stake or stone corner of the second tract sold to John D. Hageman; thence along said Hageman's farm, south, 12½° east, 33 chains to a stake in the middle of the aforesaid road; thence along the middle of said road (1) north, 82° east, 25 links (2) north 88° east 4 chains (3) south 83° east, 5 chains (4) north 87½° east 6 chains (5) south 86½° east, 7

chains and 68 links to the place of beginning. Containing 73.85 acres more or less.

Being the same premises conveyed to Basco Stock Farms, Inc. by deed of Isidore Bass and wife recorded in the Clerk's office of Somerset County on July 12, 1928 in Book of Deeds H21 on pages 148 etc. and subsequently conveyed by Basco Stock Farms, Inc. to Samuel Marcus by deed dated May 31, 1932 and recorded in the County Clerk's office of Somerset County on June 15, 1932 in Book R-22 of Deeds at page 434.

Together with all rights of way, if any, to the nearest public highway.

The purchase price is Seventy-three Hundred ($7300.00) Dollars, payable as follows:

Five Hundred ($500.00) Dollars, by check subject to collection, on the signing of this contract, the receipt whereof is hereby acknowledged.

Sixty-eight Hundred ($6800.00) Dollars in cash or good certified check on the delivery of the Deed as hereinafter provided.

The sale includes one (1) tractor—Fordson, one (1) Harrow with three (3) sections, with two (2) additional sections unconnected; one (1) double plough; 4 chicken feeders, all second hand lumber outside on the ground; one heifer, all second hand 2″ pipe.

The rent received by Mr. Marcus from Sarah Benfer for one crop for year 1935 amounting to $73.00 is to remain the property of Mr. Marcus and no adjustment is to be made.

The sale does not include 4 barn doors and such lumber and pipes as are in the compartment in the wagon barn.

The Deed shall be a full covenant and warranty deed duly acknowledged and sufficient for recording, conveying said premises free and clear of

all encumbrances of every nature and shall be delivered without expense to the Purchaser and shall include such Revenue stamps as may be necessary Taxes for calendar year to be apportioned.

The Deed shall be delivered at the home of the parties of the first part on or before June 14, 1935 at 11.30 A.M.

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The covenants and conditions herein contained are binding on the parties hereto and their respective heirs and assigns.

The deposit made hereunder shall constitute a lien on said premises but such lien shall not continue after default of the purchaser.

In Witness Whereof the parties hereto have hereunto set their respective hands and seals the day and year first above written.

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Samuel Marcus
Ludwig Bilow

If title closes before June 30, 1935 the Purchaser will rent the house on said premises to the Sellers for the period from date of closing to June 30, 1935 for the sum of One dollar.

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May 17, 1935.

Samuel Marcus
Ludwig Bilow

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Exhibit D-3.

Deed, dated May 17, 1935.

GEORGE G. BROKAW and FRANCES A., his wife to JOHN O'BRIEN and CATHARINE, his wife.	10

THIS INDENTURE, made the Twenty-fifth day of September in the year of Our Lord One Thousand Nine Hundred and Seven

Between George G. Brokaw and Frances A. Brokaw, his wife, of the Township of Branchburg in the County of Somerset and State of New Jersey of the First Part, 20

And John O'Brien and Catharine O'Brien, his wife of the City of Jersey City in the County of Hudson and State of New Jersey of the Second Part,

WITNESSETH, that the said party of the first part, for and in consideration of Forty-five Hundred Dollars, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to their heirs and assigns forever, 30 40

Exhibit D-3.

All those two tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Townships of Branchburg and Hillsborough in the County of Somerset and State of New Jersey.

First Tract being in Branchburg Township.

10 Beginning at an iron pin in the South line of the South Branch Railroad Co. lands and center of Public Road leading from Montgomery to Fair View School House, also in Northerly line of Public Road leading from Neshanic Station to Three Bridges. Thence with Southerly line of said Railroad and Northerly line of last mentioned Public Road. (1) South sixty-nine degrees fifteen minutes East, fourteen chains and nine links; (2) South seventy degrees five minutes East 20 two chains and eighty-seven links to corner of farm of Louis H. Schenck; thence with his line on Westerly side of ditch South twelve degrees forty-five minutes West eleven chains and seventy three links to stake East side of Willow tree, thence North eighty-seven degrees fifteen minutes West two chains forty links to stake close by a willow tree; thence South five degrees forty-five minutes West six chains and eighty-five links to a large birch tree (scarred) standing on North side of 30 the South Branch of the Raritan River; thence up the said River the several courses and distances to the middle of the North abutment of the Bridge over said River and in center of the Public Road leading from Montgomery to Fair View School House; thence in middle of said Road North twenty-two degrees fifty-five minutes East, twenty-two chains and fifty-nine links to place of beginning. Containing thirty-six and forty-three one hundredths acres more or less (being a part 40 of the same premises conveyed to said George G.

Brokaw by Deed recorded in County Clerks Office in Book C. No. 11 of Deeds pages 401.

Second Tract situated in Hillsborough Township.

Beginning at the lowest inside end of the East wing wall on the South side of the River Bridge (at Black Point) over the South Branch of the Raritan River on Easterly side of the public road leading from Montgomery to Fairview School House. Thence on the Upland or top of Bank on South side of said River and meadow the six following courses (1) North seventy-two degrees fifty minutes West nine chains and twenty-eight links to stone (to be set) (2) North seventy degrees fifty-five minutes West three chains and thirty-five links to small elm ten feet South of large white oak tree (3) North fifty-one degrees twenty minutes West six chains and five links to young Hickory twelve and one half feet from large Maple tree. (4) North sixty-four degrees West four chains and sixty-three links to small elm tree. (5) North fifty-eight degrees thirty minutes West four chains and fifty-three links to crotched elm tree. (6) North fifty-six degrees forty-five minutes West one chain and seventy-four links to South side of large elm tree being the last tree along meadow. Thence with other lands of party of the first part South fifty-nine degrees fifteen minutes West six chains and ninety-one links to stone (to be set) in line of Charles Duncan's (formerly McIlheney's) lands; thence with said Duncan's line South thirteen degrees thirty minutes East twenty-five chains and forty-eight links to center of before mentioned road; thence in said road the six following courses (1) North fifty-nine degrees twenty-five minutes East nine chains and nine links; (2) North fifty-seven

degrees forty minutes East three chains and five links; (3) North fifty-seven degrees forty-five minutes East four chains and sixty-five links; (4) North sixty-one degrees forty-five minutes East five chains and seventy-five links; (5) North sixty-one degrees fifteen minutes East three chains and thirty-eight links; (6) North sixty-one degrees thirty minutes East four chains and seventeen links to a post standing on Easterly side of the public road, thence North forty degrees thirty minutes East thirty-five links to place of beginning. Containing forty-two acres and nine tenths of an acre more or less 42.*910* A.

The above descriptions are taken from a survey of said premises made by Garretson and Peter C. S. Hageman Sept. 12, 1907. The above tracts are a part of the first two tracts conveyed to George G. Brokaw by Alex B. Brokaw and wife by deed dated March 30, 1907 and recorded in Book C. No. 11 on page 401 &c, of deeds for said County.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining.

Also all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever.

And the said George G. Brokaw doth for himself, his heirs, executors and administrators covenant and grant to and with the said party of the

second part, their heirs and assigns, that he the said George G. Brokaw is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever.

And also, that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid.

And also, that the said George G. Brokaw will warrant, secure, and forever defend the said land and premises unto the said John O'Brien, and Catharine O'Brien, their heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

George G. Brokaw (Seal)

Frances A. Brokaw (Seal)

Signed, Sealed and Delivered in the presence of

Louis H. Schenck

Exhibit D-3.

State of New Jersey }
County of Somerset } ss.:

Be it remembered, that on this Twenty fifth day of September in the year of Our Lord One Thousand Nine Hundred and Seven before me, the subscriber, a Master in Chancery of New Jersey, personally appeared George G. Brokaw and Frances A. Brokaw, his wife, who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Frances A. Brokaw being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

Louis H. Schenck,
M. C. C. of N. J.

State of New Jersey }
County of Somerset } ss.:

I, Walter K. Crater, Clerk of said County, do hereby certify the foregoing to be a true and correct copy of a certain Deed #5434 given by George G. Brokaw and Frances A., his wife, to John O'Brien and Catharine, his wife, dated September 25th, 1907 as the same is recorded in my office on September 26th, 1907 at 11.20 A. M. in Book of Deeds No. G 11 on page 473.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said County [seal] this 8th day of October, 1937.

Walter K. Crater,
County Clerk.

Exhibit D-4.

Deed, dated March 30, 1907.

ALEXANDER B. BROKAW and JULIA C., his wife
to
GEORGE G. BROKAW.

10

THIS INDENTURE, made the thirtieth day of March, in the year of our Lord One Thousand Nine Hundred and seven

Between Alexander B. Brokaw and Julia C. Brokaw, his wife, of the Township of Branchburg in the County of Somerset and State of New Jersey, of the first part;

And George G. Brokaw, of the Township of Branchburg in the County of Somerset and State of New Jersey of the second part.

20

WITNESSETH, that the said party of the first part, for and in consideration of One dollar and other good and valuable consideration, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever.

30

All the right, title and interest of the parties of the first part, being the undivided ½ interest in and to all those tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Townships of Branchburg

40

and Hillsborough in the County of Somerset and State of New Jersey.

The first tract being in the Township of Hillsborough and beginning at a point in the Southerly side of the south branch of the Raritan River at the mouth of the Neshanic River and running up the said south branch of the Raritan River on the Southerly edge thereof the several courses thereof to a stake a corner of the formerly McIlhaney farm; thence by said farm South fourteen degrees East forty four chains and sixty-five links to a stone in the road leading from Montgomery to Neshanic Station a corner to lands of J. Hageman; thence by his lands (1) North fifty eight and three quarter degrees East, nine chains and nine links to a stake; thence (2) North fifty seven and one half degrees East, three chains and five links to a stake; (3) North fifty seven and three quarter degrees East, four chains and sixty-five links to a stake (4) North sixty one and one half degrees East, five chains and seventy five links to a stake; (5) North sixty three degrees East three chains and thirty eight links to a stone; (6) North sixty six degrees East, five chains twenty links to the beginning. Containing sixty and thirty one hundredth acres more or less.

The second tract being in the Township of Branchburg, on the North side of the river, Beginning at an iron pin in the Southerly line of the South Branch Railroad Company in the middle of the road leading from Neshanic Station to Montgomery being a corner to lands of Theodore G. Case, and running by his lands (1) South six and one quarter degrees West, one chain to a stake on the Easterly side of said road; (2) South twenty one and one quarter degrees West, eight chains and fifty links to a stone; (3) South eighty one and one quarter degrees West, three chains

and forty-nine links to *a* the Northerly edge of a marked white oak tree; (4) West eleven chains and twenty six links to an ash tree (at 27 and 10.12 are stones); (5) North eighty two degrees West, six chains and five links to a stone (at 6.00 is walnut in line); (6) South twenty five and three quarter degrees West, three chains and fifteen links to a stone (7) South sixty-six and a half degrees East three chains eighty two links to stake (8) South eleven and one half degrees West two chains and forty links to a stake standing in the Northerly edge of the South Branch of the Raritan River; thence down the edge of said river the several courses thereof to a birch tree a corner to lands of John G. Schenck; thence by his lands (1) North six degrees East, six chains and eighty five links to a willow; (2) South eighty eight degrees East two chains and forty links to a willow on the Westerly side of a ditch; (3) North eleven and three quarter degrees East, eleven chains and seventy three links to the line of lands of the aforesaid South Branch Railroad; thence by their lands North seventy two and one half degrees West, two chains and eighty two links to a stake; thence North sixty nine and three quarter degrees West fourteen chains and nine links to the place of Beginning. Containing fifty four and four one hundredth acres more or less.

Being the same two tracts conveyed to Alexander B. Brokaw and George G. Brokaw by deed of Lemirah Suydam, dated April 1, 1905 and recorded in the Somerset County Clerk's Office in Book L No. 10 of deeds, on pages 198 etc.

The third tract being in the Township of Branchburg, beginning at an iron stake in the line of lands of South Branch Railroad, being in the middle of the road leading from Montgomery

to "Fairview School House", a corner to lands of Williamson's farm, and running by lands of said railroad (1) North sixty-nine and ¾ degrees, West thirty-three chains and forty-three links, to an iron stake, a corner to land of George Hall; thence, by Hall's line (2) South thirty eight and ½ degrees West six chains and seventy-eight links to a stake; thence (3) South forty three and ¼ degrees West one chain and eighty links to the Northerly edge of South branch of the Raritan River; thence (4) down the Northerly side of said River, the several courses thereof, to the corner of lands of the Williamson farm; thence (1) by said farm North eleven and ½ degrees East, two chains and forty links to a stake; (2) North sixty-six and ½ degrees West three chains and eighty-two links to a stone; (3) North twenty-five and ¾ degrees East, three chains and fifteen links to a stone; (4) South eighty two degrees East, six chains and five links to an ash tree (at .05 is Walnut in line); (5) East eleven chains and twenty-six links to the North edge of a white oak tree (at 1.14 is stone); (6) North, eighty-one and ¼ degrees East, three chains and forty-nine links to a stone on the Easterly side of aforesaid road; (7) North, twenty-one and ¼ degrees East, eight chains and fifty links to a stake; (8) North, six and ¼ degrees East, one chain to the place of beginning; containing forty-nine and twenty-five hundredths (49.25) acres, more or less.

Being the same premises conveyed to the said Alexander B. Brokaw and George G. Brokaw by deed of Lewis C. Pittenger and wife, dated March 9th, 1906 and recorded in Somerset County Clerk's office in Book S. No. 10 of Deeds on pages 397 etc.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges,

and advantages, with the appurtenances to the same belonging or in anywise appertaining.

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

And the said Alexander B. Brokaw and Julia C. Brokaw do for themselves, their heirs, executors and administrator covenant and agree to and with the said party of the second part, his heirs and assigns, that he the said Alexander B. Brokaw is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever.

And also that the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid.

And also, that he the said Alexander B. Brokaw will Warrant, secure, and forever defend the said land and premises unto the said George G. Brokaw, his heirs and assigns, forever, against

the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Alex B. Brokaw (Seal)
Julia C. Brokaw (Seal)

Signed, Sealed and Delivered in the presence of

Nelson Y. Dungan

State of New Jersey
County of Somerset } ss.

Be it remembered that on this thirtieth day of March in the year of our Lord One Thousand Nine Hundred and seven, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Alexander B. Brokaw and Julia C. Brokaw, his wife, who, I am satisfied, are the grantors mentioned in the within indenture, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Julia C. Brokaw being by me privately examined, separate and apart from her husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

Nelson Y. Dungan
M. C. C. of N. J.

Exhibit D-4.

State of New Jersey }
County of Somerset } ss:

I, Walter K. Crater, Clerk of said County, *Do Hereby Certify* the foregoing to be a true and correct copy of a certain Deed #4766 given by Alexander B. Brokaw and Julia C., his wife to George G. Brokaw dated March 30th, 1907 as the same is recorded in my office on April 1st, 1907 at 2.00 P. M. in Book of Deeds No. C 11 on page 401.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said County [seal] this 8th day of October, 1937.

Walter K. Crater,
County Clerk.

Exhibit D-5.

Deed, dated April 1, 1905.

LEMIRAH SUYDAM

to

10 ALEXANDER B. BROKAW, *et al.*

THIS INDENTURE, made the first day of April, in the year of our Lord One Thousand Nine Hundred and five

Between Lemirah Suydam, widow, of the Borough of Cranbury in the County of Middlesex and State of New Jersey party of the first part;

20 And Alexander B. Brokaw and George G. Brokaw of the Borough of Neshanic in the County of Somerset and State of New Jersey party of the second part.

WITNESSETH, that the said party of the first part, for and in consideration of Twenty eight hundred dollars ($2800.00) lawful money of the United States of America, to her in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these 30 presents the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to her heirs and assigns forever.

All those certain tracts or parcels of land and 40 premises, hereinafter particularly described, situate, lying and being in the Township of Hillsborough & Branchburg in the County of Somerset and State of New Jersey.

Exhibit D-5.

Beginning at a point on the Southerly side of the South branch of the Raritan River at the mouth of the Neshanic River and running up the said South branch of the Raritan River on the Southerly edge thereof the several courses thereof to a stake a corner of the formerly McIlhaney farm; thence by said farm South fourteen degrees East forty four chains and sixty five links to a stone in the road leading from Montgomery to Neshanic Station a corner to lands of J. Hageman; thence by his lands (1) North fifty eight and three quarter degrees East, nine chains and nine links to a stake; thence (2) North fifty seven and one half degrees East, three chains and five links to a stake; (3) North fifty seven and three quarter degrees East, four chains and sixty five links to a stake; (4) North sixty one and one half degrees East, five chains and seventy five links to a stake; (5) North sixty-three degrees East three chains and thirty eight links to a stone; (6) North sixty six degrees East, five chains and twenty links to the beginning. Containing sixty and thirty one hundredth acres more or less.

Second Tract in Branchburg Township, North side of said river:

Beginning at an iron pin in the Southerly line of the South Branch Railroad Company in the middle of the road leading from Neshanic Station to Montgomery being a corner to lands of Theodore G. Case, and running by his lands (1) South six and one quarter degrees West, one chain to a stake on the Easterly side of said road; (2) South twenty one and one quarter degrees West, eight chains and fifty links to a stone; (3) South eighty one and one quarter degrees West, three chains and forty nine links to *a* the Northerly edge of a marked white oak tree; (4) West eleven chains and twenty six links to an ash tree (at 27 and 10.12 are stones); (5) North eighty two degrees

West, six chains and five links to a stone (at 6.00 is walnut in line); (6) South twenty five and three quarter degrees West three chains and fifteen links to a stone (7) South 66½ degrees East 3 ch 82 links to stake (8) South eleven and one half degrees West two chains and forty links to a stake standing in the Northerly edge of the South Branch of the Raritan River; thence down the edge of said river the several courses thereof to a birch tree a corner to lands of John G. Schenck thence by his lands (1) North six degrees East, six chains and eighty five links to a willow; (2) South eighty eight degrees East two chains and forty links to a willow on the Westerly side of a ditch; (3) North eleven and three quarter degrees East, eleven chains and seventy three links to the line of lands of the aforesaid South Branch Railroad; thence by their lands North seventy two and one half degrees West, two chains and eighty two links to a stake; thence North sixty nine and three quarter degrees West fourteen chains and nine links to the place of Beginning. Containing fifty four and four one hundredth acres more or less. Being the same premises conveyed to Willard Richards by deed of Mary M. Williamson, *et als,* dated the 27th day of November 1899 and recorded in Somerset County Clerks office in Book C. No. 9 of Deeds page 262, and being the same premises conveyed to the said Lemirah Suydam by deed of Calvin D. McMurtry, Sheriff of Somerset County, by deed dated October 27, 1904 and recorded in said Clerk's office in Book I No. 10 page 411.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

Exhibit D-5.

And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in and to the above described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the above mentioned premises, together with the appurtenances, unto the said party of the second part, their heirs and assigns, to their own proper use, benefit and behoof forever.

And the said Lemirah Suydam, for herself, her heirs, executors and administrators, does covenant, grant and agree to and with the said party of the second part, their heirs and assigns, that the said Lemirah Suydam at the time of the sealing and delivery of these presents, was lawfully seized in of a good, absolute, and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances and had good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid.

And that the said party of the second part, their heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, her heirs or assigns, or of any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever.

Exhibit D-5.

And also, that the said party of the first part, and her heirs, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for them, shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, their heirs and assigns, make, do, and execute, or cause or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, their heirs and assigns forever, as by the said party of the second part, their heirs or assigns, or counsel learned in the law, shall be reasonably advised or required.

And the said Lemirah Suydam, her heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, their heirs and assigns, against the said party of the first part, and their heirs, and against all and every person or person whomsoever lawfully claiming or to claim the same, shall and will Warrant and by these presents forever defend.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Lemirah Suydam (Seal)

Signed, Sealed and Delivered in the presence of Twenty seven words interlined

Theo. B. Booraem

Exhibit D-5.

State of New Jersey, } ss.
County of Middlesex }

Be it remembered, that on this first day of April, in the year of our Lord One Thousand Nine Hundred and five, before me the subscriber, A Master in Chancery of New Jersey personally appeared Lemirah Suydam who I am satisfied is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed. 10

Theo. B. Booraem,
M. C. C. of N. J. 20

State of New Jersey } ss.
County of Somerset }

I, Walter K. Crater, Clerk of said County, *Do Hereby Certify* the foregoing to be a true and correct copy of a certain Deed #1789 given by Lemirah Suydam to Alexander B. Brokaw and George G. Brokaw dated April 1st, 1905 as the same is recorded in my office on April 3rd, 1905 at 3.30 P.M. in Book of Deeds No. L-10 on page 198. 30

In Witness Whereof, I have hereunto set my hand and affixed the seal of said County
[seal] this 8th day of October, 1937.

Walter K. Crater,
County Clerk.

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New Jersey Court of Errors and Appeals

CATHERINE O'BRIEN, Plaintiff-Respondent, *vs.* LUDWIG BILOW, Defendant-Appellant.	Action at Law. (In Ejectment.) On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Defendant-appellant, Ludwig Bilow respectfully shows unto your Honors:

Statement of Facts.

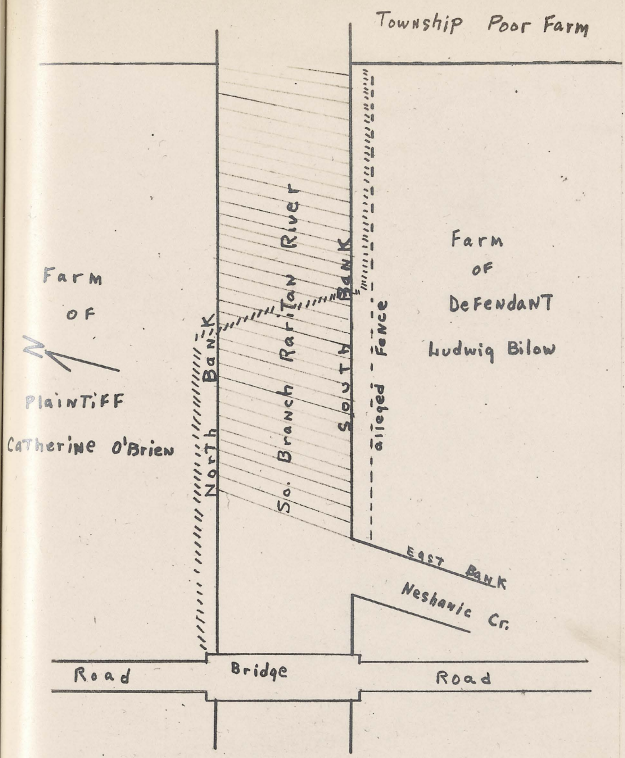
Counsel for defendant-appellant has prepared as a part of this brief, for the convenience of the Court, a sketch of the premises in question. This does not purport to be an engineer's survey, but merely a sketch of the premises in question and its surroundings so that the Court may have a clear picture of the situation.

This action involves the ownership of the area covered by the waters of the south branch of the Raritan River as shown in the sketch and in Exhibit P-1 (S. C., p. 119) and Exhibit D-1 (S. C., p. 119). The plaintiff is the owner of a farm abutting on the north bank of said river, as shown in the sketch, said north bank also being the left side of the photographs (S. C., p. 119). The farm of the defendant is on the south side of the river

and may be seen on the sketch and on the right side of the photographs P-1 and D-1 (S. C., p. 119). The photo P-1 shows the river at high water, and the photo D-1, the same river at low water. The stream emerging into the river at the lower right-hand corner of both photographs is the Neshanic Creek. Plaintiff's title deed, Exhibit D-3 (S. C., p. 123) of which the first tract, only, affects the farm abutting the north bank, runs only to the north bank of the river as by reference to said deed will appear, and no claim is made by the plaintiff that her deed covers the premises in dispute, the premises in dispute being the premises lying between the north and south banks of the Raritan River.

Plaintiff sued in ejectment claiming title to the land between the north and south bank of the river by virtue of possession under Chapter 188 P. L. 1922 (now 2:25-1, R. S., 1937), as by reference to the language of her complaint (S. C., p. 3) and by Paragraph 1 of amended Bill of Particulars (S. C., p. 7) will appear.

(*Opposite* ☞)



Legend

Shaded area of River is the Premises claimed in the complaint

Line of Fence Prior To 1910 (Covert Testimony) S.C. p. 66.

Defendant demanded a Bill of Particulars (S. C., p. 4) and received the Bill of Particulars and Amended Bill of Particulars (S. C., pp. 6 and 7) and subsequently moved to strike out the complaint filed (S. C., pp. 8 and 9) before the late, Hon. Rulif V. Lawrence, Circuit Court Judge, sitting as Supreme Court Commissioner, which motion resulted in the Order (S. C., p. 9) Counts Two and Three of the Complaint were abandoned at the motion.

In accordance with said last-mentioned Order, defendant filed Answer (S. C., p. 11) and demanded a Bill of Particulars (S. C., p. 11) and received Answers thereto (S. C., p. 13) and having received same, again moved to strike said complaint (S. C., p. 15) which last motion resulted in the opinion (S. C., p. 16) and Order Denying the Motion (S. C., p. 19).

Trial was then had before Hon. Newton H. Porter and a jury and resulted in a verdict and judgment in favor of plaintiff.

From the two Orders denying the motions to strike and from the whole of the judgment entered in this cause, defendant appeals (Notice of Appeal, S. C., p. 21) alleging the Grounds for Appeal appearing at pages 22 to 34 of the State of the Case.

POINT I.

The learned Circuit Court Judge sitting as a Supreme Court Commissioner erred in his order of June 5th, 1937 (S. C., p. 9), in which he denied the defendant's motion to strike the complaint, in that:

(a) The complaint was founded on Section one of "An act for the limitation of suits respecting title to lands" (Revision of 1877, p. 598 as

amended by Chapter 188, P. L. 1922, now 2:25-1, R. S., 1937), which statute has no application to the state of facts set forth in the complaint. Said statute as amended reads as follows:

> "1. Thirty years' actual possession of any lands, tenements, or other real estate, excepting woodlands or uncultivated tracts and that sixty years' actual possession of any woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner such possession might have commenced, or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements, or other real estate, and shall be a good and sufficient bar to all claims that may be made, or actions commenced by any person or persons whatsoever, for the recovery of any such lands, tenements, or other real estate." Approved March 11, 1933, and took effect immediately.

Defendant respectfully submits that this statute was not intended to apply presently.

To give the statute such an interpretation would be to impute to the legislature an intention to contravene the provisions of Art. 1, Sec. X of the U. S. Constitution prohibiting a state from passing a law impairing the obligation of contracts. The act takes effect immediately upon the date of its passage and provides no reasonable time for the bringing of actions, either by express provision or by interval between its passage and effective date. The omission of such a provision and the inclusion of one making the act immediately effective clearly shows an intendment of the legislature that the act should be prospective only and not retrospective, for no protection was provided against the hardship that would result from the latter intention.

On the day the act was passed defendant or his predecessor in title had the right to feel that the possession of plaintiff or her predecessors could not ripen into title until after sixty years of possession, and yet were the retrospective construction to be given the act, and thirty years possession had accrued to the date of its passage, defendant would be immediately deprived of his title, without any opportunity whatsoever to recover. Certainly an act which was intended to secure titles could not so be used to deprive one man of his title and confer it upon another, especially where he had a right to rely upon existing law.

Lieberman in his work on "New Jersey Abstracts and Titles", referring to the act in question, says that:

> "The statute, however, was enacted in 1922. Before that time the statutory bar fell only after sixty years of similar possession. Persons whose rights had already been in existence for more than thirty years at the time the statute was passed could not be denied their rights under the sixty year limitation and the statute could not constitutionally be enforced against them. Hence, in order to include rights possessed by any such persons in his abstract the searcher today must trace his chain over the sixty year period.
>
> When the 1922 statute, however, is in existence thirty years it will be necessary for the searcher to search only thirty years, since by that time all former rights under the sixty year statute will have been barred."

And see 12 Corp. Jr. 959, Title Constitutional Law, Sec. 499.

> "But so long as a reasonable time is allowed after the passage of the act to prevent its consequences, the legislature may shorten

the time required by law for obtaining title by adverse possession." Citing *Lawson* vs. *Denson,* 74 Ark. 302, 86 S. W. 661; *McAuliff* vs. *Parker,* 10 Wash. 141, 38 Pac. 744.

And Sec. 759 of the same Title.

"An act shortening the period of limitations applying both to past and future contracts is not unconstitutional, where it provides for amply time for bringing actions on past contracts before such actions shall be barred. But where it reduces the time for bringing suit to such an extent as to be unreasonable, and *a fortiori* where no opportunity is left for an action to be brought, it is unconstitutional as impairing the obligation of contracts." Citing *Wilkinson* vs. *Lemassina,* 51 N. J. L. 61, following *Morris* v. *Carter,* 46 N. J. L. 260.

Endlich in his treatise on the interpretation of Statutes, Section 273, page 367, says that:

"Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation. On the contrary, it was said in a recent case in England, *prima facie* the general rule of construing acts of Parliament is that they are prospective, and rights are not to be interfered with unless there are express words to that effect. And this requisite of express declaration, positive expression, and the like, has been repeatedly insisted upon in decisions in this country; and it has been stated, that however broad and general in its terms, a statute is not to be construed as interfering with existing contracts, rights of action, or suits, unless the intention that it shall so operate is expressly declared. So far as rights

> and obligations resting upon contracts are concerned, constitutional provisions interpose, in America, insuperable obstacles to legislative impairment or destruction of the same, and similar provisions in some of the states protect rights of property and of action. Beyond that, whilst the rule above stated is probably too strict and narrow, whatever the legislative power upon the subject may be, an intention to subvert rights of property, vested rights, should never be imputed to a statute unless indicated in such terms, having regard to all legitimate means of interpretation, as admit of no doubt, but show a clear design to effect that particular and specific purpose. General terms which may, but must not of necessity, apply and which the legislature has not particularly applied to the case, and consequently implied or constructive repeals, cannot effect it."

(b) The tract described in the complaint appears on the face of the complaint to be an uncultivated tract and therefore it is not within the purview of the statute. Reference to the complaint (S. C., p. 2) discloses that the description runs from bank to bank and embraces the premises lying between the north and south banks of the south branch of the Raritan River. The premises, of course, are river bottom.

The statute in so far as it is effective in thirty years expressly excepts woodlands or uncultivated tracts. Certainly river bottom cannot be said to be cultivated. The intention of the legislature here is clear. It is to create a shorter period for lands that might be visibly and openly possessed by cultivation or building, etc. You cannot cultivate the bottom of the river. You cannot tell that it is possessed by looking at it. It is uncultivated within the meaning of the act.

(c) The complaint failed to show adverse possession on the part of the plaintiff.

Reference to the complaint discloses that:

> "The plaintiff says that her right to possession and her title to the lands claimed vested at the expiration of thirty years actual uninterrupted possession in herself and her other direct predecessors and/or occupiers of the title through whom she claims."

There is no statement that the possession was *hostile.* This is an *essential element* under the statute as it has been construed and was intended.

In the case of *Content* vs. *Dalton,* 121 N. J. Eq., 391, 190 Atl. 328, the question of whether the possession under Chapter 188 P. L. 1922, p. 315, which is the Act involved in this case must be adverse was directly in issue, and the Court held page 402,

> "a consideration of the authorities in this and other jurisdictions clearly indicates that the possession requisite to a perfect title under this act must be adverse."

And at page 403:

> "It would shock the sense of right which must be felt equally by legislatures and judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title."

By reason of this ruling on the motion the defendant was forced to go before the jury without any allegation in the complaint of adverse possession, and in fact no testimony of adverse possession was given at the trial and yet a verdict resulted in favor of the plaintiff.

(d) The complaint failed to show that the defendant was in possession of the premises claimed in the complaint.

The complaint (S. C., p. 3) merely alleges that the defendant "wrongfully and willfully removed the plaintiff's fence around the aforesaid property, or a portion thereof and claimed right to possession of the same himself". The complaint does not allege that defendant is in possession but merely alleges that he claims a right to possession and even as to that claim is uncertain as to whether the defendant claims the whole or a portion thereof. This action was founded in Ejectment which is to recover possession. The facts in the complaint might have shown a proper case for a Bill to Quiet Title in the Court of Chancery but was lacking in the essential element of a complaint in Ejectment. And since it was uncertain as to whether the whole or a part was claimed, the defendant could not properly answer, for he could not know exactly what he was accused of taking or claiming.

(e) The complaint failed to allege privity between plaintiff and prior occupants of the premises described in the complaint.

> "If no privity has been found to exist between the successful disseisors, and the last occupant has not held adversely for the full statutory period (as was the case in the present instance), the bar is not complete, as the law presumes that the land returns to the true owner at each change of possession, when there is no privity between the several occupants."

J. B. Streets, Jr. Co. vs. *Fredrickson,* 91 N. W. 692, 694, 11 N. D. 300.

> "The general rule is that possession cannot be tacked to make out title by prescription where the deed under which the last occupant claims title does not include the land in dispute. It must clearly appear that the particular premises were embraced in the deed or

> transfer in whatever form it may have been made." 2 Corpus Juris, Title, Adverse Possession, p. 98, Sec. 96G, citing, Federal, California, Illinois, Colorado, Louisiana, Michigan, Missouri, Nebraska, New York, N. Carolina and Wisconsin decisions, and Fell & Co. *vs.* Pennsylvania Railroad Co. (N. J.), 29 Atl., p. 63.

And in the case of *Murray* vs. *Pannaci,* 64 N. J. Eq., 147, affirmed by the Court of Errors and Appeals in 67 N. J. Eq., p. 724, where complainant claimed title to land between high and low water mark by adverse possession of herself and prior occupants of the title. The Court did not permit the tacking of possession because the deed into her carried a description to high water mark only and hence there was no privity.

This last is in line with the present set of facts.

And in the case of *Colgan* vs. *Pellens,* N. J. Sup. Ct., 48 N. J. L. 27, the Court held that privity must be shown.

> "Privity is necessary in order that the successive possessions may be connected with each other. In the absence of such privity, a new and distinct disseizin is made by each disseizor. As soon as the former adverse holder quits possession the true owner, by virtue of his legal title, is again instantly seized of possession of the premises by operation of law, and thereby the continuity of the possession between the adverse claimants is broken." 2 Corpus Juris, Title, Adverse Possession, p. 85, Sec. 69 B, citing Sawyer *vs.* Kendall, 10 Cush. (Mass.) 241, and U. S., Ala., California, Georgia, Indiana, Maryland, Missouri, Arizona, Minnesota, Tennessee and Texas decisions.

Since the complaint showed that the plaintiff, herself, had not occupied the premises claimed for a period of thirty years prior to May 30, 1935, it

was necessary to allege that those before her and through whom she claims, occupied it and conveyed it to her.

(f) The complaint lacked certainty in that it does not state with certainty whether plaintiff was deprived of the possession of the whole or of a portion of the premises described in the complaint.

This question has already been argued under Paragraph (d) of this point.

(g) Paragraph (g) of the first Ground of Appeal is not argued.

(h) The Supreme Court Commissioner erred in said order in compelling the defendant to plead to a defective complaint and erred by compelling the defendant to demand a bill of particulars which were to become a part of the complaint and by compelling the defendant to plead to the complaint before the service of the said bill of particulars which were to become a part of the complaint (Order, S. C., pp. 9 and 10).

The order marked a departure from the established practise of the Court. Under the Order, the Bill of Particulars was to cure the defects in the Complaint, but under the same Order, the defendant was obliged to plead to the complaint before it showed a cause of action. The defendant had a right to have a defective complaint stricken when it did not disclose a cause of action, and it provoked confusion and was prejudicial to him to compel him to plead to a complaint which did not disclose a cause of action.

POINT II.

Appellant respectfully submits that the learned trial judge erred in his order of November 20, 1937, which order denied *nunc pro tunc* as of October 13, 1937, the motion of defendant-appellant to strike the complaint, in that said complaint taken together with the Bill of Particulars served in pursuance of the order of the Supreme Court Commissioner of June 5, 1937:

(a) Failed to disclose a cause of action because the statute on which the same is founded has no application to the period of possession claimed therein.

Plaintiff respectfully submits that the statute, chapter 188, P. L. 1922, was not intended to apply presently, for the reasons set forth under paragraph (a) under Point One of this brief.

(b) That said complaint taken together with said Bill of Particulars failed to disclose a cause of action because it does not show that defendant is in possession of the premises claimed.

The complaint (S. C., p. 3) merely alleges that the defendant "wrongfully and willfully removed the plaintiff's fence around the aforesaid property, or a portion thereof and claimed right to possession of the same himself". The complaint does not allege that defendant is in possession but merely alleges that he claims a right to possession and even as to that claim is uncertain as to whether the defendant claims the whole or a portion thereof.

Under Item 10 of the Bill of Particulars served in pursuance of the order of the Supreme Court Commissioner of June 5, 1937, which item is found

on page 13 of the State of Case, defendant demanded:

> "10. State whether or not it is claimed defendant is in possession of the premises claimed, and, if it is claimed that defendant is in possession, please state the nature of defendant's possession and the use to which the same is now being put by the defendant."

And in answer to said demand the plaintiff replied:

> "10. This is within the knowledge of the defendant."

The complaint is framed in ejectment which must be to recover the possession of property, so that the allegation that someone else is in possession is an essential allegation in such complaint.

The complaint did not show a case within the jurisdiction of this court, but rather disclosed a cause which should be brought on a Bill to Quiet Title in the Court of Chancery.

The action is not one to quiet title but to recover possession and to obtain a judgment of ouster. It was prejudicial to the defendant to permit this cause to go to trial without such an allegation as may be seen from what happened at the trial. There cannot be found in any portion of the testimony produced by the plaintiff that defendant was in possession of the premises claimed. Plaintiff departed entirely in the trial from her action in ejectment and throughout the testimony sought to confuse the issue by producing testimony as to location of boundaries which might have been the basis of a Bill to Quiet Title in the Court of Chancery, but was not pertinent to this issue, all of which produced a misconception of the entire case in the minds of the court and the jury and resulted in an erroneous verdict for the plaintiff.

(c) The complaint taken together with said Bill of Particulars failed to disclose a cause of action because the premises described therein appear on the face of the complaint to be uncultivated.

Regardless of what statement might be made in the Bill of Particulars it is apparent from reading of the description contained in the complaint that the premises claimed lay between the North and South banks of the river, premises which is clearly river bottom and certainly could not be cultivated. The fact that river bottom is not within the purview of the statute in question is shown under Paragraph (b) of Point One of this brief.

(d) That said complaint taken together with said Bill of Particulars is sham in so far as it alleges privity between the plaintiff and the prior occupants of the farm on north bank of the river, because none of the instruments under which privity is claimed cover the premises lying between the north and south banks of the river and claimed in the complaint.

At the original motion to strike the complaint in this cause the defendant objected to the complaint on the ground of the lack of an allegation of privity between plaintiff and her other direct predecessors and/or occupiers of the title through whom she claims, whose possession she desires to tack to hers to make up the thirty-year period accruing on or before May 30, 1935. This defect was to be cured by the furnishing of a Bill of Particulars.

In the plaintiff's Bill of Particulars (S. C., p. 14, Item 5) she alleges as privity three deeds, one a warranty deed from George G. Brokaw, and Frances A. Brokaw, his wife, to John O'Brien and Catharine O'Brien, his wife, recorded in Book G-11 of deeds of Somerset County, p. 473. Ref-

erence to a certified copy of said deed furnished on the motion to strike and later put in evidence at the trial (Exh. D-3, S. C., p. 123) discloses that the deed contains two tracts, the second tract being entirely removed from the premises in dispute. The first tract discloses premises on the north side of the river. Reference to the description running

> "to a large birch tree (scarred) standing on the north side of the south branch of the Raritan River; thence up the said river the several courses and distances to the middle of the north abutment of the bridge of said river."

The description clearly limits the conveyance to the north bank of the river. The premises in dispute as described in the complaint cover the land lying between the north and south bank of the river.

The second deed mentioned in the Bill of Particulars is a deed from Alexander B. Brokaw and Julia C. Brokaw, his wife, to George G. Brokaw, recorded in Book C-11 of deeds for Somerset County at page 401 reference to a certified copy of said deed furnished on the motion to strike and later put in evidence at the trial as Exhibit D-4 (S. C., p. 129) discloses three tracts, tracts one and three being entirely removed from the premises in dispute.

The second tract is specifically described in said deed as follows (S. C., p. 130):

> "The second tract: Being in the township of Branchburg on the north side of the river",

And reference to the metes and bounds contained in the description discloses the title running

> "South 11½° West 2 chains and 40 links to a stake standing in the northerly edge of the south branch of the Raritan River; thence down the edge of the said river the several courses thereof to a birch tree and corner to lands of John G. Schenck;"

The description clearly limits the conveyance to the north edge of the South Branch of the Raritan River.

The third deed mentioned in the Bill of Particulars, a certified copy of which was furnished on the motion to strike and later put in evidence as Exhibit D-5 at the trial (S. C., p. 136) is a deed from Lemirah Suydan to Alexander B. Brokaw and George G. Brokaw, recorded in Book L-10 of Deeds for Somerset County, page 198. Reference to this deed discloses two tracts, the first tract being removed from the premises in dispute.

The second tract contained in said deed is described as (S. C., p. 137) "Second tract: In Branchburg Township north side of said river." A reference to the metes and bounds contained in said description discloses the title running

> "to a stake standing in the northerly edge of the south branch of the Raritan River; thence down the edge of said river the several courses thereof to a birch tree and corner to lands of John G. Schenck."

The description clearly limits the conveyance to the north edge of the south branch of the Raritan River.

The tracts to which attention is called in the three deeds mentioned describe the plaintiff's farm on the north bank of the river and the period covered by all three deeds is necessary to make up the thirty year period claimed in the complaint. That these deeds do not establish any privity between the parties thereto as to the premises lying

between the north and south banks of the river as claimed in the complaint is apparent. Since the deeds did not convey the premises in dispute, it reverted to the true owner on each change of possession.

The law on this question of privity has been fully set out under Paragraph (e) of Point One of this brief.

POINT III.

Because at the trial the court, over the objection of the defendant, permitted the witness John O'Brien to testify to a conversation with two men said by him to be taking down a fence (S. C., pp. 45 and 46).

Defendant-appellant respectfully submits that the court erred in admitting this testimony since there was no evidence to establish an agency between the men alleged to have taken part in the conversation and the defendant.

POINT IV.

Because at the trial the court over the objection of the defendant, permitted the witness John O'Brien to answer the following question:

> "Q. Now, for what purpose was the land adjacent to the fence; from the fence to northerly used?" (S. C., p. 47).

Reference to the complaint (S. C., p. 2) shows that the description of the premises claimed therein runs from bank to bank, covering the river only and not any land that might lie on the opposite shore from plaintiff's property and between the bank on the opposite shore and the fence allegedly on the defendant's land. Keeping in

mind that the plaintiff's farm is on the north bank and the defendant's on the south bank and that the purpose of this act was the claim of ownership, by plaintiff across to the south bank and not beyond, any testimony as to the use of land between the south bank and the fence allegedly south of the south bank was irrelevant and immaterial. This strip of land is the small strip of land between the fence and the river as shown on the right side of the photo, Ex. P-1 (S. C., p. 119). That it was prejudicial may be seen by the errors complained of in the subsequent grounds of appeal. The question raised a misconception in the mind of the court as to the premises in dispute, a misconception which continued throughout the trial despite the objections of the defendant, as will be seen in subsequent trial rulings complained of and the charge to the jury, the refusal to charge as requested, and the actual instruction by the court to the jury (S. C., p. 113) that the disputed property is that "which lies between the fence and the river." This question was the beginning of a departure from the issue at trial and provoked further errors which actually resulted in an erroneous verdict for the plaintiff.

POINT V.

Because at the trial the Court, over the objection of the defendant, permitted the witness John O'Brien to testify to the usage to which the pasture on the northerly side of the river was put and, specifically to answer the following question:

> "Q. And kept in condition for that purpose?" (S. C., p. 48.)

The pasture on the northerly side of the river was also outside of the premises claimed in the complaint and any testimony as to its use was

irrelevant and immaterial and served only to further confuse an already hopelessly confused issue and was thereby prejudicial to the defendant.

POINT VI.

Because at the trial the Court, upon the objection of the plaintiff, refused to permit the witness George G. Brokaw to answer the following question propounded by the defendant on cross examination (S. C., p. 55):

> "Q. You didn't intend to convey or pass on to O'Brien the property over to the south bank?"

This question was a proper one as going to the matter of privity. The witness was the grantor of plaintiff and it was essential that it be known whether or not the plaintiff's grantor intended to convey the premises in dispute to the plaintiff since his deed did not cover it and since there must be a transfer in some form in order that the periods of possession may be tacked. The law on this question is fully set forth under Paragraph (e) of Point One of this brief.

POINT VII.

Because at the trial the court, upon the objection of the plaintiff, refused to permit the witness George G. Brokaw to answer the following question propounded by defendant on cross examination:

> "Q. Did your father ever make any claim to the land lying on the south bank?" (S. C., pp. 55 and 56).

This was also essential to the proof of privity since the period of possession claimed by the wit-

ness's father was necessary to make up the thirty year period claimed by the plaintiff. Witness's father was the grantor in Exhibit D-4 (S. C., p. 129). It was therefore certainly material, as to whether or not the witness's father claimed the premises in dispute. (The stenographer's transcript says *north* bank which is a typographical error and should be the *south* bank.)

POINT VIII.

The learned trial judge erred in refusing to grant the non-suit on a motion made therefore by the defendant at the close of the plaintiff's case in that:

(a) the statute on which the plaintiff relies has no application to the period of possession claimed. This point is fully argued under Paragraph (a) of Point One of this brief and Paragraph (a) of Point Two of this brief.

(b) There was no testimony of adverse possession.

The plaintiff's first witness was Charles Agans whose testimony is found on pages 36 to 42 of the State of Case. All that can be found from his testimony is that he remembers the fence on the defendant's side of the river, that is, the south side, which he believes is the same fence shown on the right side of the Exhibit P-1 (S. C., p. 119). His only testimony as to use was as to cattle using the space between the fence and the bank immediately below it. There is nothing at all that can be drawn from his testimony to show adverse possession or in fact any possession on the part of the plaintiff. The thirty year period accruing May 30, 1935 commenced in May of 1905. This witness left the vicinity in 1909, and according to the testimony of John O'Brien (S. C., p. 43),

the plaintiff came to the vicinity in 1907. So that all that can be derived from Mr. Agan's testimony is that there was a fence on the south side of the river for two years of the period claimed. There is no testimony of an enclosure of the premises described in the complaint or of possession of any sort. The testimony of this witness as to a conversation with Mr. Covert, a predecessor in title of the defendant, which conversation is to be found at the bottom of page 41 and top of page 42 of the State of Case shows that the fence was put there for mutual convenience to keep the plaintiff's cows from coming up on the Covert's meadow which is now the defendant's and which was then Mr. Covert's and which did not interfere with Mr. Covert's cows getting water because they drank in the Neshanic River which is the stream shown emerging into the South Branch of the Raritan River at the lower right hand corner of the Exhibit P-1 (S. C., p. 119). So that all that can be derived from this testimony is that there was a cattle fence on the defendant's side of the river.

The plaintiff's next witness was her son, John O'Brien whose testimony is found on pages 43 to 51 of the State of Case. He testified (p. 43) that his mother's property was on the north side of the river and the defendant's on the south side and that they acquired the property in 1907, which is not far enough back to make up the thirty year period accruing in 1935, as claimed in the complaint; and that there was a fence on the defendant's side of the river, and that two men took it down in 1935, and that for the last five or six years (p. 46) the witness put the whole fence up, and that for some time before that he put half of it up, and that from the time between 1907 and 1929 he put up half the fence and the owner of the farm on the defendant's side put up the other half.

On cross examination the witness admitted that the fence was not up continuously but was up and down (pp. 49 and 50) and that he only maintained the fence for about five or six years. Certainly there is nothing in this testimony to show possession of any sort and certainly not adverse possession. It simply indicates, if anything, that there was a fence on the defendant's side of the river maintained equally by the owner of the defendant's farm and plaintiff for mutual convenience in preventing cattle from straying. There is no testimony of an enclosure of the premises claimed which is the land between the north and south bank of the river. It indicates that the fence is beyond the south bank and does not even touch upon the premises in dispute. There is no testimony that it is a boundary fence. There is nothing to show an exclusive possession or any showing that the cattle belonging to the owner of the farm on the south side of the river now owned by defendant could not use the river by going out through the Neshanic Creek into the river.

The plaintiff's next witness was George G. Brokaw whose testimony is found at pages 51 to 55 of the State of Case who testified that there was a fence but that he doesn't know where it began or where it ended (p. 52), and on cross examination (S. C., p. 55) that he never made any claim of any land beyond the north bank of the river and that he never made any claim of the premises now in dispute lying between the banks of the river. The witness also testified that he was the predecessor in title of the plaintiff, and of course it was necessary to show that he claimed the land in dispute and occupied it in order to make up the thirty year period accruing in 1935. There is nothing in the testimony of this witness to show possession at all and certainly not adverse possession and his testimony denying that

he ever made any claim to the river completely defeats the thirty year period of possession claimed by the plaintiff.

The plaintiff's next witness was Harold O'Brien, a grandson of the plaintiff, whose testimony may be found on pages 56 to 62 of the State of Case. He testifies that he remembers a fence (p. 57) and that it was taken down in 1935 by two men and that as a result of it being taken down "We had to build our own fence on our side of the river" (p. 57), and the rest of his testimony up to cross examination is merely an attempt to establish damage. The cross examination deals solely with the fence "we built on our side of the river" after the fence on the south side had been taken down. There is nothing at all in his testimony to show possession and certainly not adverse possession. All that it does show is that after the fence on defendant's side was taken down, the plaintiff built her own fence on her own side of the river, that is the north side.

The plaintiff's next witness was Charles Williamson who testified that there was a fence in the years 1896 to 1898 and that the cows crossed the river. His testimony related to a period before the period of possession claimed and indicates no possession and certainly no adverse possession.

(c) There was no testimony of possession. The testimony of all of the plaintiff's witnesses has been analyzed under Paragraph (b) herein and at no point showed any possession for the thirty year period claimed, no exclusive possession and no adverse possession.

(d) There was no testimony that plaintiff was deprived of possession. Since this was an action in ejectment, such testimony was necessary. The action is to recover possession and must be predi-

cated on the theory that the plaintiff is out of possession. The testimony showed that if the plaintiff had a case at all it would be in the Court of Chancery on a Bill To Quiet Title. All that can be found from the testimony of any of the plaintiff's witnesses which is analyzed under Paragraph (b) herein is that plaintiff's cows can still go across the river and that if there is any damage as the result of the fence on the defendant's side being taken down, it would be to defendant, by reason of plaintiff's cows wandering upon his land.

(e) There was no testimony that defendant was in possession of the premises claimed. Here again, this being an action in ejectment brought to put the defendant out of possession it must be shown that he was in possession. The premises claimed is the river lying between the north and south bank. The testimony of all of the plaintiff's witnesses is analyzed under Paragraph (b) herein and there is no showing that anyone is in possession of the river.

(f) There was no testimony of privity between plaintiff and her predecessors in title.

The law on this question is fully covered under Paragraph (e) of Point One of this brief and the testimony of all of the plaintiff's witnesses is analyzed under Paragraph (b) of Point Eight. In fact the testimony of plaintiff's direct predecessor in title and on whom she must rely to make up the thirty year period shows (George G. Brokaw, p. 55) that he never made any claim beyond the north bank of the river which is the bank on the plaintiff's side of the river and never made any claim of the premises now in dispute lying between the banks. This is fatal to plaintiff's case.

(g) The tract claimed is an uncultivated tract and hence not within the purview of the statute.

The tract is the river lying between the north and south bank as may be seen by reference to the description contained in the complaint (p. 2) and there is nothing in the testimony to show that it is any different. The law and argument on this question is discussed under Paragraph (b) of Point One of this brief.

(h) No possession for the statutory period was shown.

The testimony of all of the plaintiff's witnesses is analyzed under Paragraph (b) of Point Eight and shows no possession at all, no adverse possession and certainly no possession for the thirty year period prior to May 1935 as claimed in the complaint.

Defendant respectfully submits that the entire case of the plaintiff was fatally defective in showing a cause of action that there was no evidence to warrant the case going to the jury and as may be seen by the grounds of appeal hereinafter argued did go to the jury on a misconception of what was in dispute and resulted in an erroneous verdict for the plaintiff.

POINT IX.

Because at the trial the court, upon the objection of the plaintiff, refused to permit the witness, John Covert, to answer the following question propounded by the defendant:

> "Q. And did Mr. O'Brien at any while you were on what is now the Bilow farm make any claim of title to the land between the north bank of the river and the south bank of the river?" (S. C., p. 69).

This question was material in view of the fact that the plaintiff was claiming under adverse possession and that all of the testimony to this point indicated possession if at all by permission.

POINT X.

Because at the trial the court refused to permit the witness, John Covert, upon the objection of the plaintiff, to answer the following question propounded by the defendant:

> "Q. Did they pay for that gravel?" (S. C., p. 72).

The testimony prior to this point (S. C., p. 72) was that gravel was taken out of the river bed by the township of Branchburg during the period of possession claimed by the plaintiff. Testimony as to who was paid for the gravel was clearly evidential as to who owned or was in possession of the bed of the river, which is in dispute and therefore was material, and its denial was prejudicial to the defendant.

POINT XI.

Because at the trial the court struck out the testimony of the witness John Covert, relating to gravel taken from the river (S. C., p. 73). This testimony was material as shown under Point Ten of this brief and the striking of it was prejudicial to the defendant.

POINT XII.

Because at the trial the court permitted the witness, John Covert, over the objection of the defendant to answer the following question propounded by the plaintiff:

> "Q. So that the new boundary line was established by putting the fence on the south side?"

And the following question asked at the same time as the last mentioned question:

"Q. He told you that, didn't he?" (S. C., p. 77).

The word "boundary line" was an attempt by counsel to testify in the form of asking a question. This case was not at issue on the question of boundary line, since the fence was entirely removed from the premises in dispute, lying beyond and south of the south bank of the river. This was clearly an attempt to confuse the issue and did result in confusion and a misconception in the mind of the court and jury as to the premises in dispute as may be seen throughout the trial and the grounds of appeal argued herein.

POINT XIII.

Because at the trial the court, upon the objection of the plaintiff, refused to permit the witness, John Covert to answer the following question propounded by defendant:

"Q. Mr. Covert, was the intention of building that fence to waive your father's title to the land on the bank?" (S. C., p. 77).

Every indication in the testimony to this point was that the fence was simply a cattle fence for mutual convenience, and the plaintiff was seeking to show her right by virtue of the existence of the fence over upon the defendant's land. For this reason the question was material and its denial was prejudicial to the defendant.

POINT XIV.

Because at the trial the court propounded the following question to the witness George G. Brokaw over the objection of the defendant:

> "Q. The Court: No, it hasn't anything to do with farms. This is a water line fence, usually acts as a boundary between farms. Does it or doesn't it?" (S. C., p. 82).

There was no testimony whatsoever in the case that the fence was a water line fence. All of the testimony to this point showed that the fence was beyond the south bank of the river on the defendant's side of the river and did not touch upon or have any connection with the premises in dispute which lay between the north and south banks of the river. The statement by the court shows a misconception in the mind of the court, provoked by the deliberate attempt of the plaintiff to confuse the issue and the attempt to rest her case upon a boundary dispute instead of adverse possession of the river bed as claimed in the complaint, which statement produced a misconception of the issue in the minds of the jury, resulting in an erroneous verdict for the plaintiff and was thereby prejudicial to the defendant.

POINT XV.

Point fifteen, covering ground of appeal number fifteen is abandoned.

POINT XVI.

Because at the trial the court, over the objection of the defendant, permitted the witness Ludwig Bilow to answer the following question propounded by the plaintiff and to answer the line of questions following the same which will be found on pages 92 and 93 of the State of Case:

> "Q. But so far as having a fence up there is concerned, if Mr. O'Brien will put it up it's perfectly all right with you, isn't it?"

This question and the line of questions following it are clearly irrelevant and immaterial and were intended to prejudice the jury towards the defendant by showing or attempting to show that he had no reason for not wanting the fence on his own property. It had nothing to do with the premises in dispute.

POINT XVII.

Because at the trial the court, upon the objection of the plaintiff, refused to permit the witness John O'Brien to answer the following question propounded by the defendant:

> "Q. As a matter of fact, didn't Mr. Bilow about a year ago this time meet you on the bridge, in November and offer to let you put a fence on part of his property and didn't you as the result of that discontinue a suit then pending against him?" (S. C., pp. 101 and 102).

This testimony was material to counteract the testimony erroneously admitted as claimed under Point Sixteen of this brief and should also have been admitted as evidential of what the plaintiff's claim was the year before the trial, to show that she had no intention at all of claiming title to the land in dispute but only wanted a fence to be used as a cattle fence.

POINT XVIII.

Because at the close of the testimony the court refused, on the motion of defendant, to direct a verdict in favor of the defendant on the following grounds:

(a) The statute on which the plaintiff relies has no application to the period of possession claimed.

This question has been fully argued under Paragraph (a) of Point One of this brief.

(b) There was no testimony of adverse possession. Testimony of all of the plaintiff's witnesses on this point has been fully analyzed under Paragraph (b) of Point Eight of this brief and as has been shown showed no possession at all and certainly no adverse possession. It merely indicated, if anything, that there was a fence back beyond the south bank and on the defendant's land which as may be seen from the testimony and the sketch and the photographs did not touch upon or have anything to do with the premises in dispute. The defense testimony in respect to this fence is entirely consistent with the plaintiff's testimony regarding it and is not contradicted at any point. The defense testimony showing how the fence came to be upon the defendant's side of the river is fully explained in the testimony of the witness John Covert whose testimony may be found at pages 66 to 78 of the State of Case. He testified (p. 66) that he was the son of a former owner of the defendant's farm and that up until the time he left the farm, which he says was approximately 1910 (p. 66), the fence was built half on one side of the river—that is half on the south bank, and half on the other side or the north bank, with a stringer running across the river as shown in the sketch in this Brief, and that (p. 67) that arrangement was not practical because the stringers across the river would wash out with every shower and would have to be rebuilt to keep the cows from coming through the river and that this was the reason (pp. 68 and 69), that his father permitted O'Brien to build his half of the fence upon the defendant's side of the river. This he says (p. 67) did not inconvenience his father because his father had a lake on his side of the river where his cows could get water. This

testimony which is uncontradicted and is entirely consistent with anything at all that might be drawn from the plaintiff's testimony is that the use of the river by the O'Brien cattle was by permission and was certainly not adverse. The fence was simply a cattle fence for mutual convenience and actually maintained equally by the owners of the two farms.

(c) There was no testimony of possession. The testimony of the plaintiff's witnesses on this point has been fully analyzed under Paragraph (c) of Point Eight of this brief nor can there be found anything in the defendant's case to show possession on the part of the plaintiff.

(d) There was no testimony that plaintiff was deprived of possession. The testimony of the plaintiff's witnesses on this point has been fully analyzed under Paragraph (d) of Point Eight of this brief. All that possibly can be found from the testimony of the plaintiff's witnesses and from the defense testimony is that the river is now open so that anyone might use it and that if there is anything at all to prevent the plaintiff from using it, it is the fence which she herself, through her son and grandson, built on her own side of the river, and even that, according to the testimony of Harold O'Brien, did not prevent the cows from drinking in the river.

(e) There was no testimony that defendant was in possession of the premises claimed. The testimony of the plaintiff's witnesses in this respect has been fully set out and analyzed under Paragraph (e) of Point Eight of this brief, and nowhere in the defense testimony can be found anything to cure this defect. This action was one in ejectment to obtain a judgment of ouster so that it must be shown that the defendant is in possession of the disputed premises. It is not a bill to quiet title.

(f) There was no testimony of privity between plaintiff and prior occupants of the premises claimed.

The testimony of plaintiff's witnesses on this point has been fully analyzed under Paragraph (f) of Point Eight of this brief and the law on this question has been fully argued under Paragraph (e) of Point One of this brief. There is nothing in the defense testimony to cure this defect. In fact the defense witness, George G. Brokaw, whose testimony may be found at pages 80 to 86 of the State of Case, testified that he was the grantor of the plaintiff and who testified at pages 80 and 81 that he never made any claim to the premises in dispute, that he didn't include it in his deed to the plaintiff, and that he didn't by any other means convey it to the plaintiff and that he received his farm on the north bank from his father, that his father never made any claim to the premises in dispute and did not convey or pretend to convey the premises in dispute to him. Since the period covered by his title and his father's title was necessary to make up the thirty year period accruing in May of 1935, the plaintiff's case wholly failed to show the statutory period and was in this respect fatal.

(g) The premises claimed was an uncultivated tract and hence not within the purview of the statute.

This question has been fully argued under Paragraph (b) of Point One, Paragraph (c) of Point Two, and Paragraph (g) of Point Eight of this brief.

(h) No possession for the statutory period was shown.

The testimony of the plaintiff's witnesses in this respect has been fully analyzed under Paragraph (h) of Point Eight of this brief. The

plaintiff's witness, Charles Agans connected the fence with the advent of O'Brien which O'Brien testified was in 1907 and the testimony of all witnesses agrees that the fence was up and down during that period so that even if it could be said that the fence has anything to do with the premises in dispute, which in fact it has not, since it does not touch upon the premises in dispute and certainly does not enclose it, there was no showing of a fence for a period of thirty years prior to 1935 nor any showing by the testimony of any witness of possession in any other form.

The case at the time of the motions for a direction of a verdict, being entirely lacking in the showing of the statutory requisites a motion should have been directed in favor of the defendant. That it was not so directed, appellant respectfully submits was the result of a misconception produced in the mind of the court as to the premises in dispute, a misconception which was produced by the deliberate attempt of the plaintiff to confuse the issue. By reason of the failure to direct in favor of the defendant the case went to the jury on a misconception of what was in dispute and resulted in an erroneous verdict for the plaintiff and was thereby prejudicial to the defendant.

POINT XIX.

Because the learned trial judge denied the request of the defendant to charge the jury as requested in the second request (S. C., p. 115) as follows:

> "2. Plaintiff in her complaint states that the thirty years' unbroken adverse possession accrued on or before May 30, 1935. Since plaintiff's testimony admits that she herself did not adversely possess the premises claimed for thirty years prior to that date,

she must, in order to maintain this action show that those before her and through whom she claims possessed the premises adversely and continuously for a sufficient number of years to make up the thirty year period to May 30, 1935. In addition to that she must show that those whose possession she relies on to make up the thirty year period, intended to acquire title by adverse possession and have passed on, one to the other and finally to her the rights which they were acquiring; in other words she must show privity between the several occupants of the premises claimed. If no privity is found to exist between the successive occupants, and the last occupant has not held adversely for the full statutory period of thirty years, the bar is not complete, as the law presumes that the land returns to the true owner at each change of possession, when there is no privity between the several occupants."

This request involved instructions on the question of privity between the several occupants. The law on this question is fully covered under Paragraph (e) of Point One of this brief. The failure so to charge was prejudicial because, as shown under Paragraph (f) of Point Eight of this brief there was no testimony of privity between the several occupants and as a matter of fact the plaintiff's witness, George Brokaw, her direct predecessor in title, denied that he ever made any claim to the premises in dispute. Despite the testimony of the plaintiff's own witnesses and the entire lack in the plaintiff's case of any showing of privity so as to make up the thirty year period claimed in the complaint the jury erroneously found for the plaintiff which they should not have done had the trial court charged them as requested.

POINT XX.

Because the learned trial court denied the request of the defendant to charge the jury as requested in the third request (S. C., p. 116) as follows:

> "3. You must also determine whether the premises claimed are of the type specified in the statute on which this action is based. That statute expressly excepts uncultivated tracts. It is for you to determine whether the premises in question are uncultivated. If you find as a fact that they are uncultivated then the plaintiff's case fails, and your verdict should be 'not guilty' ".

In the case of *Miller* vs. *Penn-Reading Seashore Lines, Inc.,* 117 N. J. L. 152 at page 155 (Errors and Appeals, 1936) the court held that it is for the jury to determine whether the *locus in quo* was cultivated or uncultivated.

The premises described in the complaint are the premises lying between the north and south bank of the river and are clearly river bottom which certainly could not be said to be cultivated and while defendant contends that the premises are not cultivated and that there should have been a non-suit or a direction of a verdict in favor of the defendant on this ground, that at least, that having been denied the defendant, the question of determining whether or not in fact it was cultivated should have been left to the jury. The status of titles bordering upon streams of water would be in a hopeless state of confusion if a person on one side of the stream could acquire title across to the other side simply because over a thirty year period his cows wandered into the stream and sometimes across to the other side to get water. This is certainly far different from plowing ground or cutting wood in such a fash-

ion that any one could see that the premises were being possessed.

POINT XXI.

Because the learned trial judge charged the jury,

> "And the south side of the river is the northerly boundary of the defendant's land" (S. C., p. 105).

There is no evidence in the case to show that fact. The charging of that fact completely denied the title of the defendant to the middle of the stream and is therefore prejudicial to the defendant.

POINT XXII.

Because the learned trial judge charged the jury,

> "In other words the river is not included in their deed. And you are not concerned with whether or not by implication, the ownership may go to the central line of that stream. But the dispute here is with respect to a strip of land along the river on the Bilow side of the river, between it and a fence that admittedly was there for some time. And the plaintiff says that for over thirty years she was in possession of that disputed strip of land, that she occupied it adversely to the title owner and that occupancy has been open, notorious, actual, continued, visible, distinct and hostile to the title owner for all of those years" (S. C., p. 105).

This charge is palpably erroneous and the result of a misconception produced in the mind of the court as shown heretofore in this brief. The matter of whether or not the title of plaintiff and defendant ran to the middle of the stream was di-

rectly in issue and the dispute here is not "with respect to a strip of land along the river on the Bilow side of the river, between it and a fence that admittedly was there for some time." The fence that the court was speaking of here is the fence that is shown on the right side of the picture Exhibit P-1 (S. C. 119) and the land along the river which the court is speaking of here is the small strip of land shown in the photograph between that fence and the bank. This strip of land was not in dispute at all as by reference to the complaint it will be seen that the dispute was as to the premises lying between the north and south bank of the river the shaded area shown in the sketch and nothing else. The instruction in this respect coupled with the further instruction complained of under Point 31 of this brief is fatal and highly prejudicial to the defendant, the jury being advised by the court that the dispute was as to a piece of land that was not included in the complaint and resulted in an erroneous verdict for the plaintiff; and this instruction followed by the later instruction covered under Point 31 of this brief which was made after the jury had retired and returned seeking instructions could not have been cured by any general instruction in the original charge of the court.

Nowhere in the plaintiff's case can be found any evidence that

> "For over thirty years she was in possession of that disputed strip of land, that she occupied it adversely to the title owner and that occupancy has been open, notorious, actual, continued, visible, distinct and hostile to the title owner for all of those years."

The charge then in this respect was prejudicial as not only referring to the wrong premises but as stating that the plaintiff said something that did not appear in the evidence at all.

POINT XXIII.

Because at the trial the learned trial judge charged the jury,

> "She says by one of her witnesses that that fence was there over forty-one years ago and was continuously there since, and how much longer she doesn't know" (S. C., p. 105, at l. 30).

Nowhere in the testimony of the plaintiff's witnesses can be found such a statement or anything akin to such a statement and this charge amounted to an absolute instruction to the jury in favor of the plaintiff and was thereby prejudicial.

POINT XXIV.

Because the learned trial court charged the jury,

> "And she says that that fence was maintained equally by the two owners; that it was down at times because of the water conditions, freshets or ice in the river carrying it down, but that it substantially had been there during this period of years under the conditions that she claims" (S. C., p. 105, at l. 33).

Here again there can be found no such statement or any testimony from which such statement might be found in the plaintiff's case and the charging in this respect amounted to an instruction in favor of the plaintiff and highly prejudicial to the defendant.

POINT XXV.

Because the learned trial judge charged the jury,

> "And she says that that situation obtained until the fifteenth of June, 1935 at which time

> Mr. Bilow became the owner of the farm across the river, and he caused that fence to be removed and that as a result thereof the cattle pastured on the O'Brien farm wandered out across the river" (S. C., p. 105, l. 39, and p. 106 to l. 8).

Here again, there can be found in the plaintiff's case no such statement or anything from which said statement might be drawn and the instruction in this respect amounted to an instruction in favor of the plaintiff and was highly prejudicial to the defendant.

POINT XXVI.

Because the learned trial judge charged the jury,

> "Since then there has been no fence there, I take it, and so she, Mrs. O'Brien, comes here, through her witnesses, to ask that she be awarded the possession in this suit of that disputed land, that Mr. Bilow now has possession of and claims as his, *because her deed covers it; his deed going to that fence and not to the edge of the river,* and she says that she is entitled to it because what had been begun wrongfully originally, has, because of the lapse of years, ripened in a right and that because she has had possession of this property for this period of years is now the owner of it" (S. C., p. 106, at l. 20).

There was no evidence in any part of the plaintiff's case that Bilow was in possession and the court again erred in speaking of disputed land when what was actually in dispute was river bottom.

This instruction states that her deed covers it, meaning the plaintiff's deed, where as a matter of fact no such claim is made by the plaintiff and in fact her deed Exhibit D-3, first tract runs to the

north bank of the river only. Such an instruction was fatal and amounted to a disposition of the case for certainly if her deed covered the premises in dispute, which the testimony shows that it did not and which she herself never claimed there would be no dispute and is in this respect highly prejudicial to the defendant.

The instruction further states that his deed, referring to the defendant went to the fence only and not to the edge of the river. There was certainly no evidence of that fact, the defendant's deed not being in evidence and here again the court was under the misconception that it was the land between the fence and the river that was in dispute instead of the land lying between the north and south bank of the river as claimed in the complaint. An instruction that the defendant's deed ran to the fence only amounted to a disposition of the case for if that were so there could be no dispute for the jury to decide. This instruction amounted to an absolute instruction in favor of the plaintiff and was therefore erroneous and highly prejudicial to the defendant.

The balance of the instruction complained of under this point is erroneous and prejudicial because it is again speaking of the wrong premises and there was no evidence that the plaintiff possessed it for a period of thirty years adversely.

POINT XXVII.

Because the learned trial judge charged the jury,

> "Now, of course, Mr. Marcus may have been there as a tenant and Mr. Bilow may still have had men there doing work" (S. C., p. 107, l. 30).

In this instruction the court of course was referring to the Exhibit D-2 which was the contract

for sale between the defendant and his grantor Samuel Marcus which was produced in evidence to show that the defendant was not in possession of the farm on the south bank at the time when the plaintiff claimed the fence was taken down. There is no evidence of such a fact in the testimony and nothing to justify such an inference and the instruction was therefore erroneous and prejudicial to the defendant as an indication by the court to the jury that the plaintiff was in possession even though under the terms of his contract he was not to be in possession on the date in question.

POINT XXVIII.

Because the learned trial judge charged the jury,

> "But can there be any question that this is cultivated land? It is a farm used for farming purposes; and just because a river flows through it doesn't take it out of the class of cultivated land and so I say to you as a matter of law that this is the kind of land that the Statute contemplated. It is cultivated land" (S. C., p. 110, l. 27).

Here again the instruction was prompted by a misconception in the mind of the court as to what premises were in dispute, the court apparently still being under the impression that the land in dispute was the small strip of land between the fence shown on the right side of the photograph of Exhibit P-1 (S. C., p. 119) and the south bank shown on the right side of the same photograph, whereas in fact the premises in dispute, as reference to the description contained in the complaint will appear was the premises between the north and south bank of the river the shaded area in the sketch, which is clearly river bottom and which defendant, in his motion for a non-suit and later

for a direction of a verdict, maintained, as a matter of law and fact, was uncultivated. The court having denied these motions the defendant respectfully submits that at least the question of whether or not it was cultivated should have been left to the jury under the case of *Miller* vs. *Penna-Reading Seashore Lines, Inc.*, 117 N. J. L. 152 at page 155, as argued herein under Point 20. The charge in this respect was fatal and amounted to an instruction in favor of the plaintiff and was highly prejudicial to the defendant.

POINT XXIX.

Because at the trial the learned trial court charged the jury,

> "Where proprietors of adjoining land, such as the O'Brien property and the Bilow property or their predecessors in title, as the case may be, agreed between themselves on the boundary line or the fence and did not put it exactly where the deeds called for, they are holding it adversely, each against the other, with respect to any lands that are enclosed in that fence or otherwise. That is quite different from a license or permission to use land. Of course, if a person gives permission to another to use, there would be no wrongful taking in the first instance. I repeat, if they agreed to divide the course of the border line between their land, that gives neither any permission or use, but on the question of the significance of the fence if there was ever one there or whether it was there and the fact that they divided the course between them does not defeat the running of the statute with which we are concerned" (S. C., p. 110, l. 33, to p. 111, l. 16).

It must be remembered in this case that the action was predicated on adverse possession of the premises lying between the north and south

banks of the river as shown in the shaded area in the sketch, which covers the premises described in the complaint. It did not run to the fence which, as has been shown throughout the testimony, lay beyond the south bank. This case did not come into court as a boundary dispute and the plaintiff did not claim to the fence. Certainly if she predicated her case on a boundary dispute claiming the fence to be the boundary, she would have claimed to it and not stop at the south bank as she did in her complaint. There is no evidence at all in the case to show that the parties agreed on the boundary line, or by agreement, or by mistake or by any other means set a boundary line other than what is found in the deeds. The river, of course, is the natural boundary between farms abutting on it. All of the testimony simply indicates that the fence was put on the defendant's side of the river for mutual convenience because if they put it entirely on the plaintiff's side, then the plaintiff's cows couldn't get into the river to drink and if they put it half on the plaintiff's side and half on the defendant's side with a stringer across the river, then the high water would carry out the stringer. The testimony shows that for these reasons the owner of the defendant's farm was willing to have the fence built on his side of the river which protected his property without the trouble of constantly rebuilding the fence across the river and which did not prevent his cattle from drinking because he had a lake on his side of the river and also had the use of the Neshanic Creek.

The portion of the charge was again the result of the misconception produced in the mind of the court as to what was in dispute. Certainly the building of a cattle fence on the defendant's side of the river by permission and for mutual convenience could not establish adverse possession in the plaintiff.

POINT XXX.

Because the learned trial court refused at the request of the jury to have the stenographer read the testimony of the witness John Covert.

It is apparent from the whole case, that the witness John Covert is the only living witness to explain how the fence came to be on the defendant's side of the river and for how long a period it was there, and how it was built half on one side of the river and half on the other until approximately 1910, and for this reason the jury should have had the benefit of having this testimony read to them when they requested it. His testimony was the only testimony in the case which could clarify a hopelessly confused issue.

POINT XXXI.

Because the learned trial judge instructed the jury in answer to a question by Juror 3, "Is there any diagram belonging to either party?" and the statement made by the Juror, "We don't understand how many chains or links—", instructed the jury as follows (S. C., p. 113):

> "The Court: No , I don't either. But that isn't the point. The point is with respect to the disputed property, I told you that in my charge; *that which lays between the fence and the river.* You are not concerned whether 4 chains and 17 links or 17 chains and 4 links. It is the disputed property; no question about what it is. You don't need to know the extent of the area of it. It won't help you in your determination of what they are entitled to or not. It may be a square mile or a square inch, it doesn't make any difference in the presentation of the case whether it is a large area or a small area."

This instruction is fatal. It shows again that the court was under a misconception of what was

in dispute. He again refers to the small strip of land on the defendant's side of the river lying between the south bank and the fence as shown on the sketch and on the photograph. It amounted to an absolute instruction to the jury that that was what was in dispute when in fact the complaint shows that the dispute was as to the premises lying between the north and south bank of the river as shown in the shaded area on the sketch.

Up to the time that instruction was given the jury had been out for a long period of time and came back and requested the instruction and having received this instruction complained of retired and came back in a very short time with a verdict of "Guilty and $1.00 damage". This instruction is palpably erroneous and highly prejudicial to the defendant and produced an erroneous verdict.

Conclusion.

The defendant-appellant respectfully submits that upon a consideration of the entire case, these things are certain:

1. That the plaintiff relied on the statute set forth in Paragraph (a) of Point One of this Brief. That under that statute as it was construed in *Content* v. *Dalton*, 121 N. J. Eq. 391, cited in Paragraph (c) of Point One, she had to show thirty years of *hostile* possession. That any possession shown was permissive and for mutual convenience. That the fence was on defendant's side of the river because the old fence arrangement extending across the river as shown on the sketch was impractical. That the fence was nothing but a cattle fence.

2. That she had no possession for thirty years because she came there in 1907 which is not thirty years prior to May, 1935. That she had to rely on the possession of her predecessors in title to

her farm on the North Bank. That her immediate predecessor in title, George G. Brokaw, never claimed the premises in dispute, recognized the North Bank as the Southerly boundary of his property, did not convey the premises in dispute to her, by description in the deed or by any other means. And that his father, the predecessor next removed from him, never claimed the premises in dispute and did not convey it to him either by deed or by any other means. That the deeds themselves show no transfer of the premises in dispute.

3. That the premises actually in dispute as may be seen from the description in the complaint, is the premises lying between the North and South banks of the River, as shown in the shaded area on the sketch. That the premises do not even touch upon the alleged fence shown on the right side of the sketch, and on the right side of Exhibit P-1.

4. That early in the trial a misconception was produced in the mind of the court, that the premises in dispute was not that which lay between the North and South Banks as described in the complaint, but was the narrow strip of land between the South bank and the alleged fence (the South bank and alleged fence being shown on the right side of the sketch and the Exhibit P-1), a misconception which prevailed throughout the trial causing the trial rulings complained of and resulting in the actual and positive instruction to the jury that the premises in dispute was "that which lays between the fence and the river".

5. That in the trial, the plaintiff departed from her claim of adverse possession and sought to show a confusion of boundaries by continued reference to the fence which did not even bound, touch upon, or enclose the disputed premises.

That she so confused the Court that the Court was led to instruct the jury that the plaintiff's deed covered the premises in dispute and that she claimed it because "her deed covers it" (S. C., p. 106, l. 25) and that the defendant's deed ran only "to that fence and not to the edge of the river" (S. C., p. 106, l. 26), whereas the plaintiff admitted and her deed Exhibit D-3, First Tract (S. C., p. 124) shows that the *North* bank was the Southerly boundary of her property, and the complaint showed she was not claiming under a deed, but by possession.

6. That the river is the natural and the true boundary between plaintiff and defendant, and that the plaintiff has not been deprived of the use of the river.

That these salient points standing alone, lead inescapably to the conclusion, that the judgment is contrary to law, that the verdict is contrary to the weight of evidence, that there was no evidence to support the verdict of the jury, and that the court was without jurisdiction.

By virtue of the errors complained of the defendant, who bought and paid for a farm on a river, has lost access to the river, the very thing which gives his property value; and defendant-appellant respectfully submits that the judgment of the Court below should be set aside and for nothing holden.

Respectfully submitted,

McDonough & McDonough,
Attorneys for Defendant-Appellant.

Charles A. Reid, Jr.,
Of Counsel with Defendant-Appellant.

New Jersey Court of Errors and Appeals

CATHERINE O'BRIEN, *Plaintiff-Respondent.* *vs.* LUDWIG BILOW, *Defendant-Appellant.*	Action at Law (In Ejectment) On Appeal from New Jersey Supreme Court

BRIEF OF PLAINTIFF-APPELLEE

Plaintiff-Appellee, Catherine O'Brien respectfully shows unto your Honors:

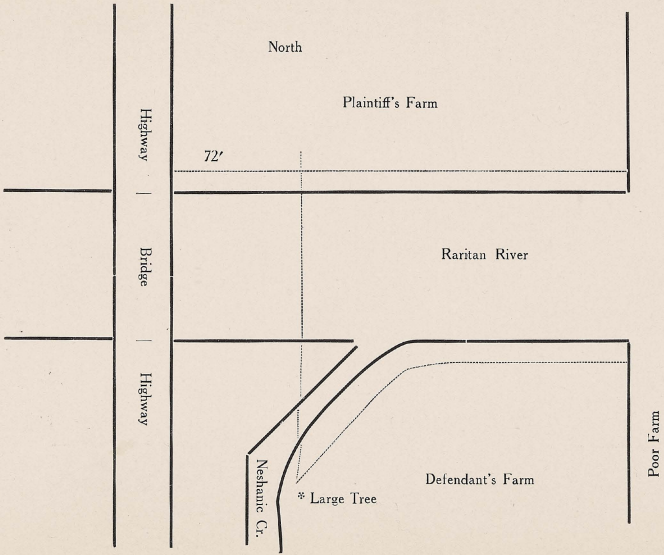
Statement of Facts

This was an action of ejectment.

The premises were described as follows:

Beginning at a large tree now or formerly on the east bank of Neshanic Brook near where the said brook intersects the South Branch River; thence running along the east bank of said brook to the place where it intersects the south bank of the South Branch River; thence in an easterly direction along the south bank of the South Branch River to a point therein marking the dividing line between the farm now owned by the defendant and the farm now owned by the Township of Hillsborough, known as the Poor Farm; thence at right angles across the South Branch River to the north bank thereof and the lands of the plaintiff; thence in a westerly direction along the northerly bank of the South Branch River to a point approximately seventy-two feet easterly from the northeast corner of the bridge crossing said South Branch River on the road leading to Montgomery; thence in a southerly direction in

line with east bank of Neshanic Brook across the South Branch River to the point or place of beginning.


North
Plaintiff's Farm
72′
Highway
Bridge
Highway
Raritan River
Neshanic Cr.
* Large Tree
Defendant's Farm
Poor Farm

The above sketch is presented for the convenience of the court in tracing the description. Plaintiff's evidence shows continuous possession of the disputed land from 1897 to the time of the alleged trespass in 1935.

The pictures (Ex. P-1 and Ex. D-1 S. C. p. 119) give a view of the premises in dispute. Each picture is taken from the bridge looking down stream in an Easterly direction. The land to the left or North of the stream is plaintiff's property. The land to the right or South of the stream embraces the land in dispute and defendant's property.

The steep bank on the north side made it difficult for the plaintiff to fence so that his cattle could get water from the river and the gradual sloping bank on the south side made it difficult to maintain any fence placed near the water's edge at low water.

The Neshanic Creek runs along the westerly side of defendant's pasture land and in addition thereto he had a lake in his pasture from which his cattle were watered. (S. C. p. 67 at l. 1 - 10 inc.)

Both sides admit that the fence was placed on the south side of the river for the convenience of the parties and to mark their boundary line. Defendant claims the change was made in 1910 and has not yet ripened into a title and says that prior to that time only half of the fence was on the south side of the river and supports this testimony by a single witness, John Covert, a son of the defendant's predecessor in title. Plaintiff says that the fence has been on the south side of the river since 1897 and supports that assertion by two disinterested witnesses, Charles Williamson and Charles Agans.

The fence arrangement was to the advantage of both farmers and no question would have arisen had not the farm to the south been purchased by defendant, who was from the city. He prizes free access to the river for scenic and sport purposes and is not concerned about the advantageous use of the land in question for agriculture purposes.

POINT I.

This point is argued at length not because it is essential to this case but because the Court may want to settle the law applicable to limitations as applied to real estate.

THE CASE MAY BE DECIDED ENTIRELY ON THE LAW AND THE FACTS STATED IN POINT XXIX.

Plaintiff based his right to the land in question upon Section One of "An Act for the limitation of suits respecting title to lands", Chapter 188 Public Laws of 1922, now Title 2, Chapter 25, Section 1 of the Revised Statutes, fully set out in appendix A.

Mr. Justice Case in Content v. Dalton, 122 Eq. 425, at pages 433, 434, 435, 436 asd 437, gives a learned historical anaylsis of the section and it is herein set out in Appendix B.

Defendant-appellant says that the cited Act does not apply because of two reasons:

First:- "The Act takes effect immediately upon the date of its passage and provides no reasonable time for the bringing of actions, either by express provisions or by interval between its passage and effective date."

Second:- "The act should be prospective only and not retrospective.

Neither contention is applicable for the reasons hereinafter set out.

If the Act is prospective only then no action could be brought under it until 1952. Titles heretofore settled under it where the Constitutional question was not raised would be unsettled.

In 1930 the Court of Errors and Appeals, (Conway vs. Daly, 106 N. J. L. 207,) established title to land in Atlantic City upon the theory that the owner had occupied it since 1896 and that under the act now before the court thirty years possession gave title. The constitutionality of the act was apparently not raised.

This decision has been cited with approval in other cases. Miller vs. Pennsylvania Reading Seashore Line, 117 Eq. 152; Gordon vs. Lumberville Delaware Bridge, 108 N. J. L. 261; Content vs. Dalton, 121 Eq. 391, affirm-

ed 122 Eq. 425, but in the affirmation the constitutionality question did not arise.

That titles should not be thus held in suspense is apparent, that many titles would be in suspense is apparent from the fact that the cited statute repeals the former statutes.

Plaintiff's adverse possession commenced in 1897 and, therefore, matured in 1927 or five years after the enactment of the statute in question. Our courts have consistently held that where a party has ample time after the shortening of a statute of limitation to assert his right he cannot complain.

Mr. Justice Heher speaking for the Court of Errors and Appeals in Lapp vs. Belvedere, 116 N. J. L. 563 held that there must be a material and substantial impairment of an existing remedy to make the change unconstitutional.

In 1933 the Legislature shortened the time to bring deficiency judgments after foreclosure from six months to three months. This change in limitation has consistently been held to be constitutional. Wootoon vs. Pollock, 116 Eq. 490, reversed on other grounds, 119 Eq. 128; Union County Building and Loan Ass'n vs. Weltchek, 175Atl. 625, and a collection of cases in an opinion of Judge Smith, Winter vs. Tippett, 179 Atl. 476; 13 Misc. 497.

The rule is well stated, Sec. 445 Vol. 12 Amer. Juris. Said section is set out in full in Appendix C.

The Court of Errors and Appeals, 189 Atl. 381, unanimously affirmed the opinion of Judge Lawrence in Johnson vs. Asbury Park Press, 184 Atl. 518; 12 Misc. 282. In that case the libel was published March 7th, 1934, at which time the limitation, if any, for bringing an action was six years. Within thirty-seven days thereafter the legislature passed an act limiting the time to one year. The act took effect immediately. Judge Lawrence held that notwithstanding the fact that the new Act did not give any time for bringing of actions then in existence the plaintiff actually had ten months before the bar of the statute and this was ample time and, therefore, the statute applied.

In the case before the court the defendent or his predecessor in title had from 1922 to 1927 and this would certainly seem to be a reasonable time for him to assert his right and that the statute should therefore apply in the instant case. And the statute although it does not expressly so state should apply to existing titles. Amer. State Reports 66 p. 653, Merchants' National Bank vs. Braithwaite (7 North Dakota, 358);

"Limitations--Shortening Time Within Which to Bring Actions.--The time within which to bring action may be lessened by statute, as to existing causes of action, provided the suitor has still a reasonable time, after the law is passed, in which to commence his suit, and, upon the failure of the statute to fix such time, the court is to decide what is a reasonable time, which is to be computed from the day when such law was passed, and not from the time it took effect."

"Action-Shortening Time Within Which To Commence. --It is not essential to the validity of a law shortening the time within which actions may be brought that it shall, as to existing causes of action, fix a certain time after its enactment within which such actions must be enforced, provided the time actually left in which to sue is not unreasonable."

American Decisions 99 p. 68, Mecklem vs. Blake (22 Wisconsin 495);

"Statutes Providing that Ten Years' Adverse Possession Under Tax Deed shall bar title of original owner applies to such possession commencing before the passage of the statute, if a reasonable portion of the term remained after its passage in which he might have commenced suit; otherwise former limitation of twenty years applies.

See American State Reports 72 p. 878, Relyea vs. Tomahawk Paper and Pulp Co. (102 Wisconsin, 301). U. S. Sup. Court, 3 Peters p. 679. 7 L. Edition, p. 278, at page 287:

"Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligations of con-

tracts; such, too, is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment."

(b) Judge Lawrence in his opinion preliminary trial (S. C. 16 at l. 30-34 inc; S. C. 18 at l. 25-26) determined that the *Locus in quo* was cultivated land, and Judge Porter in his charge to the jury (S. C. 110 at l. 34) charged that it was cultivated land. The defendant having raised it previous to trial and the court having so determined it, and the proof being uncontradicted showing it have been used in dairy farm operations there could be no dispute and the court properly so charged.

(c) The complaint follows the form attached to the rules of the Supreme Court and in addition to that the defendant in answer to Bill of Particulars (S. C. p. 13 at l. 40) ascertained that the use was adverse.

(d) The complaint follows the form attached to the rules of the Supreme Court and there is no merit to defendant's suggestion that the bill should have been to quiet title.

(e) Plaintiff's testimony shows that the adverse possession was continuous from 1897 to 1935 and this disposes of defendant's contention of lack of privity.

The ejectment act, (Rev. Statutes II, Ch. 51 at p. 25-28) expressly provides for a Bill of Particulars and limiting of the evidence of title to matters contained in the Bill of Particulars. The defendant suffered no harm through the ruling of the Supreme Court Commissioner.

Wait's Actions and Defenses, Volume 8, Chapter 18, page 570, Limitations, Statute of:

"Section 1. Right to enact, repeal or change statutes of limitations. The right of the state to prescribe a time within which existing rights shall be prosecuted, and the means

by and conditions on which they may be continued in force, is substantially unquestioned; and it is elementary that the State may establish, alter, lengthen or shorten the period of prescription of existing rights, provided that a resonable time be given in future for complying with the statute. Vance vs. Vance, 108 U S. 514; Terry v. Anderson, 95 U. S. 628; Dyer vs. Gill, 32 Ark, 410; Koshkonong vs. Burton, 104 U. S 668; Pearsall vs. Kenan, 79 N. C. 472. The right to defeat a just debt by the statute of limitations is not a vested right such as will be beyond the power of the legislature to take away by a repeal of the statute. The statute merely bars the remedy on the contract and does not extinguish the obligation, and when the bar is removed by a repeal of the statute the contract may be enforced. Campbell v. Holt, 115 U. S. 620. There is a distinction between the effect of statutes of limitations in vesting rights to real and personal property and their operation as a defense to contracts. Id.; Jones v. Jones 18 Ala. 248. In respect to land, the lapse of time limited by the statute of limitations not only bars the remedy but it extinguishes the right and vests a perfect title in the adverse holder. Bicknell v. Comstock, 113 U. S. 149; Dickerson v. Colgrove, 100 U. S. 583; ante p. 505."

The constitutionality of the Act has been here argued at length because it is felt there should be a positive decision settling the questions raised. It is, however, not necessary to the determinotion of the Act as shown in Point XXIX.

POINT II

The questions raised under this point were raised in substance and disposed of in Point 1.

As to the question of possession the statute Title 2, Chapter 51, Section 14 reads as follows and completely answers defendant's argument:

> "Admission of possession by answer. The defendant's answer in an action of ejectment shall be an admission for the purposes of the action, that he was in possession of the premises for which he defends or that he claimed title thereto at the time of the commencement of the action."

POINT III

It is submitted that the testimony objected to should be pointed out with more definiteness; assuming that it applies to State of the Case page 45 at lines 29 to 40, the objection came too late, being after the answer had been received. Assuming that it applies to lines 10 to 17, page 46, it was admissable because it was a statement by men actually destroying a line fence and was made by men apparently in charge of the premises.

POINT IV

In making this point the defendant assumes that the level of water in the river was constant at all times. The photographs (S. C. p. 119) clearly show the difference in the river at high water and low water; furthermore, it is pointed out by Judge Lawrence in his opinion "to land partly meadow and in part the bed of a stream known as South Branch River" (S. C. p. 16 at l. 31-32). Judge Lawrence understood the situation, Judge Porter understood, the jury understood, and the question was perfectly proper, its purpose being to prove the use of the land between the fence and the water level, whatever that water level might be.

POINT V

The answer to Point Five is a reiteration to the answer to Point Four. It might be further pointed out that the Raritan River runs for a considerable distance through Somerset County and the residents of the county are familiar with the fact that the flow of water in the river is not constant and the jury might have taken judicial notice of that fact.

POINT VI

This objection is faulty in that it does not point out the line in which the objectionable testimony is found and the examination of the full page reveals that the defendant took no exception to the court's ruling and the question, therefore, is not subject to review here.

POINT VII

Admitting for the purpose of argument that the State of Case is wrong, defendant suffered no injury because he asked the same question:

"Q. Now, during the time that you held that farm, did you ever make any claim to the land lying between the north and south banks of the river?

A. I answered that before, no; I had no claim." (S. C. p. 80 at l. 36)

POINT VIII

Paragraph (a) of this Point was fully argued under Point One. Paragraphs (d and e) were fully answered in Point Two. Paragraph (g) has been heretofore disposed of under Point One and Point Four. Paragraph (h) is a reiteration of (c). Paragraph (c) is a reiteration of Paragraph (b). Plaintiff will quote the testimony refuting defendant's claim in paragraphs (b) and (c) and will proceed to quote testimony refuting his testimony under paragraph (f):

Testimony of plaintiff's witness Charles Agans (S. C. p. 37 at l. 1-40 inc.)

"Q. And where did you reside in 1897?

A. I was on the Township farm.

Q. And where was the Township farm located at that time? A. Alongside of Mr. Covert's farm.

Q. On the down stream side of the farm?

A. Yes.

Q. And did it immediately join the farm of Mr. Covert? A. Yes.

Q. And when you speak of Mr. Covert's farm, you mean the farm now owned by the defendant in this case? A. Yes.

Q. Was there a fence between the Covert farm running approximately parallel with the river? A. Yes, on the south side.

Q. And where did that fence run from and to? A. It adjoined the line of the Township farm and ran up the river.

Q. And did it run up the river toward the road? A. Yes, toward the bridge.

The Court: What is the name of that river?

The Witness: One is the Raritan and the other what empties in the Raritan is the Neshanic.

Q. What did the fence do when it reached the Neshanic River? A. Stopped there as far as I know; didn't cross the Neshanic.

Q. It stopped at the entrance to the Neshanic River? A. Yes.

Q. Now, how did it run along the Raritan River? A. Ran along into the bank on the grade.

Q. About how many feet from it? A. I would not say. I seen the fence was there and that's all there was to it for me.

Q. When did you first see the fence was there? A. I first saw it working on the Township farm.

Q. And what year was that? A. 1897.

Q. And how long did you continue there? A. Twelve years.

Q. So you were there from 1897 up to 1909. Now, did you have occasion to go by on the roadway adjacent? A. Oh yes, quite often. I had to water my cows down there at the river the first year I was there. I could see the fence.

Q. I am speaking now of the time subsequent to your removal from the Township farm. Did you go back to that vicinity again? A. Yes, on the farm right below it; on Judge Schenck's farm.

Q. How long were you there? A. One year.

Q. That was during the year 1910? A. Yes.

Q. And what did you notice about the fence during that year? A. We mowed the meadow what adjoined up there that fall. The fence was there then.

Q. The same as it was when you were there in 1897? A. Yes; after that I don't know." (S. C. p. 37 and S. C. p. 38 l. 1-22 inc.)

"Q. Now, during these years, Mr. Agans, whose cattle occupied the space between the fence and the river, the Raritan River? A. O'Brien's, when I was there." (S. C. p. 39 at l. 10-44 inc.)

"Q. But whoever had it, their cattle was up between the fence and the river? A. I suppose, yes.

Q. Did you have a talk with the then owner of the farm on the fence side of the river? A. With Mr. Covert? Q. Yes. A. I did." (S. C. p. 39 at l. 20-30 inc.)

"Q. What date was it, approximately, as near as you can remember, Mr. Agans? A. Well, it was the first year I was there." (S. C. p. 41 at l. 19-21 inc.)

"The Witness: I asked him, how come he had that fence there. He said it was on account of keeping his neighbor's cows from coming up on the field, meadow. I said, you are heading yours off getting water? No, he said, they go up in there in the Neshanic River and drink. That's all I know about the fence." (S. C. p. 41 at l. 39 and 40; S. C. p. 42 at l. 1-9 inc.)

"Q. And the fence shown in the picture was there on the first day of April in 1897 and to your knowledge for twelve years? A. Yes." (S. C. p. 42 at l. 16-18 inc.)

This shows conclusively that the fence was at the location shown in the picture from 1897 to about 1910 and that it was used for the purpose of keeping the cattle on the plaintiff's farm, from entering upon the farm of the defendant. It clearly placed the *Locus in quo* at the use and disposal of the plaintiff.

Testimony of plaintiff's witness John O'Brien is as follows:

"Q. When did your mother acquire this property? A. In 1907. Q. Was the fence there when she purchased it? A. Yes." (S. C. p. 43 at l. 34-37 inc.)

"Q. When did you first see the fence in question? A. Why, I imagine about October 1st of 1907." (S. C. p. 44 at l. 12 and 13.)

"Q. I show you a picture marked P-1 and ask you to examine it and tell me whether or not you are familiar with the fence shown in that picture? A. I am.

Q. And was that fence there at the time your folks moved on the farm? A. Yes sir. Q. And has it been there ever since? A. Yes sir. Q. Did you have any trouble about the fence from the time you moved there in 1907 to date? A. No sir, not until it was taken down. Q. And when was it taken down? A. June 15, 1935, I think." (S. C. p. 44 at l. 22-35.)

"Q. Now, who had been maintaining that fence? A. Well, for the last six-five or six years back I put the whole fence up because he had no cows there at all.

Q. There were no cows of the defendant's? A. No, not on the Covert side and I put the whole fence up all the way from the Neshanic Brook or River, all the way down to the poor house.

Q. That would have been from the years 1929 to 1935? A. Yes, He only put half of it up until six years before.

Q. From the time you moved to the farm in 1907 and 1929, who put up the fence? A. Between the two of us. Both of us put the fence up.

Q. That is the man that then owned the defendant's farm? A. And myself.

Q. And you people put up half and half? A. Yes." (S. C. p. 46 at l. 18-35.)

"Q. You sometimes put boarder cows in there? A. Yes.

Q. For that the purpose you used the entire meadow, including the portion enclosed in this fence? A. Yes.

Q. And that's the portion described in the complaint in this case? A. Yes." (S. C. p. 48 at l. 33-41 inc.)

"Q. Who was on the poor farm when you moved there? A. Mr. Agans.

Q. And how long did he continue on the poor farm? A. I think he was there three years, if I am not mistaken." (S. C. p. 51 at l. 11-15 inc.)

This testimony shows conclusively that the fence was up when his parents purchased the property; that he went into immediate possession and use of the locus in quo and he continued to occupy it exclusively until the defendant took the fence down in 1935. It shows that the farm was

purchased in 1907 and the testimony of Mr. Agans is, that from his knowledge, the fence was there from about 1897 to about 1910 and that the locus in quo was used by the plaintiff or his predecessors in title. This clearly establishes their adverse occupation for a period of approximately thirty years.

Harold O'Brien, a witness called by the plaintiff, on direct examination testified as follows:

"The Court: And for how long can you recall it? For how many years?

The Witness: Oh, as long as I remember back I can remember there always being a fence there."

Q. How many years would that be? A. About seventeen years.

Q. And you as a boy, I suppose, had the duty of driving cattle down there and routing them out again? A. That's right.

Q. And the land adjacent to the fence and from the fence northerly over across the river was used for what purpose? A. For pasturing cows.

Q. Now, when was the fence taken down? A. June 15, 1935." (S. C. p. 57 at l. 1-19 inc.)

"Q. And has the fence been up from June, 1935 to the present time? A. No, it hasn't.

Q. And have you been deprived of the use of the river there for your cattle? A. Yes."
(S. C. p. 57 at l. 24-28 inc.

This testimony clearly shows possession, use and occupation in the plaintiff.

Mr. Charles Williamson testified as follows:

Q. And did you ever occupy or work on either farm? A. I did, on the O'Brien farm.

Q. And when did you work on the O'Brien farm? A. Well, I think it was possibly '96-'98.

Q. '96 to '98? A. As far as I can remember.

Q. Now, I show you P-1 and ask you to examine it, looking particularly at the fence that ran along the river. Was that fence or one similar thereto at that location? A. There was, very similar to that.

Q. That three years you worked there? A. Yes.
(S. C. p. 62 at l. 30-40 inc.)

Now, did the cows from the O'Brien farm cross the river there to the opposite bank where the fence is? A. They did.

Q. And that took place during the whole three years you were there? A. It did.
(S. C. p. 63 at l. 1-8 inc.)

This testimony clearly shows that for the three years from '96 to '98 the cows from the O'Brien farm occupied the locus in quo.

Mr. John Covert, a witness called on behalf of the defendant, stated that until 1910 the fence was maintained one half on one side of the river and then on the other. He testified as follows:

Q. Mr. Covert, are you familiar with the farm now occupied by Ludwig Bilow. A. Yes.

Q. And under what circumstances did you become familiar with that farm. A. I lived there from 1895 to 1910.

Q. Your father was the owner, wasn't he? A. That's right.

Q. During that time, Mr. Covert, did you observe the condition pertaining along the water front of that property. A. Yes.

Q. With particular reference to a fence? A. I built the fence; I helped build it.
(S. C. p. 66 at l. 12-25 inc.)

Q. Will you tell the Court and Jury what condition occasioned the change in that fence? A. The reason, because the fence across the river would wash out with every shower and then they would have to rebuild it to keep the cows from coming through and so they decided to build the fence on one side of the river so they wouldn't have to put the fence across the river.

Q. And do you know whether or not they decided to build it on one side of the river through the result of an agreement? A. That was a mutual agreement.
(S. C. p. 6 at l. 12 & 13, 18-27 inc.)

Q. What did your father tell you? The Witness: I asked him - this perhaps happened after I left home - I asked my father how it was Mr. O'Brien was building the fence on that side of the river; why, he said, it stopped us from having to keep the fence up across the river.

The Court: When was that?

The Witness: I left home 1910.

The Court: When was this conversation?

The Witness: I can't tell the exact date.

The Court: When was the fence built in the manner in which you have described. Can you give us that?

The Witness: Not the exact date.

The Court: Well, approximately?

The Witness: Approximately 1910.

(S. C. p. 68 at l. 38-40 inc.; p. 69 at l. 1-15 inc.; at l. 29 & 30)

On cross examination in speaking of the change in the fence in 1910, he says as follows:

Q. But your father did tell you that they made that change in the boundary line so to keep from putting the fence across. A. Yes.

Q. Now, there isn't any question about that, is there? A. No.

(S. C. p. 76 at l. 38-40 inc.; p. 77 at l. 1 & 2)

Q. Yes, and the purpose of building the fence was to fix the line between you two parties and keep his cows out of your place and keep your cows out of his? A. That's what they built the fence for.

(S. C. p. 77 at l. 22-26 inc.)

It is clear from the testimony of this witness that his father told him a fence had been put in the position contended for by the plaintiff to fix the boundaries between the properties. He fixes the date as 1910 and this is in direct contradiction to the testimony of Mr. O'Brien, Mr. Williamson and Mr. Agans.

Mr. Charles Gustafsun, witness on behalf of the defendant, testified that he worked the defendant's farm on shares some 12 or 15 years ago, at page 79 he says:

Q. What side of the river was the fence on then? A. On what side of the river?

Q. Yes, on your side? A. Yes, over on Covert's side.

Q. You fix half and O'Brien fixed half? A. Yes.
(S. C. p. 79 at l. 12-21 inc.)

Q. You maintained half of that fence the same as he maintained half of the fence, the other adjacent property owner? A. Well, I kept half of it and O'Brien kept the other half.

Q. That's the way it went all the way around the farm. A. Yes. (S. C. p. 80 at l. 12-18 inc.)

It is apparent from this man's testimony that both the defendant and the plaintiff maintained one half of the fence and of course, it was so maintained because it is the custom among adjacent farmers for each to maintain one half of the fence.

Mr. George C. Brokaw, called by the defendant, on cross examination testified as follows:

The Court: What is a line fence as you understand it?

The Witness: The line between two neighbors.

Q. Does it usually mark the boundary line between the neighbors? A. Well, it's a straight line, a turn and you define a fence.

The Court: No, it hasn't anything to do with farms. This is a water line fence usually acts as the boundary between properties. Does it or doesn't it.

The Witness: Yes, it certainly does.
(S. C. p. 82 at l. 22-27 and 33-39 inc.)

Q. There isn't any question about that in your mind, is there, George? A. No. I own quite some land up there and that's where that's always been.

Q. And you have always known what the line fence was? A. Yes.

Q. You knew in 1907 when you owned this place what the line fence was? A. Why, certainly.
(S. C. p. 83 at l. 3-11 inc; 21 & 22)

Q. And there's no question but what you signed is thus: "And has been a fence between the property for at least thirty years without interruption." That's over

your signature? A. Right, I am not going to read it again. (S. C. p. 84 at l. 26-30 inc.)

Q. Then you did sign it? A. There's my signature.

Q. Now, you further state that "during the thirty years of my personal knowledge the owners of the so-called O'Brien farm have had use and occupancy of the full width of the South Branch River to a fence," didn't you? A. I don't recall that; I don't know.

(S. C. p. 85 at l. 23-30 inc.)

The testimony of Mr. Brokaw clearly shows that he had executed an affidavit in 1935 stating that the fence in question including the *Locus in quo* with the property of the plaintiff was considered the line fence and had been so considered for thirty years previous to 1935. This substantiates the testimony of the plaintiff's witness and the testimony of the defendant's witness, Mr. Covert, that it was considered the line fence between the parties.

Mr. John O'Brien in rebuttal at page 101 testified as follows:

Q. And at the time your parents purchased the farm in 1907, did Mr. George Brokaw point out the boundary along the river? A. He did, because we came from the south and didn't know where the property was really and then I had gotten the deed and read it over and on the other side of the river was a fence that he told me that my half was that end toward the poor fence and Mr. Covert's end was on this, the lower end.

Q. The right end? A. Yes.

Q. And did the fence as he pointed it out to you extend as approximately shown in that picture? A. Approximately has been there ever since we have been here.

In Davock vs. Nealon (58 N. J. L. p. 21) the court discusses in detail the law regarding privity of estates and tacking of successive possessions. The law is well stated in the syllabus as follows:

"1. The adverse possessions of successive occupants, between whom a privity of estate exists, can be tacked so as to make a continuous twenty years adverse possession.

2. Where one encloses and possesses more land than is covered by the description in his deed, and sells to another by the same description, who enters into possession of all the land enclosed, the successive possessions can be tacked." (58 N. J. L. p. 21)

The evidence by which this is substantial is found in the testimony of Mr. Agans and Mr. Williamson as to the erection of the original fence and more particularly in the testimony of Mr. O'Brien (S. C. p. 101 at l. 1-18 inc.)

POINT IX.

This question was properly excluded. The witness was not an owner of the adjacent property and in addition the question calls for the witness' conclusion.

POINT X.

There is no merit to this point for the very next question involving identically the same thing was answered on page 73 at line 1 of the State of the Case "Q. Who did they pay? A. Paid my father."

POINT XI.

There is no merit to this point as it was conversation between the witness and his father and, of course, was not binding or admissable as against the plaintiff. It was purely a self-serving conversation.

POINT XII.

There is no merit to this point and it is not properly before the court, no reference being given as to the State of the Case as to the first question, and no exception being taken to the court's ruling on either question.

POINT XIII.

There is no exception taken to the ruling of the court on this point and, in addition, the witness was not owner of the property and could not state what were the intentions of his father.

POINT XIV.

There is no merit in this point; counsel took no exception to the court's ruling and, in addition, it was an improper question. The witness was evasive, was attempting to contradict an affidavit he had made in 1935 and was doing everything in his power to evade direct questions.

POINT XVI.

This objection is not well taken. The answer had been made previous to the objection and in addition the Court says: "He has answered it twice. Let it stand." (S. C. p. 92 at l. 24).

POINT XVII.

This question propounded here has nothing whatever to do with the dispute in question and is irrevelant and immaterial.

POINT XVIII.

This is a reiteration of Point I. It is not reargued here.

POINT XIX.

This request to charge is not the law so far as the following part thereof is concerned "In addition to that she must show that those whose possession she relies on to make up the thirty year period, intended to acquire title by adverse possession and have passed on". This is not the law. The law only requires that their claim shall be adverse. They need have no intention of holding land for the purpose of making title, for instance, it is sufficient if they believe they own it or if they hold it openly and notoriously as their own. The court covered the matter on page 110 of the State of the Case at lines 1 to 23 inclusive.

POINT XX.

This point is without merit because the defendant, by motions before trial, had Judge Lawrence determine and decide whether or not the lands were cultivated or uncult-

ivated, and in addition thereto, the testimony was uncontradicted, that the land was pasture land, was used each year in the pasture of cattle, was fenced in, was adjacent to a public highway, and during the pasture season was in daily use.

There are several cases holding that normally it is for the jury to determine, but in none of these cases did the Plaintiff cause the court to determine it previous to trial. In none of these cases was the evidence uncontradicted as to the land being cultivated.

The defendant again contends that the lands in question are entirely river bottom. He entirely overlooks the finding of Judge Lawrence at the beginning of the case "to land partly meadow and in part the bed of the stream". The pasture land being on the opposite side of the stream, it, of necessity, carries the river with it. And Judge Porter in his charge to the jury, states that the real dispute is "with respect to a strip of land along the river on the Bilow side of the river, between it and a fence that admittedly was there for some time". It is hard to understand why the defendant persists in his opinion that the flow of the Raritan river is constant and that nothing is embraced within the description given in the complaint except the river bottom.

POINT XXI.

There is no exception taken to this part of the charge; furthermore, Exhibit D-2 of the State of the Case, page 120, at line 28 reads as follows: "Thence along said bank of said river the courses and distances thereof to Neshanic Creek". The court was perfectly right in its charge.

POINT XXII.

Here again there is no substantiation at any point in the State of the Case for counsel's argument. It was apparent in the last course above that the defendant's deed ran to the Southerly bank of the South Branch river and the deed of the defendant (Ex. D-3 S. C. p. 124 at l. 28) "to a large birch tree (scarred) standing on North side of the South Branch of the Raritan River; thence up the

said River the several courses and distances to the middle of the North abutment of the Bridge". The court's charge was perfectly correct; it stated the issue clearly; it stated it as it had been determined and defendant's criticism is entirely unwarranted.

POINT XXIII.

Defendant took no exception to this part of the charge and it is not properly before the court for determination. It is true that no single witness testified that the fence had been there for forty-one years, but it is true that one witness testified that it was there in the year 1896 and for three years afterwards, and that another witness testified that it was there from 1897 and for twelve years afterwards, and that another witness testified that it was there from 1907 to date, making in all a period of forty-one years. The court expressly called the jury's attention to the fact that the jury was to be the judge of the facts regardless of what the court or counsel might say. (S. C. p. 107 at l. 39) "That raises questions of fact and you are the fact finders" and at page 108 of the State of the Case at line 11 "In what I have said, however, if I have misquoted the testimony in any particular, of course you must disregard such errors and depend on your recollection of what the testimony was. Likewise if Counsel may have misquoted the testimony in any particular, you will disregard their errors, depending on the testimony as you recall it".

POINT XXIV.

There is no exception taken to this part of the charge and it is not properly before the court and, in addition thereto, there is ample evidence to support this statement of the jury's function. Point XXIII applies here.

POINT XXV.

The plaintiff reiterates his answer to Point XXIV.

POINT XXVI.

There is an error in the Court's charge here where the Court says "because her deed covers it, his deed going

to that fence and not to the edge of the river" probably what the court intended to say was "that her deed should go to that fence and not to the edge of the river". Be that as it may, there is no exception to this part of the charge and it is not properly before the Court and if the Court was wrong the error was rectified by that part of the Court's charge mentioned in Point XXIII.

POINT XXVII.

This is not properly before the trial court, it not having been excepted to, and in addition there seems to be ample in the testimony to justify the statement of the court.

POINT XXVIII.

There is no exception taken to this part of the charge and it is not properly before the Court. It might be well, however, to point out that the misconception as to what was in dispute was not the misconception in the mind of either Judge Lawrence or Judge Porter nor of the jury but the misconception seems to persist solely in the mind of the defendant although he himself had the matter decided previous to the trial.

POINT XXIX.

This part of the charge which the defendant charges to be incorrect, correctly stated the law and it disposes of the entire case. 7 N. J. Misc p. 642 Walter B. Keilt, et al, appellants vs. Annie D. Lozier, et al, respondents, decided July 3, 1929, before Chief Justice Gunmere and Justice Parker.

> "If the jury should find from the evidence that the persons who by these deeds were the former owners of the plaintiffs' property by their acts in locating the line had fixed it definitely, and so induced the defendants and those from whom they derived their title to act upon such erroneous location, the plaintiffs are bound by such location, and are, by their acquiescence and the acquiescence of their predecessors in title, now precluded from disputing the boundary line so fixed, even

though the acquiescence was for a period less than twenty years. In our view, this instruction was legally unobjectionable."

"Where proprietors of adjoining lands agree upon, fix, and establish a boundary line" between their respective tracts, and each occupies up to the boundary line, their possession is mutually adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, will ripen into a perfect title." (2 C. J. 137.)

In Wait's Actions and Defenses, Vol. 7, Ch. XVI, p. 257, "Where adjoining land-owners agree upon a line dividing their lands, and enter into possession and occupy according to such line, they will be concluded from afterward disputing such line as the true one; and the rule is the same where parties, for a period of twenty years, acquiesce in such a line." (Hubbard v. Stearns, 86 Ill. 35).

The defendant's own witness, John Covert, under cross examination testified as follows:

"Q. But your father did tell you that they made that change in the boundary line so to keep from putting the fence across? A. Yes." (S. C. p. 76 at l. 37-40 inc.)

"Q. Now, there isn't any question about that, is there? A. No.

Q. So that the new boundary line was established by putting the fence on the south side? A. It was agreed to build the fence on the south side of the river.

Q. Yes, and the purpose of building the fence was to fix the line between you two parties and keep his cows out of your place and keep your cows out of his? A. That's what they built the fence for."

(S. C. p. 77 at l. 1-6 inc. and l. 20-25 inc.)

Charles Gustafsun who farmed the defendant's place for three years, twelve or fifteen years ago says:

On Direct Examination:

"Q. What side of the river was the fence on then? A. On what side of the river?

Q. Yes, on your side? A. Yes, over on Covert's side.

Q. You fixed half and O'Brien fixed half? A. Yes."

(S. C. p. 79 at l. 15-21 inc.)

And on Cross Examination:

"Q. You maintained half of that fence the same as he maintained half of the fence, the other adjacent property owner? A. Well, I kept half of it and O'Brien kept the other half.

Q. That's the way it went all the way around the farm? A. Yes."

(S. C. p. 80 at l. 12-18 inc.)

And the defendant's witness, George C. Brokaw stated:

"Q. And there's no question but what you signed is thus: "And has been a fence between the property for at least thirty years without interruption." That's over your signature? A. Right. I am not going to read it again." (S. C. p. 84 at l. 26-30 inc.)

"Q. Then you did sign it? A. There's my signature.

Q. Now, you further state that "during the thirty years of my personal knowledge the owners of the so-called O'Brien farm have had use and occupancy of the full width of the South Branch River to a fence," didn't you? A. I don't recall that; I don't know.

Q. Well, you signed it, didn't you, George? Now, listen. You signed it?

Mr. Reid: It is irrelevant. He doesn't deny signing it at all."

(S. C. p. 85 at l. 22-32 inc. and 35 and 36.)

Direct examination of John O'Brien:

"Q. And at the time your parents purchased the farm in 1907, did Mr. George Brokaw point out the boundary along the river? A. He did, because we came from the south and didn't know where the property was really and then I had gotten the deed and read it over and on the other side of the river was a fence that he told me that my half was that end toward the poor fence and Mr. Covert's end was on this, the lower end.

Q. The right end? A. Yes.

Q. And did the fence as he pointed it out to you extend as approximately shown in that picture? A. Approximately has been there ever since we have been here."

(S. C. p. 101 at l. 1-16 inc.)

The foregoing evidence clearly demonstrates that the predecessors in title of plaintiff and defendant established the fence as the boundary line between the two properties. It is clear under the stated law that this placed the title of the *Locus in quo* in the plaintiff and his predecessors in title. It is further clear that this constituted adverse possession. Under the law as stated at the beginning of this point and as stated by this court in Lehigh Valley Railroad Co. vs. Mc Farland (43 L. 605) the plaintiff has a perfect title.

POINT XXX.

It is submitted that the practice followed by the court here is the correct practice. In addition, there is no exception to this charge.

POINT XXXI.

There is no exception taken to this part of the charge and in addition thereto the court was perfectly correct.

CONCLUSION

The plaintiff-respondent respectfully submits:

The evidence clearly discloses two things:

First: That plaintiff and defendant's predecessors in title fixed the line between them and being so fixed it cannot be changed.

Second: The testimony is clear and convincing that plaintiff and his predecessors in title have been in possession of the *Locus in quo* since 1897 and that possession had ripened into a right at the time that defendant took the fence down in 1935.

The Statute of 1922 is applicable. The defendant or his predecessors in title had fom 1922 to 1927 (when the thirty year period matured) or a period of five years in which to perfect their title. This was a reasonable time, therefore, the Statute of 1922 was applicable.

The *Locus in quo* was clearly described and it was understood both in the motions before trial and during the trial exactly what was the *Locus in quo*. It was pointed out in the pictures (S. C. p. 119) and was clearly presented to the jury. The defendant cannot now defeat the action by claiming that the word "bank" is the equivalent of "water's edge" and thereby place the *Locus in quo* entirely under water.

It is respectfully submitted that the record shows no reversible error and that the judgment of the court below should be affirmed.

Respectfully submitted,
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Attorneys for Plaintiff-Respondent

Ryman Herr,
Of Counsel with Plaintiff-Respondent.

APPENDIX A

CHAPTER 188, P. L. 1922.

An Act to amend an act entitled "An act for the limitation of suits respecting titles to land" (Revision of 1877, page 598).

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section one of the act to which this is an amendment is hereby amended to read as follows:

1. Thirty years' actual possession of any lands, tenements, or other real estate, excepting woodlands or uncultivated tracts and that sixty years' actual possession of any woodlands or uncultivated tracts uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner such possession might have commenced, or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements, or other real estate, and shall be a good and sufficient bar to all claims that may be made, or actions commenced by any person or persons whatsoever, for the recovery of any such lands, tenements, or other real estate.

2. All acts and parts of acts inconsistent with this act are hereby repealed.

3. This act shall take effect immediately.

Approved March 11, 1922.

APPENDIX B.

In Content vs. Dalton (122 N. J. Eq. 425 (433).

The 1787 statute may be better understood if viewed in the light of earlier legislation. At the 1727-1728 session, in the first of George II, the provincial assembly passed an act entitled "An act for the limitation of actions, and for avoiding suits in law" (Kinsey 211), which, although apparently passed February 10th, 1728 is usually referred to as the statute of 1727. It provides:

"For Quieting Mens Estates, and avoiding of Suits, Be it Enacted by the Governor, Council and General Assembly of this Province, and it is hereby Enacted by the Authority of the same. That all the Statutes now in Force in that Part of Great Britain called England, concerning the Limitation of Actions real and personal, shall, and are hereby declared to be in Force in this Province from the Publication hereof, as fully and effectually as if every of them were herein at Length repeated and Enacted, any Law, Usage, or Custom to the contrary in any wise notwithstanding."

Allinson prints the same statute at page 72 and as a footnote gives the material parts of the statutes of England which are "meant and intended" by the 1727 statute. Four sets of statutes are there set out. Of these, the second, which is the thirty first of Elizabeth, chapter V, and the fourth, which is the fourth and fifth Anne, chapter XVI, are not pertinent. The first is the thirty-second of Henry VIII, chapter II, passed in 1541, which provides inter alia a sixty year limitation upon making title or claim to lands and tenements. In section 8 it provides that if any person or persons be "now within the age of twenty-one years" or handicapped by other named disability he shall have six years after he "shall accomplish the age of one and twenty years." &c., to bring action; and in sections 9 and 10 it provides further relief, upon conditions, for persons under certain disabilities. The third, the twenty-first of James I, chapter XVI, relates, in part, to the writ of formedon, an ancient writ in the nature of a writ of right provided for those interested in an estate tail who were likely to be

defeated of their right by a discontinuance of the estate tail (Bouvier's Law Dictionary), and has, for the benefit of persons under disability, a saving clause so strikingly like that in section 2 of our 1787 statute that we here set it out:

"That if any Person or Persons that is or shall be entitled to such Writ or Writs, or that hath or shall have such Right or Title of Entry, be or shall be at the Time of the said Right or Title first descended, accrued, come or fallen, within the Age of one and twenty Years, Feme-Covert, Non Compos Mentis, imprisoned, or beyond the Seas; that then such Person and Persons, and his and their Heir and Heirs, shall or may notwithstanding the said twenty Years be expired, bring his Action, or make his Entry, as he might have done before this Act; so as such Person and Persons, or his or their Heir and Heirs, shall within ten Years next after his and their full Age, Discoverture, coming of sound Mind, Enlargement out of Prison, or coming into this Realm, or Death, take Benefit of and sue forth the same, and at no Time after the said Ten Years."

Sections 1, 2 and 5 of the 1787 statute (section 1 of which, as amended in 1922, appellant relies upon, supra) are as follows: they are given as they appear at pages 81 and 82 of Paterson, except that we have italicized the word "times" in the two instances where it occurs:

"I. Be it enacted by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same, That sixty years actual possession of any lands, tenements or other real estate, uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner such possession might have commenced or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements or other real estate, and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person or persons whatever, for the recovery of any such lands, tenements or other real estate.

APPENDIX B

"II. And be it further enacted, That thirty years actual possession of any lands, tenements or other real estate, uninterruptedly continued as aforesaid, wherever such possession commenced, or is founded upon a proprietary right, duly laid thereon, and recorded in the surveyor-general's office of the division in which such location was made, or in the secretary's office, agreeably to law, or wherever such possession was obtained by a fair bona fide purchase of such lands, tenements or other real estate, of any person or persons whatever in possession, and supposed to have a legal right and title thereto, or of the agent or agents of such person or persons, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements or other real estate. Provided always, That if any person or persons, having a right or title to lands, tenements or other real estate, shall, at the time of the said right or title first descended or accrued, be within the age of twenty-one years, feme covert, non compos, imprisoned, or without the United States of America, then such person or persons, and his and their heir and heirs, may, notwithstanding the aforesaid times are expired, be entitled to his or their action for the same, so as such person or persons, or his or their heirs, commence or sue forth his or their action within five years after his or their full age, discoverture, coming of sound mind, enlargement out of prison, or coming within any of the United States, and at no time after. And provided also, That any citizen or citizens of this or any other of the United States, and his or their heirs, having right or title to any lands, tenements or other real estate within this state, may notwithstanding the aforesaid times are expired, commence his or their action for such lands, tenements or other real estate, at any time within five years next after the passing this act, and not afterwards.

"V. And be it further enacted. That so much of the act, entitled, 'An act for the limitation of actions, and for avoiding of suits,' and such and so many of the statutes in England, now in force in this state, as are affected by and

repugnant to this act, be, and the same are hereby repealed, made void and of no effect."

The similarity between the quoted portion of twenty-first James I and the provisos in section 2 of the 1787 statutes suggest that one was the model for the other; this, even if it be, as stated in Den, ex dem. Johnson v. Morris, 7 N. J. Law *6, 11, that our colonial courts held that the twenty-year limitation of twenty-first James I was not within the purview of the act of 1727. These provisos, it will be noted, were complete sentences separate and distinct from the context. The logic of them is as pertinent to the first section of the statute as to the second; we think more so. Although the sentences appear in the second section and are without a separate paragraph marking, each contains the words "the aforesaid times"—in the plural—and there are no "times" antecedent to that expression except the time of sixty years mentioned in the first section and the time of thirty years mentioned in the second section. All of which carries the implication that, notwithstanding the paragraph formation, the provisos were intended to apply to the first section equally with the second; particularly so since otherwise there were no saving clauses whatsoever as to the first section. The same sentence construction was preserved through the various compilations down to and in Elm. Dig. 314. But beginning with the 1847 Revision, page 652 (although this statute was not revised) the printers have changed the punctuation. Periods have been replaced by semi-colons and capital letters by those from the lower case, with the result that the provisos now appear to be merged with, and physically a part of, the sentence which relates, in section 2, to the original thirty-year limitation alone. 3 Comp. Stat. p. 3172. It has been said by our courts that neither of these sections conflicts with or modifies the other (Spottiswoode v. Morris and Essex Railroad Co., supra; Model Plan Agency v. Diamond, supra), but these remarks were not, we think, essential to the reasoning which led to the conclusions, were not made with respect to the classes which we have been discussing, and in any event do not alter the historical setting.

APPENDIX B

The indications are that those who passed the statute in 1787 intended to give a time beyond the date of enactment within which all persons subjected to limitation in their rights of action might bring suit and, further, an opportunity for those who were then or should thereafter be under a disability to bring action within a reasonable time after the removal of the disability. Mr. Justice Elmer remarked in the Pinckney Case, supra, that the statute, being an act for the limitation of suits respecting title to land, should be interpreted to harmonize with the provisions of other acts for the same pupose, and Vice-Chancellor Green in Hall v. Otterson, 52 N. J. Eq. 522 (at p. 533); affirmed, 53 N. J. Eq. 695, in the application of that principle and with citation of the Pinckney Case held that under the twenty-year statute, 1877 Revision, page 597, sections 16, 17 (3 Comp. Stat. p. 3169), the limitation did not run against a remainderman until the death of the life tenant.

APPENDIX C

12 Am. Jur. 89:

"445. Statutes of Limitation. - An existing law of limitations is not considered as being a part of the contract. Hence, the Legislature may enact a statute which limits the time within which actions may be brought to enforce demands where there was previously no period of limitation or which shortens the existing time of limitation, and such a law may operate, upon existing contracts without necessarily being invalid as impairing their obligations. The Legislature by enactment may suspend the operation of a statute of limitations as to contracts in existence at the time of the passage of the act or may control the statute of limitations, if it does not thereby take away the remedy to enforce existing contracts. Such statutes relate only to the remedy and the enforcement of rights and, as a general rule, control future procedure in reference to previously existing causes of action, where they contain no language clearly limiting their application to causes of action arising in the future. It is within the power of the legislature to shorten the period of limitation, leaving always a reasonable time within which to invoke a remedy for a breach of contract, or to prolong the period of limitation, where the right to plead it has not accrued. If, however, the period fixed by a statute of limitations is unreasonably short and is designed to defeat the remedy upon pre-existing contracts, which is part of their obligation, the statute is void. A statute which declares that a period already elapsed should bar an action upon a contract is however, an arbitrary destruction of contractual rights and, therefore, unconstitutional, as would also be a statute which practically denied a party the right to sue period of limitations, without leaving a reasonable time thereafter in which to bring the action. The question as to what shall be considered a reasonable time within which an existing right must be asserted after a new statute of limitations is enacted before the statute will bar the right is for the determination of the legislature, and is in no sense a judicial question. Unless the time allowed is so manifestly insufficient that it becomes a denial of justice, the court will not interfere with the legislative discretion."

See also note 108 A. L. R. 896