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Notice of Appeal.

(Filed January 3, 1931.)

ESSEX COUNTY CIRCUIT COURT.

EDWIN L. BENTLEY, *Plaintiff,* v. THE CITY OF NEWARK, *Defendant.*	Notice and Grounds of Appeal.

To FRANK A. BOETTNER, Esquire, Defendant's Attorney and Clerk of Essex County Circuit Court.

TAKE NOTICE that plaintiff appeals to the Court of Errors and Appeals in the Last Resort in All Causes, from the judgment in favor of defendant and against plaintiff, entered herein November 7, 1930, and from the whole and every part of said judgment;

The grounds of plaintiff's appeal are as follows:

1. The Court should have rendered judgment in favor of plaintiff against defendant, with costs of suit.

2. That it is error for the judgment to provide, as it does that "the finding being a matter of law, title to the fee being in the defendant" since the Court decided the matter upon facts and law.

3. That it is error for the judgment to find

"there having been no abandonment of the use for which the premises were condemned" since it appears by the undisputed facts in the case that there was such abandonment.

4. That the title in fee never vested in the City of Newark.

5. That the Act of 1851 under which the City acquired the use of the lands, did not afford the City any title nor any fee title.

6. That the City never condemned the lands for sewers and drains, never used the same for sewers and drains, and there is no evidence of any such condemnation or use, and the non-user of the lands for such purposes from 1851 to date constitutes an abandonment of such intended use, if ever intended, which it could not have been since there was no condemnation at any time for that purpose.

7. Abandonment of the lands for the purpose for which condemned clearly appears in the undisputed facts.

8. There is no evidence that the City paid full value for the lands.

9. Judgment should have been for plaintiff in accordance with the following: That under the Act of 1851, the City could not take fee title; that whether it got or assumed to get a fee title, that title was always subject to reversion by reason of abandonment of the use for which the lands were condemned; that it condemned only for a market place, that it never condemned for sewers and drains; that it never used for sewers and drains; that it wholly abandoned the use of the lands for the purposes for which condemned; that the title reverted to the original owners, of whom plaintiff

now is one; that he is entitled to maintain ejectment; that judgment should have been awarded him for possession of the lands, mesne profits, and costs.

STETSON & MAPLETOFT,
Plaintiff's Attorneys.

Summons.

(Filed May 22, 1928.)

The State of New Jersey to The City of Newark:

(L. S.) You are summoned to answer the annexed complaint of Edwin L. Bentley, in an action at law in the Essex County Circuit Court wherein said Edwin L. Bentley demands of you the possession of the equal undivided one-fifteenth part of a tract of land with the appurtenances situate in the City of Newark, in the County of Essex and particularly described in said complaint. And take notice that unless you file your answer to said complaint with the Clerk of the said Circuit Court, at Newark, aforesaid, 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.

WITNESS, Worall F. Mountain, Esquire, Judge of the said Essex County Circuit Court at Newark, this 21st day of May, Nineteen Hundred and Twenty-eight (1928).

JOHN H. SCOTT,
Clerk.

HORACE & HENRY T. STETSON,
Attorneys.

Complaint.

(Filed May 21, 1928.)

ESSEX COUNTY CIRCUIT COURT.

EDWIN L. BENTLEY,
Plaintiff,

v.

THE CITY OF NEWARK,
Defendant.

Action at Law.
Complaint.

Plaintiff residing at #145 West 71st Street, in the City of New York, County of New York and State of New York, demands of The City of Newark, the Defendant herein, possession of the equal undivided one-fifteenth part of a tract of land with the appurtenances, situate in the City of Newark, County of Essex and State of New Jersey, and described as follows:

BEGINNING on the North side of Commerce Street in the Town of Newark, at the Westerly corner of a lot conveyed by the said Joseph C. Hornblower and wife to Frederick H. Smith by deed bearing even date herewith, (which corner, place of Beginning is Eighty-nine feet distant from the Westerly corner of Usal Tuttles dwelling-house); and from thence running along the North side of Commerce Street towards Broad Street, Thirty feet; thence towards the Morris Canal on a line parallel with the West side or line of the lot so as aforesaid conveyed to Frederick H. Smith One Hundred and Fifteen feet, more or less, to the South side of the passage-way or Street which has been

opened from Broad Street to Mulberry Street along the South side of the said Canal; thence (3) along the South side of the said passage-way or Street Thirty feet to the Northerly corner of the lot so as aforesaid conveyed to the said Frederick H. Smith; and thence (4) along the West line or side of said lot to the North side of Commerce Street at the place of BEGINNING.

Excepting therefrom,

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

And, also the sum of One Hundred Thousand Dollars for mesne profits and damages,

Answer.

And, That the Plaintiff says that his right to the possession of the same accrued on March 25th, 1924, and that the Defendant wrongfully deprives him of the possession thereof to his damage, Two Hundred Thousand Dollars.

HORACE & HENRY T. STETSON,
Attorneys for Plaintiff.

Answer.

(Filed June 8, 1928.)

ESSEX COUNTY CIRCUIT COURT.

EDWIN L. BENTLEY,
Plaintiff,

v.

THE CITY OF NEWARK,
Defendant.

Action at Law.
Answer.

Defendant says that:

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

JEROME T. CONGLETON,
Attorney for the Defendant.

Plaintiff's Bill of Particulars.

(Filed May 8, 1930.)

ESSEX COUNTY CIRCUIT COURT.

EDWIN L. BENTLEY, *Plaintiff,* v. THE CITY OF NEWARK, *Defendant.*	Action at Law. Bill of Particulars.

The following is a Bill of Particulars of the Plaintiff's claim or title to the premises mentioned and set out in the Plaintiff's Complaint:

(1) One Peter Lindsley, Plaintiff's ancestor, took title to the property described in the Complaint by a Warranty Deed made by Joseph C. Hornblower and Mary Hornblower, his wife, to Peter Lindsley, dated October 31, 1832, acknowledged October 31, 1832 and recorded April 12, 1833, in Book M-3 of Deeds for Essex County, New Jersey, at Page 314.

(2) Peter Lindsley, pursuant to the foregoing Deed became the Owner in fee simple of the property set forth in the Complaint on October 31, 1832, and thereupon became possessed of the same and died the owner in fee simple of the same in the year 1856, testate, and his Last Will which was admitted to probate on or about April 15, 1856, by the Essex County Surrogate, which Will is recorded in Book L, of Wills for said County, page 180, devised all of his estate including said premises in fee to his wife, Abigail Lindsley.

The said Abigail Lindsley, widow of Peter Lindsley, died in the year 1857 intestate, in Essex

County (See Surrogate's records, Administration Book C, Page 90), and leaving her surviving three children and heirs-at-law of whom her daughter, Augusta Lindsley, who was also the daughter of Peter Lindsley, was one.

Said Augusta Lindsley married Edwin L. Bentley and upon the death of Abigail Lindsley, Augusta Lindsley became the owner of an undivided one-third interest in the fee of the premises in question and thereafter the said Augusta Lindsley Bentley died in the year 1916, intestate, her husband, Edwin L. Bentley having predeceased her, having died in 1899, and her title to said interest to said premises thereupon descended to five children, one of whom is Edwin L. Bentley, the Plaintiff, and upon the death of said Augusta Lindsley Bentley in the year 1916, the said Edwin L. Bentley, Plaintiff thereupon became the owner of an undivided One-fifteenth interest in fee in the premises described in the Complaint.

(3) During the lifetime of Peter Lindsley, the ancestor and original owner of the premises in question, certain proceedings were had at the instance of the Mayor and Common Council of the City of Newark, New Jersey, in the year 1853. Section 15 of the New Jersey Laws of 1851, Page 232, at Page 237, which is an "Act to amend An Act to Incorporate the City of Newark etc.", provided that it may be lawful for the Common Council of the City of Newark to take, for the purpose of enlarging the present Public Market Place, called, "The Centre Market" such lands as the Common Council deemed requisite, compensation being paid therefor in the same manner as then provided when lands were taken for Public Streets; pursuant to which act an Ordinance of the City

of Newark was passed in 1852 by the Common Council resolving to increase the market facilities and resolving to acquire two certain tracts of land for that purpose, one of them being the land described in the Complaint; such proceedings were thereupon had pursuant to said Ordinance as resulted in the payment by the City of Newark to Peter Lindsley of the sum of Sixteen hundred and thirty-six (1,636) Dollars, in payment of the damages awarded him for enlargement of Centre Market for the premises in question being Lot Marked "2", Thirty (30) feet front and Fifty-two (52) feet deep, pursuant to Map filed July 1, 1853. Thereafter the City of Newark took possession of the lands described in the Complaint and occupied the same for the purposes of a Farmers' Market, or a Market Plaza, adjacent to Centre Market, in the City of Newark, but never acquired the fee title of said premises, acquiring only the use of said lands and premises solely for the purposes of a Market Place in Farmers' Market, or Market Plaza, as aforesaid. Thereafter, the City of Newark on or about April 13th, 1926, wholly abandoned the property described in the Complaint for the use for which it was condemned and the effect of such abandonment was the reversion of said lands to the heirs of Peter Lindsley and the resumption by the Plaintiff of his undivided interest in fee title in said lands.

(4) Although the City of Newark has completely abandoned said lands for the purpose for which they were as above occupied by the City of Newark, yet notwithstanding the City of Newark is in possession of the said lands described in the Complaint.

HORACE & HENRY T. STETSON,
Attorneys for Plaintiff.

Defendant's Bill of Particulars.

(Filed March 13, 1930.)

ESSEX COUNTY CIRCUIT COURT.

EDWIN L. BENTLEY, *Plaintiff,* v. THE CITY OF NEWARK, *Defendant.*	Action at Law. Bill of Particulars.

To HORACE AND HENRY T. STETSON, Esquires, Attorneys for the Plaintiff, or Whom It May Concern:

The following is a Bill of Particulars of the defendant's claim or title to the premises mentioned in the plaintiff's complaint:

The City of Newark acquired title in fee simple to the premises described in the plaintiff's complaint by condemnation proceedings instituted by virtue of an act entitled "A further supplement to an act entitled 'An Act to incorporate the City of Newark'" (P. L. 1851, page 232).

An award was made by the Commissioners of Condemnation appointed by virtue of said act on July 1, 1853, and payment of said award was made on November 16, 1853, to Peter Lindsley, who was the owner of the premises in question at the time of the condemnation.

Dated June 30th, 1928.

JEROME T. CONGLETON,
Attorney for Defendant.

Agreed State of Facts.

(Filed January 10, 1931.)

ESSEX COUNTY CIRCUIT COURT.

EDWIN L. BENTLEY, *Plaintiff,* v. THE CITY OF NEWARK, *Defendant.*	Action at Law. In Ejectment. Statement of Right in Controversy and Agreed State of Facts.

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

STATEMENT OF RIGHT IN CONTROVERSY.

The plaintiff, as heir-at-law and devisee under the Will of Peter Lindsley, deceased, claims to be the owner in fee simple of a one-fifteenth interest in the lands and premises hereinafter described, and entitled to the possession thereof. The defendant, The City of Newark, claims to be the owner in fee simple of said premises by reason of the condemnation proceedings of 1852 or 1853, hereinafter referred to and to be entitled to use said premises for market purposes or for any other public purpose.

AGREED STATEMENT OF FACTS.

1. PETER LINDSLEY, grand-father of the plaintiff, acquired the title in fee simple from Joseph C. Hornblower and wife, by deed dated October 31, 1832, and recorded April 12, 1833, in Book M-3 of Deeds for Essex County, at page 314, to premises in the City of Newark, Essex County and State of New Jersey, which premises are marked "C" on the map hereto annexed and made a part hereof, and according to said Map are more particularly described as follows:

> Being in the City of Newark, in the County of Essex and State of New Jersey:
>
> BEGINNING at the North-westerly corner of lot conveyed to Peter Lindsley by deed recorded in Book M-3, pages 314-315, dated October 31, 1832; thence Southerly along the Westerly line of said lot 53 feet more or less, to the Northerly line of lot formerly belonging to Christian R. Wolters; thence easterly along the same 30 feet; more or less, to the easterly line of lot conveyed to Peter Lindsley by the above-mentioned deed; thence northerly along the same 53 feet, more or less, to the southerly line of Raymond Boulevard; thence westerly along the same 30.10 feet to the place of BEGINNING.

2. In 1851, the Legislature of the State of New Jersey passed an Act entitled "A further Supplement to an Act entitled: 'An Act to Incorporate the City of Newark' ". (Pamphlet Laws, 1851, page 232.)

3. Pursuant to the provisions of Sections 15 and 16 of said Act of 1851, the Common Council of the

City of Newark, in the year 1852 or 1853 (after receiving a report from the Committee on Markets that the Committee was unable to treat with the owners of lands and other real estate requisite to be taken for the purpose of enlarging the then Public Market place called Centre Market), passed a resolution appointing Commissioners to make an estimate and assessment of the compensation and damages to be received and sustained by any owner or owners of the lands and other real estate, with the appurtenances, which it was the intention of the Common Council to take and which were requisite to be taken and appropriated for the purpose of enlarging the then public market place called Centre Market; the lands referred to, including the lands which are the subject-matter of this suit; and said resolution further provided that the said Commissioners, in making an estimate and assessment of the compensation and damages, had authority to proceed in the same manner as was then provided when lands were to be taken for public streets.

Thereafter, July 1, 1853, the Committee on Markets presented to the Common Council the report of said Commissioners, which report was accepted and it was thereupon resolved that the report of the Commissioners to assess the compensation and damages to be received and sustained by any owner or owners of the lands and other real estate with the appurtenances which it was the intention of the Common Council to take and which were requisite to be taken and appropriated for the purpose of enlarging the then public market place called Centre Market, be ratified and confirmed; and it was thereafter further resolved by the Common Council that the City Treasurer

be authorized to pay the several owners of property taken for said purpose the sums respectively awarded to them; and, thereafter, it was resolved by said Common Council that the Committee on Markets be instructed to take possession of the property taken for the enlargement of the Centre Market and to cause the same to be cleared of buildings, to the end that said lands might without delay be applied to the purpose for which the same were taken by the City.

4. Thereafter, the Treasurer of the City of Newark paid to Peter Lindsley, "in full satisfaction and payment of the damages awarded" him by said Commissioners, the sum of $1,600.00, plus interest of $36.00, making a total of $1,636.00.

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

6. The City of Newark received no deed for said premises from the said Peter Lindsley, his heirs or devisees, but acquired its title to the same by the aforesaid condemnation proceeding (the plaintiff does not hereby admit that the City of Newark acquired a title in fee simple or any other title), and entered into and upon the aforesaid premises and used the same together with adjoining premises for market purposes.

7. In or about the month of February, 1925, or shortly thereafter the City of Newark opened a new market place on premises to the east of Mulberry Street, and disconnected from the premises in question, which new market place is a permanent structure built on lands acquired by the City of Newark for that purpose, is of the same char-

acter as the market that was conducted upon the premises in question and is now and has ever since, about February, 1925, been conducted as such market.

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

The Lefcourt Company is now erecting on the westerly property marked "B" a modern steel and brick office building of about thirty-five stories in height.

9. On or about March 25th, 1924, The City of Newark adopted an ordinance entitled: "An Ordinance to provide for the opening of Commerce Court, from Commerce Street to South Canal Street," which ordinance provided that Commerce Court shall be opened as a public street or highway from Commerce Street to South Canal Street. The premises designated as "C" and "D," on said map, and shown as Commerce Court, are the prem-

ises described in said ordinance. A copy of said ordinance is annexed to this stipulation, and made a part hereof.

10. The Commissioners of Assessments for Local Improvements of the City of Newark made no award to the plaintiffs for damages and benefits caused by the taking of said lands under the said ordinances of March 25, 1924, alleging in their report that "ownership of the property in question is found to be in the City of Newark," and certified and reported the same to the Circuit Court of the County of Essex.

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

11. Peter Lindsley died in April, 1856, leaving a Last Will and Testament duly probated in Book 8 of Wills of Essex County at page 180, wherein he left all of his real estate to his wife, Abigail Lindsley.

Said Abigail Lindsley died intestate in 1857 (See Administration Book C of Essex County, page 90) leaving five (5) children as follows:

(a) Joseph, who died on May 28, 1863, intestate and unmarried;

(b) Irenaeus, who died in 1914, intestate, without issue, leaving a wife Adelaide, who died in 1919 intestate, without issue;

(c) Anna, who subsequently married Lewis Wilbur, both of whom are now deceased, and who left two children them surviving;

(d) James H., who died in 1919, leaving a Last Will and Testament, wherein he devised everything to Mrs. Adele H. Lindsley, who died in 1929, devising the premises in question to her step-son, James Mortimer Lindsley, who is still living;

(e) Augusta, mother of the plaintiff, who married Edwin L. Bentley, both of whom died intestate, leaving five (5) children, of whom the plaintiff is one.

Plaintiff, therefore, is entitled to an undivided one-fifth part of a one-third share, or, in other words, a one-fifteenth interest in and to all the real estate in which Peter Lindsley at death, and Abigail Lindsley at death, had any interest or title of any kind whatever.

12. The statements contained in paragraphs 1 and 11 are matters of which the City has no knowledge, and does neither admit nor deny the same, except that it admits such facts for the purpose of the determination of the issue in this suit.

Dated April 2, 1930.

HORACE & HENRY T. STETSON,
Attorneys for Plaintiff.

FRANK A. BOETTNER,
Corporation Counsel,
Attorney for Defendant.

Agreed State of Facts.

CITY OF NEWARK

Certified Copy of an Ordinance adopted
by the
BOARD OF COMMISSIONERS

(Seal)
William J. Egan
City Clerk.
Newark, N. J.
8728-D.

AN ORDINANCE TO PROVIDE FOR THE OPENING OF COMMERCE COURT FROM COMMERCE STREET TO SOUTH CANAL STREET.

THE BOARD OF COMMISSIONERS OF THE CITY OF NEWARK DO ORDAIN:

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

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

erly line of above mentioned Wolters 115 feet, more or less, to the northerly line of Commerce Street; thence easterly along the northerly line of Commerce Street 30 feet to the place of Beginning.

All as shown on a map prepared under the direction of this Board, which map is hereto attached and made a part hereof and a copy of which map also is on file in the Office of the Chief Engineer, Division of Surveys, Department of Streets and Public Improvements, known and designated as No. 1231-O, dated January 3rd, 1924. Under and by virtue of the provisions of an act entitled "An Act Concerning Municipalities" approved March 27, 1917 (P. L. 1917—319), and the supplements thereto and amendments thereof.

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

Section 3. That the sum of $500.00 is hereby appropriated to pay the cost of said improvement, and for the purpose of meeting said appropriation and temporarily financing said improvement, temporary bonds or notes shall be issued from time to time in an amount not to exceed $500.00 under and by virtue of the provisions of an act entitled "An Act to authorize and regulate the issuance of bonds and other obligations and the incurring of indebtedness by county, city, borough, village, town, township or any municipality governed by

an improvement commission" approved March 22, 1916 (P. L. 1916—525), and the supplements thereto and amendments thereof, which bonds or notes shall bear interest at a rate not to exceed six per centum per annum.

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

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

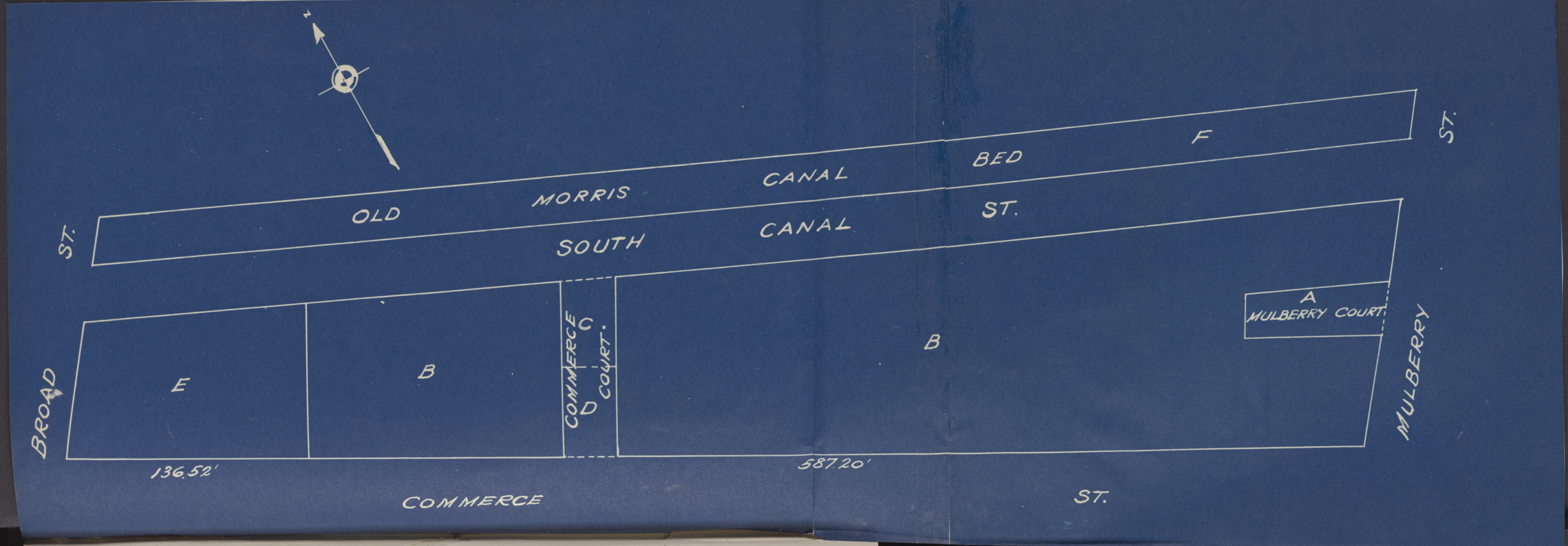
JOHN HOWE
W. J. BRENNEN
F. C. BREIDENBACH
The Board of Commissioners of the City of Newark, N. J.

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

IN TESTIMONY WHEREOF, I have hereunto [SEAL] set my hand, and affixed the seal of the City of Newark, this eighth day of November A. D., 1928.

W. J. EGAN,
City Clerk of Newark, N. J.

(A blue-print of the premises and their situation was attached to this agreed state of facts and is part thereof.)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Decision.

(Filed November 5, 1930.)

EDWIN L. BENTLEY,
Plaintiff,

v.

CITY OF NEWARK,
Defendant.

Action at Law.
Decision.

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

HORACE & HENRY T. STETSON (by WILLIAM HAMILTON OSBORNE, of Counsel), Attorneys for Plaintiff.

FREDERICK H. GROEL, Attorney for Defendant.

SMITH, J.:

This action of ejectment is brought to recover possession of land from the City of Newark, which is part of what was formerly a public market place.

The City's rights were acquired by condemnation under an act entitled "A further supplement to an act entitled 'An act to incorporate the City of Newark'" paragraphs 15 and 16, P. L. 1851, p. 237. The words of the statute are as follows: "That it may be lawful for the common council to take, for the purpose of enlarging the present public market place, called the center market, and for the purpose of sewers and drains, such lands or other real estate and appurtenances as the common council determine to be requisite, compensation being first ascertained and paid therefor, in the same manner as is now provided when lands are

taken for public streets; and all enactments inconsistent herewith are hereby repealed, and the provisions relating to the mode the city shall be reimbursed; expenditures for drains and sewers shall be unaffected hereby."

The original act incorporating the City of Newark, passed in 1836, P. L. 1836, p. 185 at p. 192, gives authority to the City for the erection of a public market, in these words: "For erecting, maintaining, and regulating one or more public markets in said city."

Paragraph 3 of the agreed state of facts sets forth the procedure taken by the city authorities for the condemnation of the property in question and indicates the intention of the city of taking the property for the purpose of enlarging the public market place, called the Center Market.

The proceeding therefore gave the city the rights to the property contemplated by the statute; that is, for a public market.

Such a taking is an appropriation of the fee to public purposes and not the creation of an easement. This is clearly shown by the decision in our Court of Errors and Appeals in the case of *Curry* v. *New York Transit Co.*, 66 N. J. Eq. 313.

Counsel for the plaintiff seems to think if property is taken for the purpose of a public market, that with the abandonment of the use of the property for a public market, the title reverts to the former owners or their successors in title. This claim I cannot agree with. The City takes its fee for public purposes and the limitation against it is to keep the property for public purposes. Ejectment would not lie in this case even though there were an abandonment for the public market, because the act under which the property was taken

provides that it may be used for the maintenance of sewers and drains. A right would therefore continue to be in the city to maintain sewers and drains in this property, even though the plaintiff's contentions are well founded. This right to maintain sewers and drains would in itself defeat ejectment.

I therefore find as a fact that the public rights in the property have not been abandoned and as a matter of law that the fee remains in the defendant, and therefore find judgment for the defendant.

WM. A. SMITH,
Judge.

October 31, 1930.

Judgment.

(Entered November 7, 1930.)

ESSEX COUNTY CIRCUIT COURT.

EDWIN L. BENTLEY,
Plaintiff,

v.

THE CITY OF NEWARK,
Defendant.

Action at Law.
In Ejectment.
Judgment.

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

which the cause was submitted; and there having been no abandonment of the use for which the premises were condemned; and judgment having been rendered in favor of the defendant;

It Is, on this 7th day of November, 1930, on motion of Frederick H. Groel, Attorney of defendant,

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

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

ESSEX COUNTY CIRCUIT COURT.

Edwin L. Bentley, *Plaintiff,* v. City of Newark, *Defendant.*	46394. Action at Law. In Ejectment. Judgment Entered November 3, 1930. Costs $86.60.

Frederick H. Groel, Atty. for Deft.

This action was tried before Judge William A. Smith without a jury at the Essex Circuit Court on November 3, 1930.

Judgment in Ejectment in the above entitled action was rendered in favor of the defendant City of Newark and against the plaintiff Edwin L. Bentley for the sum of Eighty-six Dollars and Sixty Cents Costs of Suit.

Judgment signed and entered November 3, 1930.

William S. Gummere,
C. J.

Book 112 Page 3 C C Judgments

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

New Jersey Court of Errors and Appeals

EDWIN L. BENTLEY, *Plaintiff-Appellant,* *vs.* THE CITY OF NEWARK, *Defendant-Respondent.*	*In Ejectment.* *On Appeal from Essex County Circuit Court.*

BRIEF FOR THE DEFENDANT, THE CITY OF NEWARK.

Facts.

The facts in the Statement of the Right of Controversy set forth the situation sufficiently, so that the City will not burden the Court with any repetition of the same, except to point out that nowhere in the Statement is there any allegation that the City abandoned the premises for market purposes, although the plaintiff in his brief, frequently makes such a statement. The City denies that there was any abandonment, and in a subsequent part of this brief will establish that point.

Question in Controversy.

The only question involved in this case is what interest the City acquired by virtue of the condemnation proceedings instituted in 1852 or 1853, pursuant to Paragraph 15, page 237, of the Session Laws of New Jersey for 1851, known as a further supplement to an act entitled: "An Act to Incorporate the City of Newark." The plaintiff contends that the City acquired either an easement or a base fee. The City denies that it

obtained either of these and insists that what was obtained under said condemnation was an absolute fee simple. If the Court does not agree with the City in this contention then the City insists that it can still devote the lands in question to its present use, even though it may only possess a qualified estate. Section 15 of the aforesaid act, under which the lands were condemned, reads as follows:

> "15. AND BE IT ENACTED, That it may be lawful for the common council to take, for the purpose of enlarging the present public market place, called the centre market, and for the purpose of sewers and drains, such lands or other real estate and appurtenances as the common council determine to be requisite, compensation being first ascertained and paid therefor, in the same manner as is now provided when lands are taken for public streets; and all enactments inconsistent herewith are hereby repealed, and the provisions relating to the mode the City shall be reimbursed; expenditures for drains and sewers shall be unaffected hereby."

I. By virtue of the condemnation proceedings of 1852 or 1853, the City of Newark acquired an estate in fee simple absolute, the title to which is not subject to any right of reversion, nor to being divested.

1.

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

Such interest may be a fee simple absolute, or any lesser estate. In Lewis' Eminent Domain,

Vol. 2 (3rd Ed.), Section 448, the learned author said:

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

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

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

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

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

2.

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

The Statement in the Plaintiff's brief, page 7, unsupported by any authority in point, that there is no case deciding that a fee title has been conferred in the absence of express language in the statute, is to say the least mere talk, as the following will disclose.

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

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

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

> "The plaintiff contends that the City owns nothing which can be the subject of a sale to a private individual. The rights of the city having been acquired solely by condemnation for a public park, it is said that it has only an easement in the land, to use it for park purposes, and therefore nothing which can pass by conveyance. This suggestion is one which might be thought to more directly concern the proposed purchaser for consideration than the plaintiff taxpayer, but we have no hesitation in saying that it is not well made. It is well settled that the state has the power to determine the estate or quantity of interest

> which shall be taken by condemnation proceedings, and may authorize the taking of a fee, as well as an easement only. Heyward *v.* Mayor, etc., 7 N. Y. 214; Commissioners *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Dingley *v.* City of Boston, 100 Mass. 544; Waterworks Co. *v.* Burkhart, 41 Ind. 364; Railroad Co. *v.* Davis, 2 Dev. & B. 451. It is not necessary that the authority to take a fee be given in express terms, or that exact or technical language should be used in the enabling act, in order that the fee or the whole title of the owner pass by the condemnation proceedings."

In the case of *New York Railroad Co.* v. *Trimmer*, 53 N. J. Law, page 1, on page 3, in discussing the rights of a railroad company in lands acquired by condemnation under the General Railroad Act, which did not provide any express language for the acquisition of a fee, but merely said that upon payment or tender of the amount awarded, "the company is empowered to enter upon and take possession of the said lands and materials for the purposes aforesaid," and that said payment or tender shall be considered "plenary evidence of the right of any company incorporated under this act to have, hold, use, occupy, possess and enjoy the said lands or materials." Chief Justice Beasley said:

> "There seems to be no reason why this language as it stands in this statute is to be interpreted differently from what it would if it were found in a deed from a land owner to the company and in this latter event it is not probable that a doubt would arise in the mind of anyone as to the company's right to immediately enter upon the lands thus condemned and to hold them in exclusive possession for the uses of its road."

In *Dingley* v. *City of Boston,* 100 Mass. 544, it was held that under a statute which permitted

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

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

From these cases it is apparent that the omission of the word "title" in the statute of 1852 does not prove that the City did not acquire a fee simple interest, because as Justice Holmes says: "Any language in the Statute which makes its meaning clear is sufficient, and a very little more than 'take and hold' has been held enough." Admittedly, in the Carroll and Bachman cases there can be no question that the City acquired a fee simple absolute, as counsel for Bentley impliedly states. The use of such expressions as "title," "right to possession," "vested in said City," etc., place these two cases in the fee simple class beyond a shadow of a doubt. Perhaps the language in the case at bar is not as strong as the language in the other two cases, but it is sufficiently clear. The statute specifically says the

City shall "take * * * lands or other real estate and appurtenances." What is meant when it says "lands or other real estate?" Why the distinction between "lands" and "Real estate"? There can be no other reason but to indicate that it was the intention of the Legislature to confer upon the City the power to take everything. Vice-Chancellor Walker, in *Philadelphia Trust &c. Co.* v. *Borough of Merchantville,* 74 Equity, page 333, says:

> "Thus it appears that land may be condemned, or water may be condemned, or, for that matter any other species of property may be condemned; but, when land is condemned without qualification, the fee itself, carrying with it all appurtenances, goes to the party acquiring title under the proceedings for that purpose."

3.

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

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

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

4.

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

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

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

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

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

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

5.

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

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

Now we must inquire as to the effect provisions in the statute that land may be condemned "for a certain purpose." Is the estate which may be acquired limited by this language? The law on this point is definitely settled that these words fail to limit the nature or the extent of the estate acquired or to create any right of reverter in the former owner.

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

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

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

> "The minuteness of direction concerning the administration of property conveyed to a

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

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

In *Currie* v. *New York Transit Co. and National Docks R. R. Co.*, 66 N. J. Eq. 313, the Court commented as follows:

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

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

And in *T. W. Phillips Gas & Oil Co.* v. *Lingenfelter*, 105 Atl. 888, it was held that where a school district acquired property by a deed which contained the provision "for school purposes only," such words were purely superfluous and did not have the effect of limiting the estate acquired by the deed.

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

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

6.

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

A. Technical language, not being necessary, the words were broad enough to convey an absolute fee.

The Statute under which the lands were acquired was a special act entitled "A further sup-

plement to an act entitled 'An Act to Incorporate the City of Newark.'" It was not general legislation, but passed for the purpose of permitting the Common Council of the City of Newark to do certain things, one of which was to take "lands or other real estate and appurtenances" for the purpose of enlarging the present public market place, called Center Market, and (*not or*) for the purpose of sewers and drains.

Thus, the "lands or other real estate and appurtenances" acquired under this act were not for market purposes alone, but for sewers and drains as well.

The use of such terms as "Lands and other real estate and appurtenances" does not sound as though the Legislature intended the taking only of an easement, as alleged by counsel in his brief, page 4.

The word "appurtenances," when used in its strictest sense is employed generally for the purpose of including such things as easements or servitudes, but the words "lands" or "real estate" include much more than a mere easement. In fact, to repeat the language of Vice-Chancellor Walker, in *Philadelphia Trust & Co.* v. *Borough of Merchantville*, 74 N. J. Eq. p. 330:

> "When land is condemned without qualification the fee itself, carrying with it all appurtenances, goes to the party acquiring title under proceedings for that purpose."

Land has been held in this State to include every sort of interest. In *Darlington* v. *West Jersey and Seashore Ry. Co.*, 1 Misc. Rep. 413, the word "land" in its generic sense was held to embrace wharfs. Justice Dixon, in passing on the 11th section of the Essex Public Road Act, which

contained the phrase "land and real estate," in *State* v. *Richenor*, 41 N. J. L. 345, said:

> "In statutes providing for compensation to owners of land taken for public use, the word 'land' has been held to cover the claims of all persons having rights in the land."

In *John Ross* v. *Elizabeth Town and Somerville R. R. Co.*, 3 N. J. Eq. Rep. 422, an application was made for an injunction by the remainder man, restraining the railroad company from entering upon land that has been condemned and paid for, under the provisions of an act incorporating the railroad company, the provisions of which act were similar to that of the present railroad act, and provided for the payment of damages for the occupancy of lands taken by the company. Payment had been made by the railroad company to the occupant of the lands who only held a life interest in the same. Chancellor Pennington, in delivering the opinion, said:

> "Those in remainder have therefore a strong and in many cases a much stronger claim for damages than the present occupant. The words of the act also favor this construction; for in the seventh section, upon the application to the Justice of the Supreme Court for the appointment of commissioners a description of the property is required to be given to such justice, with the names of the occupant and owner or owners. The claims of all persons having rights in the land are clearly to be satisfied, as well as those who have the reversionary interest as those having the present estate."

From these cases it is apparent that when the Legislature used the expression "lands or other real estate and appurtenances," it conferred upon the City more than the mere power to take

an easement or a base fee, but all the rights in the land, embracing the claims of those

> "who have a reversionary interest as well as those having a present estate,"

in other words, an absolute fee simple.

B. The statute did not limit the City to the rights acquired when lands were condemned for public streets.

But counsel for the plaintiff goes a step further to sustain his position, he alleges that since the statute says:

> "Compensation being ascertained and paid therefor in the same manner as is now provided when lands are taken for public streets"

that this means that only an easement was acquired because he alleges that all the City acquired when it took lands for public streets was an easement. No authority is cited to sustain this point, except Section 30 of the Charter of the City of Newark, page 198, Session Laws of 1836, relating to the condemnation of land for public streets, the language of which is similar, he says, to the case at bar. From this counsel argues that since only an easement is required in the instant case, the easement must be acquired when lands are taken for public streets, because the language of the statutes is the same. This is an argument in a circle, and begs the whole question as to whether an easement or a fee simple is acquired when lands are condemned under either of these statutes.

But if for the sake of argument it were admitted that all the City obtained by the condemnation of lands for public street purposes was an easement, that does not affect this case because the statute does not say that the City acquired

by condemnation the same rights as it obtains when lands are condemned for public streets.

Counsel for Bentley has endeavored to place a construction upon this statute that is entirely foreign to its true meaning. The words of the statute

> "Compensation being first ascertained and paid therefor in the same manner as is now provided when lands are taken for public streets"

simply means that the manner of ascertaining compensation shall be that which was used when lands were taken for public streets.

The taking of lands by power of eminent domain in market cases was a new procedure in 1851. Market cases were likely to be rare in comparison with street or road cases, in which the jurisdiction and proceedings were familiar. No one for a minute would deny that even in 1852 a definite method of procedure would have to be followed in the condemning of lands whether the lands were to be used for markets, parks or streets. Therefore, the Legislature took the easiest and most natural way by prescribing the method used in street and road cases as the mode to be followed in market cases. The proceedings in street cases were set up as the model or standard to be followed as far as practicable.

This is also apparent from the fact that the last part of Section 15 repeals inconsistent enactments, and in particular

> "the provisions relating to the mode the city shall be reimbursed."

In order that the adjoining property owners would not be assessed for any benefits as they were under the procedure for street openings, this

saving clause was inserted to change the proceedings in that respect.

This was not the first time that the Legislature had adopted as a model the procedure used in street openings for the condemnation of lands for public streets. The Legislature immediately preceding the one which passed Section 15 of the Pamphlet Laws of 1851 (p. 237) on February 14, 1850, passed a further supplement to the act entitled "An Act to Incorporate the City of Newark," and among the powers conferred thereunder, permitted the Common Council of the City of Newark to condemn lands for public squares or parks, and provided in section 10 of the Pamphlet Laws of 1850 (p. 69):

> "That all the provisions of an act entitled 'An Act to incorporate the City of Newark' passed February the twenty ninth, eighteen hundred and thirty six, and of the several supplements thereto now in force, relating to the laying out and opening streets, roads or highways in said city, touching the notices of the times and places of the meetings of the commissioners, the manner of proceeding of said commissioners, the reports to be by them made, the proceedings of the common council thereon, the appeal from the same, and the proceedings upon such appeal, the payments for the lands, with the appurtenances, taken and appropriated and of the other expenses incurred, and the collection of the amounts assessed against the owners of houses and lots and lands intended to be benefited as aforesaid, to the liens upon lands, the sale and redemption thereof, and all other of the said provisions, shall be deemed and taken to be parts of this act, so far as the same may be applicable to the laying out and establishing public squares or parks, except so far as the same may be repugnant to or inconsistent with the provisions of the previous sections of this act."

Thus, when the land taken was for park purposes, the procedure used in acquiring of lands for public streets was to be followed.

In *Phillips* v. *Co. Commrs. of Middlesex*, 122 Mass. 258, the statute authorized the county commissioners to "remove all dams" on certain streams "for the purpose of proper drainage" in certain towns, and provided that damages therefor should be assessed "in the same manner" as "in laying out of highways." The Court in passing upon statute, said:

> "This general reference to the provisions of the highway acts cannot be interpreted as requiring that these provisions shall be strictly and literally applied to all proceedings under this act. The phase 'in the same manner' means, by similar proceedings, so far as such proceedings are applicable to the subject matter. Much that is necessary in order to adapt the provisions of the General Statutes in substance and effect to the new conditions of this special act, must be left to necessary implication."

In other words, all that was meant by the Legislature when it said

> "Compensation being first ascertained and paid therefor in the same manner as is now provided when lands are taken for public streets"

was that the proceedings should be the same as those required when lands were condemned for public streets.

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

In determining the intent of the Legislature in statutes of this nature, the distinction has frequently been made upon the basis of the charac-

ter of the use and occupation to be made of the property by the condemning corporations.

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

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

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

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

It is not necessary that the statute expressly use the language "fee simple absolute" in order that such a power be conferred upon the

City for condemnation purposes if the use to which the premises are to be put requires such a title. For, as the Court said in *Keatley* v. *Sommers County Court*, 73 S. E. 706:

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

Ample authority has already been submitted in paragraph 5 to negative the possible contention that the use of the words "for market purposes" in the statute under which the land was condemned have the effect of limiting the nature or extent of the estate acquired.

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

7.

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

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

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

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

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

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

> "Where the state has taken a fee simple or authorized the taking thereof and compensated the owner therefor, the subsequent abandonment of the use will not reinvest the owner with the title."

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

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

where the Court said:

> "But when the land has been acquired for public use, as for a park, by condemnation

and payment to the owner of its full value, or by sale or purchase, it seems to be competent for the legislature to authorize a municipality so requiring it to use it for other purposes."

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

8.

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

Although the plaintiff on page 2 in Statement of Facts says that the City abandoned its use of said premises as a market place, the Stipulation of Facts nowhere contains any statement that the City abandoned the premises, and the City specifically denies that there was any abandonment. It is true that the Stipulation in paragraph 7 says that the City opened a new market place of the same character as the market conducted on these premises, and that the old market has not been used since February, 1925, and that the Lefcourt Building has been erected on the property adjoining, but even this does not constitute an abandonment. There is nothing to prevent the City from using the premises at some subsequent date for market purposes, should it so desire, and even if the City ceased to use the premises for market purposes for

twenty (20) years, that in itself does not constitute an abandonment. As the Court said in the *Raritan Power Co.* v. *Vighto*, 21 Equity 463, on page 480:

> "To accomplish an abandonment, the facts or circumstances must clearly indicate such an intention. Abandonment is a question of intention. Non-user is a fact in determining it, but is not, even for twenty years, conclusive evidence in itself of an abandonment. Its weight must depend upon the intention to be drawn from its duration, character, and accompanying circumstances. Washb. on Easem. 551-6; Crossley *v.* Lightowler, Law R. 3 Eq. 279; Ward *v.* Ward, 14 E. L. & E. 413; Queen *v.* Charley, 12 Q. B. 515; Stokoe *v.* Singers, 8 E. & B. 31."

But must the lands be used exclusively for market purposes, and is a failure to use them for market purposes alone an abandonment under the statute in this case? The statute conferred the power of condemnation upon the City not for one purpose, but to quote the language itself, "for the purpose of enlarging the present public market place, called the Centre Market, AND *for the purpose of sewers and drains.*"

It is to be noted that the sentence is conjunctive, not disjunctive, and that the lands were condemned under the statute for two purposes. The sewers and drains were of just as great importance as the market itself. Even the plaintiff must admit that the City has not abandoned the premises for this purpose. They are still used for sewers and drains, and when used as a public street will continue to be used for sewers and drains in the same manner that they were used in the past. In other words, the City is using the lands for practically the same purpose and in the same manner today, so far as the

sewers and drians are concerned, as it used them seventy-eight years ago. Clearly, on this phase of the case there can be no room for a reasonable difference of opinion. The lands have not been abandoned and are used the same as heretofore.

Counsel, in the brief for the plaintiff-appellant, contends that the City did not condemn the land for sewers and drains nor use it for sewers and drains (p. 21, Brief). To sustain this point he alleges that since the resolution passed by the Common Council appointing commissioners to proceed with the acquisition of the lands was silent as to sewers and drains, therefore, the City did not acquire the land for that purpose. It does not necessarily follow that such is the case. While it may be that the main purpose of the Common Council was to acquire the property for market purposes, yet it is very evident from what took place after the acquisition of the land, that the Common Council also intended that the land be acquired for the dual purpose of enlarging a market and also for sewers and drains. Ever since the acquisition of the land by the City it has been used for the latter purpose and an examination of the premises at the present time will indicate the fact that it is still used for sewers and drainage purposes. So that what the governing body actually did, which, after all, is the best means of determining what the intent of the governing body was, is in direct contradiction to the statements of plaintiff-appellant.

Even assuming, for the sake of argument, that it was not the original intention of the City to acquire this property for purpose of sewers and drains, it does not follow that if the City had power to acquire and use it for this purpose and subsequently did use it for this purpose, plaintiff-appellant would have the right to eject the

City from the premises when it was using it for a perfectly proper purpose under the statute.

Judge Smith, of the Essex County Circuit Court, who is familiar with the situation in Newark, and who decided this case when submitted to him at the Essex Circuit, correctly analyzed the situation when he said:

> "Counsel for the plaintiff seems to think if property is taken for the purpose of a public market, that with the abandonment of the use of the property for a public market, the title reverts to the former owners or their successors in title. This claim I cannot agree with. The City takes its fee for public purposes and the limitation against it is to keep the property for public purposes. Ejectment would not lie in this case even though there were an abandonment for the public market, because the act under which the property was taken provides that it may be used for the maintenance of sewers and drains. A right would therefore continue to be in the city to maintain sewers and drains in this property, even though the plaintiff's contentions are well founded. This right to maintain sewers and drains would in itself defeat ejectment.
>
> I therefore find as a fact that the public rights in the property have not been abandoned and as a matter of law that the fee remains in the defendant, and therefore find judgment for the defendant."

2.

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

Counsel for the plaintiff has cited the case of *State* v. *Laverack,* 34 N. J. Law 201. At first

blush it would seem to indicate on reading of that case, that land acquired for one purpose cannot be devoted to any other use, except the extremely narrow one for which it was condemned. An examination of the case does not disclose that to be the real holding. The case arose upon an appeal from a conviction for an assault and battery, which occurred as the result of the sale of farm produce from a farm wagon placed close to the curb in a street in front of the defendant's property. The City ordinances permitted the use of the street as a public market for the sale of country produce. The City in this case had merely an easement in the street, and under these circumstances the Court thought that the appropriation by the City of the land of the defendant to the purpose of a market was an additional burden upon the landowner because the market was an obstruction to the highway. In reaching this conclusion the Court discussed very thoroughly the principle of compensation for additional burdens, but did not deny that land acquired by the public for one purpose could not be devoted to other and additional uses, provided there was no additional burden placed upon the adjoining property. This principle was applied in the case of *Hitchman* v. *Paterson Horse Railroad Co.*, 2 C. E. Green 76, where the Court decided that the establishment of a horse railway in the highway was not an additional burden upon the adjoining landowners of the highway, but a legitimate use of the same. Although that use of the highway for horse cars was somewhat different from that produced by the ordinary vehicles, the rights of the landowner were not affected, and it did not interfere with the use of his property any more than the ordinary

use of the highway. Comparing the Horse Car case with the Laverack case, the Court said where an additional easement is created, such as the holding of a market in the street, then the adjoining landowner is entitled to compensation, but if no additional easement is created, no greater burden is placed upon the adjoining landowner, and the use of the premises is merely, "a new mode of its legitimate and ordinary use," then such use would be a perfectly proper one. In the words of *Carter* v. *Wright,* 3 Dutcher 76,

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

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

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

In other words, the Court was of the opinion that if an easement is acquired by the City for the holding of a public market, that the compensation paid for it would be substantially greater than that paid for street purposes, so that if the City in the case at bar acquired by

condemnation only an easement for market purposes, in restricting the use of the land now to street purposes no greater burden is placed upon the landowner, but on the contrary benefits are conferred upon him.

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

The case of *State* v. *Laverack* is one where the landowner owns to the center of the street. His adjoining property, in which he has an absolute fee simple interest, is harmed thereby. In the case at bar we have no adjoining landowners. The City when it acquired the property took everything. There was no dominant and servient relationship of estates. There can be no easement in the case at bar. When counsel for the plaintiff contends in his brief that the City of Newark took an easement in the property acquired under the condemnation proceedings, he appears to be unfamiliar with the true nature of an easement, and of what it consists, because in the instant case it is legally impossible for an easement to have arisen. Bouvier, in his law dictionary, on page 967, under the title "Easement" defines it as follows:

> "A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in

the owner, 2 Washb. R. P. 25; *Clark* v. *Glidden*, 60 Vt. 702, 15 Atl. 358.

A privilege which the owner of one adjacent tenement hath of another, existing in respect of their several tenancies, by which that owner against whose tenements the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists.

Although the terms are sometimes used as if convertible, properly speaking easement refers to the right enjoyed by one and servitude the burden imposed upon the other."

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

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

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

The principle as fully developed by the Chief Justice in *State* v. *Laverack* was adopted by At-

torney-General Thomas F. McCran in an opinion submitted by him, pursuant to a resolution adopted by the New Jersey State Senate January 24, 1921, in reference to the abandonment of the Morris Canal and Appointment of Commissioners. One of the questions submitted to him by the Senate was as follows:

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

His answer to this question was as follows:

> "A 5. The statute authorized the Canal Company to acquire the necessary property for the carrying on of the business. The company acquired where the grant was without limitation what amounted to a fee for the time limited in the statute so long as used for such purpose. It is impossible to define the respective rights of the parties should the canal property be abandoned for public purposes when the property shall be taken over by the State unless an examination shall be made of the deeds of conveyance. Most of the conveyances where there was no conveyance in fee would, probably, be construed to contain clauses indicating a condition subsequent vesting in the grantee and the State taking under it. The words

'creating such condition' when indicated within the limitations of a proper construction, are such phrases as 'on condition,' 'providing,' 'so that,' 'so as,' or 'if it happen,' 'as long as.' If the deeds do not indicate the intention to limit the Canal Company by a condition, but use words importing another intention and the State should abandon the canal for canal purposes, it would not, in my opinion, operate to cause the property to revert to the original owners or their heirs, nor would this occur if, as suggested in the question, the property is to be utilized as a public highway, such as an electric line, even if such a condition has been expressed by the original grantors.

Section 25 of the act provides that the canal when completed shall forever thereafter be esteemed a public highway, free for the transportation of any goods, commodities or produce whatsoever. A case somewhat similar was that of the LANCASTER LATERAL CANAL COMPANY IN OHIO, incorporated in 1826, which was ultimately taken over by the State and the property leased to a railroad company. This action was upheld by the highest courts of that State and the Supreme Court of the United States, and it was there held that the property was taken by a title for the uses and purposes of the canal, but that the State by leasing the land for purposes of a railroad did not extinguish the original easement, but that the railroad took the property subject to the duty of making compensation to the owner of the freehold where there had been limited conveyances for the purpose to the extent of the value of the additional burden imposed upon the land and such damage as might result from the new use.

My answer is, therefore, that notwithstanding a condition subsequent may be found to exist in some of the deeds of conveyance to the Canal Company, though under the rule the land may revert to the reversioner, nevertheless, if the land is continued

> for the use of a public highway for the transportation of goods, etc., then the rights of the reversioner consist only in receiving compensation for the additional burden placed upon the land by the change of its use and such damage as might also result therefrom, if any."

The same ruling was adopted in the State of Massachusetts upon the change of use of canal property in that State.

To like effect is the case of *Strock* v. *East Orange*, 77 Atlantic Reporter, 1051. The defendant municipality was authorized by the Playground Act, as amended in 1908, to acquire a playground by rental, purchase or condemnation. By a supplement to that act passed in 1908, the municipalities were permitted to use these grounds in a limited manner for exhibition and games. Discussing the legality of the municipality using the land for other than playground purposes, the Court said on page 624:

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

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

> "It sometimes becomes expedient to abandon the original use and to substitute a different one. The owner of the fee, who has received compensation for a perpetual easement in the land, is in no position to require that the public use continue precisely the same, or that it be operated by the same public agent. If the new use is no more onerous

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

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

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

Counsel for the plaintiff in his brief makes a great point of the proposition that statutes conferring the power of condemning property should be strictly construed. A number of cases are cited to establish this point, but there is one fact

that must not be overlooked in his case. Almost all of the cases cited by counsel are cases not involving a municipality, which is a public corporation, but public utilities, which are private corporations performing public functions, subject to state or federal regulations.

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

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

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

Curry *v.* New York Transit Company;

Pennsylvania Railroad Company *v.* Breckenridge;

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

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

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

Certainly the attitude of the Court in construing a statute conferring the power of eminent domain upon a private corporation would be quite different than that applying to a public corporation like the City. One is a private corporation engaged for profit, the other a public corporation created for the common good of the citizens at large. Public opinion, many times, has shown itself to be hostile toward railroad companies, water companies, public service corporations, and other utilities of that nature. Naturally, the Court would be very slow in construing the statutes relating to corporations of this kind by giving these corporations more general powers. The case of a municipality is entirely different. It ex-

ercises the power of condemnation in the interest of the people for the common good, and its use of public property is directed in the interest of the public welfare. For this court to interpret the statute in the narrow spirit of the days of common law pleading would work a tremendous hardship upon the taxpayers of the City of Newark.

There is one case upon which the plaintiffs lay particular stress, and which at first blush appears to be a case supporting plaintiff's position. Its title: *"Slingerland* v. *Newark,"* 54 Law 62, would lead one to believe that this is somewhat different than the railroad and pipe line cases, but an examination of the case indicates that it should not be regarded in any different light than those already mentioned. The power of eminent domain which the city was using in this case was invoked in aide of a private company, the celebrated East Jersey Water Company, which was to supply water to the city and whose works the city had a right to purchase. Here again is a case in which a private corporation is either directly or indirectly involved, and is not a case where the City is condemning lands entirely for its own use. It was because of this fact that the City did not seek to obtain a fee interest, and purposely did not define or seek to describe the interest which it wished to acquire. (See last paragraph of case, p. 69.) Under the circumstances, the acquisition of an absolute fee in this case by the City would be subject to the very poignant criticism that such an interest was inconsistent with the purposes for which the lands were to be used. Certainly, this case is not at all similar to the case at bar, where the City was operating its own public market and was acquiring land for its own purposes and not that of any private corporation or individual.

Finally, the case did not involve a question similar to the one in the case at bar. It was an opinion delivered upon the granting of a writ of certiorari, bringing under review certain proceedings taken by the Mayor and Common Council of the City of Newark to condemn lands for the purposes of laying down and constructing pipe lines, so that the question involved in the case was "whether the City is endeavoring to apply the power of eminent domain for a lawful public use" (p. 65). In short, it was a review of the legality of certain condemnation proceedings, and the extent of the City's power to condemn under a particular statute. Thus, all the discussion in the case relative to the disposition of the property should the land be abandoned for public use is mere *obiter dictum,* and not involved at all in the question at issue. This same argument applies with equal force to some of the other cases cited by counsel for the plaintiffs, as stated by the Chief Justice himself in the case of *Curry* v. *N. Y. Transit Co.,* 66 Equity 316, where he said:

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

In conclusion, counsel for the City of Newark wishes to bring to the Court's attention, one fact which needs no citation of law to establish the justice of the City's claim.

Here is a piece of property, condemned some eighty years ago, at which time the owner received full and fair compensation. All of his land was taken. There was no dominant tene-

ment, no property of the plaintiff's that would be burdened by the change that the City has made. Plaintiff stands in the same position in 1930 as he did in 1852 or 1853, when the lands were acquired. During all this period of time, the property in this vicinity has been increasing in value. The City has been developing with rapid strides. The plaintiff has done nothing to increase the value of this property. To suddenly and gratuitously present the heirs of the owner with a windfall, and to have them succeed to the harvest to which the public is properly entitled, would indeed work a great injustice. The weight or authority has recognized the harshness of any reversion in cases of this character, and as a general rule has adopted the view that an absolute fee simple title has been acquired in cases of this nature, or else that the property may be devoted to slightly different uses, so long as no greater burden is imposed.

What the plaintiff is seeking to do in this case is to have the Court find in these condemnation proceedings a condition subsequent which would defeat the rights of the public. Conditions subsequent have always been looked upon with disfavor, especially when they would work a forfeiture and are invoked to defeat the public interest.

Respectfully submitted,

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Attorneys for Defendant,
The City of Newark.

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~~To be argued by~~
~~Wm. Hamilton Osborne.~~

New Jersey Court of Errors and Appeals

Edwin L. Bentley, *Plaintiff-Appellant,* *v.* The City of Newark, *Defendant-Respondent.*	In Ejectment. On Appeal From Essex County Circuit Court Judgment.

BRIEF OF PLAINTIFF-APPELLANT.

This is an appeal from a judgment entered in an ejectment suit in favor of defendant-respondent against plaintiff-appellant (see Judgment, p. 23): which judgment is based upon a decision (p. 21) rendered by a Judge of the Essex Circuit Court upon an Agreed State of Facts sitting without a jury.

The facts are set forth in the Stipulation (p. 11). They are not here repeated because fully set forth therein. In brief the plaintiff's claim is that when the market place in Newark was abandoned in 1925, certain lands which are the subject of this suit reverted to the heirs of the original owner. The Court below held that the City acquired a fee, and that there was no reverter.

Note: *This case differs materially from other cases being considered at the same time, in this respect:*

In this suit the Act of 1851, under which the lands were taken, DID NOT authorize the taking of any TITLE.

This case involves a portion of "Commerce Court" as shown on the map annexed to the stipulation in this suit.

This piece of land was condemned in 1852, pursuant to the Session Laws of New Jersey, 1851, page 232, at page 237, paragraph 15 (relating to the City of Newark, N. J.):

> "15. *And be it enacted,* That it may be lawful for the Common Council to take, for the purpose of enlarging the present public market place, called the Centre Market, and for the purpose of sewers and drains, such lands or other real estate and appurtenances as the Common Council determine to be requisite, compensation being first ascertained and paid therefor, in the same manner as is now provided when lands are taken for public streets;"

Acting solely by virtue of this Act, the City of Newark in 1852 or 1853 took possession of the land pursuant to a resolution to take lands "requisite to be taken and appropriated for the purpose of enlarging the then public market place called Centre Market."

(See Stipulation, p. 12, par. 3.)

No deed was taken by the City (Stipulation, p. 14, par. 6).

In 1853 the Treasurer of the City of Newark paid to Peter Lindsley "in full satisfaction and payment of the damages awarded" him by the Commissioners, the sum of Sixteen Hundred Thirty-six ($1636) Dollars (Stipulation, p. 14, par. 4).

In 1853 the City of Newark entered into possession of the land and used the same for market purposes (Stipulation, p. 14, par. 6).

In 1925 the City of Newark abandoned its use of said premises as a market place (Stipulation, p. 14, par. 7; p. 15, pars. 8, 9).

The plaintiff-appellant contends that the lands thereupon reverted to him, since he derives from the original owner.

Attention is here called to the fact that since the 1916 Amendment of the Practice Act, where Court hears a case without a jury, on submission of a state of facts, *no exception need be taken to Courts findings,* provided errors are specified in the grounds of appeal.

See:

Pannonia Building & Loan Association v. *West Side Trust Co.*, 93 N. J. Law 377 (Court of Errors).

POINTS

I.

The Correct Principle of Law.

(*See all Grounds of Appeal.*)

The following is, we affirm, a correct statement of the law governing this case:

> *"The appropriation of land under the power of eminent domain does not give a fee-simple estate in the absence of express statutory language to that effect, but only a right to use and occupy the land for the purpose for which it is taken.*
>
> "Under Act * * * authorizing school directors to occupy sufficient ground for the erection of school buildings, the title acquired by the school district is merely a right to use and occupy the land condemned, *and when this use ceases the title reverts to the original owners.*"
>
> *Lazarus* v. *Morris*, 61 Atl. Rep. 815.

(While this case is one decided by the Supreme Court of Pennsylvania, we cite it this early in this brief, with the conviction that it expresses the law of the State of New Jersey governing the questions at issue herein.)

This case further says:

> "In this case it is not necessary to consider what constitutes an abandonment, *as it is conceded the school district has ceased to use and occupy the land.*"

II.

The only right in the lands acquired by the City was through the Act of 1851, and the authorized proceedings thereunder.

(*Grounds 3, 4, 5 and 9.*)

Let us see what that right *was.*

The Act of 1851 provided that the lands should be taken "for the purpose of enlarging the present public market place, called the Centre Market" * * * *"in the same manner as is now provided where lands are taken for public streets."*

Taking the latter language first, we refer to the Charter of the City of Newark found in Pamphlet Laws of 1836 of New Jersey, "An Act to Incorporate the City of Newark" and to paragraph 30 thereof, which provides for the taking of land for streets, by language in substance similar to paragraph 15, page 237, Laws 1851, providing for the market place.

We call attention to this, because it is very clear that the City, *when it took lands for streets, never acquired anything but an easement in the lands so taken.*

There is no mention of *title* in paragraph 30 of the Charter, and there is no mention of *title* in the Act of 1851.

Clearly the Legislature of 1851 had in mind that the City would, *in taking lands for market place, parallel the situation where it took lands for streets.*

Therefore, we find the Treasurer of the City of Newark paying Sixteen Hundred Thirty-six ($1636) Dollars to Peter Lindsley in 1853 "in payment of the damages" awarded him (Stipulation, p. 14, par. 4).

Nowhere do we find payment to him for the value of his land, nor for his title. (Parenthetically we believe the city will here claim that because it took lands for a market place, it can, with impunity, abandon that use, and put the lands to use as a street. Of this later. The Act of 1851 clearly related to use for market purposes and not for street purposes.)

The method of condemning lands for streets in 1851 was the method provided for in paragraph 30 of the Charter of the City of Newark, adopted in 1836.

Regarding the language used by the statute, see *Currie, et al.* v. *New York Transit Co., et al.*, 66 N. J. Eq. 313 (Ct. Errors):

> "It needs no argument to show that the interest acquired in land by virtue of proceedings taken under the one statute (giving a fee title) is as widely different from that acquired from proceedings taken under the other (statute not giving fee title) as would be the case were the interests obtained by * * * grant."
>
> "When they have made payment, they are to have, hold, use, occupy, possess, and enjoy the land, *so long as they devote it to the uses for which they are authorized to acquire it.*"

If the legislature had intended to authorize the taking of a title or a fee title, it would have ex-

pressed that intention in words. Compare this act with another:

The Act of 1886, Chapter CXCI, is the Act involved in the *two other cases now before this court,* —the *Bachman* case and the *Carroll* case.

There the language on page 269 of the Laws of 1886, near bottom of page, is as follows:

> "* * * immediately upon the payment * * * *the title to and the right of possession of such property* shall immediately *become vested* in such city."

On page 270, Par. 6 of the Act of 1886, it is provided:

> "That all *titles* taken for the purposes mentioned in this Act, shall be in the name of the City."

If the legislature, in one act (that of 1886), provides for the taking of a title, and in another act (that of 1851), makes no such provision, it is a fair deduction that in the *one* case, title is acquired, and in the *other, no* title is acquired.

Nichols on Eminent Domain, Sec. 225, p. 688:

> "In the *great majority* of cases in which land is taken by eminent domain the title acquired is not a fee, but is merely an easement."

Sec. 150, p. 461 (Nichols):

> "If an *easement will satisfy the public needs,* to *take the fee would be unjust to the owner,* who is *entitled* to retain whatever the public needs do not require, * * *. The owner retains the title to the land in fee. * * * The estate or interest which is acquired by eminent domain when it is not necessary to condemn the fee is usually called an easement or servitude."

See:

Currie v. *N. Y. Transit Co.*, 66 N. J. Eq. 313, Court of Errors, *supra*, held (p. 318):

"When they have made the payment they are to have, hold, use, occupy, possess and enjoy *the land* so long as they devote it to the uses for which they are authorized to acquire it.

"Where land is held by a railroad company under a deed containing the words of this statute, it can hardly be doubted that the conveyance * * * operates to * * * vest the same in the company so long * * * as it continues to devote the land to the uses which its charter prescribes, 'and there seems no reason (to quote the language of Chief-Justice BEASLEY in *New York, Susquehanna and Western Railroad Co.* v. *Trimmer, supra*) why this language, as it stands in this statute, is to be interpreted differently from what it would if it were found in a deed from the landowner to the company.'"

In this and similar cases, the New Jersey Courts have decided that a *fee title* was given *and acquired because the statute in those given cases contained adequate and unmistakable language giving a fee.*

But there is *no case* deciding that a fee title has been conferred *in the absence of express language in the statute.*

"What is not plainly given is withheld."

So held in Court of Errors in

Pipe Line Co. v. *D. L. & W. R. R. Co.*, 62 N. J. L., p. 254 at p. 262.

The case of *Philadelphia Trust Co.* v. *Merchantville*, 74 N. J. Equity 330, at page 333, does not apply. This case is cited in the City Counsel's brief.

A reading of that case will show that the case did not involve the degree of title, nor any similar question. All that it involved was the question whether, when *land* was condemned, *water* on the land was also subject to the same condemnation. The paragraph on page 333 referred to does not decide any question in any way related to the present controversy.

Comparison of the language of the Act of 1851 with other acts shows that such language did not import a fee title.

We repeat that where the legislature intends to give a fee title, it must clearly so provide.

Justice DEPUE in *De Camp* v. *Hibernia,* 47 N. J. Law, page 43, says:

> *"All powers of this nature will be strictly construed—what is not expressly given is withheld."*

There are no decisions in the State of New Jersey contrary to that pronouncement.

The legislature can, and does at times, provide for the passing of the fee; where the legislature *intends fee title to be taken,* it expressly so provides by the Act itself.

See Chapter 152, Laws 1917, page 380 (for instance):

> "Upon the acceptance of any such award, *title* to such lands and real estate shall vest in the municipality."

School Act, Compiled Statutes of N. J., Vol. 4, pages 4750-51, Sec. 84—refers to "The *Title* to School Property."

Same Act—C. S. N. J., Vol. 4, pages 4821-2, Sec. 280—The award of the Commissioners aforesaid, and the payment of the money, shall *vest* in the Trustees of the School District the lands and

premises described in the Award, *the same estate* as would have vested in them had the owner conveyed the same to the trustees of said school district *in fee simple* (Act 1888, p. 43). C. S. N. J., page 4823, Sec. 285: "—immediately upon payment * * * the *title* to *and* the *right of possession* shall immediately *vest* * * *."

Sec. 286: "All titles taken."

The above statutes are set forth merely to show that when the legislature *intends* to award title or fee title, it *expressly says so.*

It may be that exact and technical *language* need not be used by the legislature, as argued in the City Counsel's brief, but to *overcome* the general rule that "what is not *expressly* given is *withheld,*" the legislature must make it clear that a fee title is intended.

Why did the legislature in the Act of 1851 say *nothing* about title and nothing about fee: and why does it, in the other acts referred to, provide very expressly for a fee title: unless it intended to withhold the fee title in one case and grant it in the other.

Regardless of the term used, whether "easement," "servitude" or other description, we still say that no fee title was granted here.

Counsel for the City may rightly argue that in order that there be an easement, only one part of an owner's property may be taken, leaving the balance of it subject to the easement. As in the case of a farmer, taking a strip 40 feet wide for a county road. Where the *entire* land and right to possession of land is taken for a certain purpose, it would be more proper to say that *possession* and *the right of possession* of the land is taken, *for the purposes for which taken.*

Cases relating to the so-called "increase of burden" have no place in this discussion. Those cases relate to a situation where *part* of a man's property is taken, say, for a road, and the question arises as to whether putting car tracks, telephone poles and the like, upon that road, will increase the burden on the property *not* taken.

Counsel for respondent cites

> *Strock* v. *Mayor, &c., of East Orange,* 77 Atl. Rep. 1051,

but that case does not apply.

All that that case decides is that "the use of public playgrounds for outdoor exhibitions and contracts for a limited time under direction of the Playground Commissioners is not inconsistent with the purposes for which such playgrounds were authorized by the legislature and acquired by the Municipality."

The Act of the Legislature under which the lands in the *Strock* case were taken is Chapter 117, Laws of 1907, page 279, at page 280, Sec. 2, last three lines, which provide:

> "The *title* to all lands so purchased or taken shall *vest* in the City, and all leases of lands for the purposes of this act shall be in the name of the City."

This is just another sample of the legislature expressing in words its grant of *title, vesting* of title, etc.

The *Strock* case *assumes* that the Municipality acquired a fee title, because the act said it did.

Care must be taken, in the perusal of cases relating to this subject, whether New Jersey cases or those of another state, to determine to what statute, and to what statutory language, they refer.

POINT III.

Statutes conferring power to condemn property are strictly construed and must be strictly complied with.

(*Grounds 2, 4, 5, 8 and 9.*)

In support of this proposition, see

Vreeland v. *Jersey City*, 54 N. J. L. 49;
Manda v. *Orange*, 75 N. J. L. 251:

"Where the State invests a corporation with the sovereign prerogative of eminent domain, the grant to it should be construed, not as investing it with capacity to take a fee, but as merely giving it power to acquire such an easement in the land taken as will fully enable it to accomplish the purposes for which they were created.

"Such grants, like all public grants, are to be strictly construed. What is not plainly given is to be understood as withheld."

See:

New Jersey Zinc Co. v. *Morris Canal, etc.*, *supra*, at page 399:

"In cases where the Morris Canal and Banking Company have, by force of their charter, and not by grant, taken land for a part of their right of way, there they have simply acquired such an easement in the land as it was necessary for them to have to fully accomplish the purposes of their creation, leaving the fee in the owner."

"Public grants are to be strictly construed. The grantee can take nothing except what his grant plainly gives."

Lehigh Valley R. R. v. *Orange Water Co.*, 42 N. J. Eq. 205.

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

Metlar v. *Middlesex Co.*, 72 N. J. L. 524, at page 526 (Court of Errors).

See:

Vreeland v. *Jersey City, supra;*
De Camp v. *Hibernia Underground R. R. Co.*, 47 N. J. L. 43, at page 50.

In the latter case the Court says:

"All powers of this nature will be strictly construed—what is not expressly given is withheld. * * * It must take what the Legislature authorized it to take, and in the state and condition prescribed by the legislative will."

See also:

National Docks Ry. Co. v. *United New Jersey R. R. Co.*, 52 N. J. Eq. 366, at bottom of page 377:

"The fact is, and no sensible presumption can be made to the contrary, that the *landowner means to grant nothing;* he simply submits to legal compulsion and does not intend to give up anything which the law will permit him to keep."

See also:

Pipe Line Co. v. *D. L. & W. R. R. Co., supra;*
Penn. R. R. Co. v. *Breckenridge*, 60 N. J. L. 583-586.

POINT IV.

Even where title is acquired, an abandonment will cause reverter.

(*Grounds of Appeal 2, 3, 7 and 9.*)

See *Slingerland* v. *City of Newark*, 54 N. J. L. 62, involving Chapter CIV of the Laws of 1891, page 172, at page 173, which provides:

> "* * * on payment * * * the said city is hereby empowered to enter upon and take possession of the said land; and *all title* thereto for the purpose for which the same is taken shall upon such payment * * * pass from the said owners and parties interested to the said city;"

At page 66 (says Court in *Slingerland* case):

> "For this *purpose and for this only*, does the statute transfer the title to the city and authorize it to enter upon and take possession of the land."

And on page 67:

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

See *Citizens' Electric Co.* v. *Susquehanna Boom Co., et al.*, 113 At. Rep. 559 (Sup. Ct. Penna.):

> "The title acquired by condemnation gives the condemnor the exclusive enjoyment of the land as though it owned it in fee *subject* only to reverter to the original owner in case of abandonment. * * *"

It has a base or conditional fee, terminable on the cessor of the use for railroad purposes. A base or conditional fee at Common Law was one made to determine or be defaulted on the happening of some contingent act or event.

> "Where land is acquired for a public park, there is reverter in case the land ceases to be used for a park."
>
> *Lyford* v. *Laconia,* 75 N. H. 220; 72 Atl. Rep. 1085, page 1087.

In that case the statute provided:

> "Whenever any town cannot obtain by contract, for a reasonable price, any land required for public use, such land may be taken, the damages assessed, and the same remedies and proceedings had as in case of laying out highways."

(Singularly enough, the language of that act is *almost identical with our own act of 1851.*)

The Supreme Court of New Hampshire says in its decision that what is taken under the statute is a perpetual easement, *but a discontinuance of the use vests the whole estate* in the original owner.

This decision, found in 72 Atl. Rep. 1085, completely sustains our contention at every point.

POINT V.

Upon abandonment of the purpose for which lands are authorized to be taken, the lands will revert to the original owner.

(*Grounds 3 and 9.*)

See:

> *New Jersey Zinc and Iron Company* v. *Morris Canal and Banking Company, et al.,* 47 N. J. Eq. 598; affirming 44 N. J. Eq. 398, at page 406:

"The word 'lands' was used in this part of the charter * * *" and means:

"That that part of the defendants' charter giving them power to take land, shall be so construed as that they shall not be authorized to take any right or estate in *lands taken by them for the purposes of their canal,* * * *. That they should derive no benefit from it, * * * leaving the fee of the land in its owner."

See also:

Mayor and Aldermen of City of Paterson v. *Town of Kearny,* 87 Atl. Rep. 103:

"Where the real object of a condemnation of public waters was not to supply a public use, or the water was directed to some other use, the right acquired will be at an end, *just as land reverts to the prior owner, as in other cases of condemnation.*"

See:

Nichols on Eminent Domain, Second Edition, Vol. 2, page 1418:

"It is well settled that when an easement has been taken by eminent domain for the public use, * * * if the public use is subsequently discontinued or abandoned, the public easement is extinguished, and the possession of the land reverts to the owner of the fee free from any rights in the public."

Citing:

Paterson v. *Kearny,* 84 N. J. L. 456,

where, at page 458, the Court says:

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

citing:

Slingerland v. *Newark*, 25 Vroom 62, 67 (*supra*).

Again citing *Nichols* (Vol. 2), pages 1419-1420:

"Similarly when a fee is acquired by a municipal or a public service corporation * * * if the use is discontinued or abandoned the title and right to possession revert to the grantor."

See also:

Kennedy v. *Utility Board*, 102 N. J. L. 326 (Ct. of Errors),

in which case the Court held that the privilege of a public corporation to condemn lands is based upon the condition that such lands are to be applied exclusively to the object for the promotion of which they were bestowed.

See also:

The State v. *Laverack*, 34 N. J. L. 201, at page 204,

where the Court holds that where the fee of the soil was in a private owner *and the property was condemned for a street, it could not be used for a market place.*

See also:

Nicholl v. *N. Y. Telephone Company*, 62 N. J. L. 733, at page 736,

which case holds that the right of the Telephone Company to erect a telephone line within the limits of a public highway upon land the fee of which is owned by private persons, imposes an additional servitude upon the fee, and can be acquired, against the consent of such persons, only through the power of eminent domain.

See also:

Lazarus v. *Morris,* 61 Atl. Rep. 815, *supra.*

In that case, the Supreme Court of Pennsylvania held as follows, pages 816-817:

> "The right to take private property for this public use is asserted under the power of eminent domain. * * * It can only be called into operation by the authority of the Legislature, and must be exercised in the manner, by the tribunal, and with the limitations provided by law. * * * The grantee takes what the Act gives, and no more. If the Act gives an absolute estate, * * * the whole title may be acquired. * * * The appropriation of land under the power of eminent domain does not give a fee-simple estate therein, *in the absence of express statutory language to that effect,* but only a right to use and occupy the land for the purposes for which it is taken. * * * The exercise of the right of eminent domain, whether directly by the State, or its authorized grantee, is necessarily in derogation of private right, and the rule is that such authority must be strictly construed. * * *"
>
> "Applying these well-recognized rules to the case at bar, it is clear the school district of Hanover Township only acquired the right to use and occupy the land in dispute for school purposes. The damages assessed by the viewers and paid by the school district to the landowner were based, not on the value of the absolute fee in the land, but on the right to use and occupy the same for school purposes. In some of our cases this right has been called an easement. In others the suggestion has been made that it is a base or conditional fee. But whatever kind of right, estate, or easement the school district acquired, terminated when it ceased to use it for the purpose for which the land was appropriated, and the title reverted to the original owner or those who hold under him. The appellees in this case

represent that title, and are entitled to repossess themselves of the land described in the writ of ejectment."

"In this case it is not necessary to consider what constitutes an abandonment, as it is conceded the school district has ceased to use and occupy the land; nor is it necessary to discuss whether the land so appropriated might be used for other kindred public purposes. The question does not arise under the facts of this case. All of the remaining questions were properly disposed of by the court below."

In *Porter* v. *International Bridge Co.*, 200 N. Y. 234, the Court held:

"The effect of the dedication of the land designated as a public square on the map of the proposed extension was to create an easement in favor of the public. * * * The easement vested * * * in the City of Buffalo. * * * It was not necessary that the fee of the land should pass in order to secure the easement to the public. The naked fee remained in the original proprietors and their successors in interest. * * * An easement may be abandoned by unequivocal acts showing a clear intention to abandon, or by mere nonuser, * * * or some other unequivocal act showing an intention to permanently abandon and give up the easement."

"The occupation of Porter Square by the structures placed * * * there * * * with the sanction of the municipality (bridge and railroad structures) is not consistent with the use of the property thus occupied for the purposes of a public square."

"HELD, that the acts evidencing an intention to abandon the easement for use of the premises in question as a public square are unequivocal and conclusive."

Where land is dedicated to public for park purposes, the construction of a swimming pool on such

property by the city is a use adverse to purposes of dedication. *Hill* v. *Borough of Belmar,* 127 Atl. Rep. 789. In this case, the Court says, page 790:

> "There was a dedication of the tract in question as and for a public park * * *. Under such circumstances the right of possession vests in the municipality, which holds a sort of secondary title in trust for the purposes of the dedication, while the bare legal title remains in the dedicator in trust for the use expressly or impliedly declared in the dedication."

POINT VI.

The land was abandoned by the City.

(*Grounds 2, 3, 7 and 9.*)

It is error for the judgment to find

> "there having been no abandonment of the use for which the premises were condemned"

because the lands were used as a market place until 1925 and this is admitted by the stipulation of facts, but in 1925 the City of Newark abandoned its use of said premises as a market place. Paragraph 7 of the Stipulation of Facts (Case, p. 14) shows the preparation for the abandonment of the same. Paragraph 8 of the Stipulation of Facts (Case, p. 15) shows the actual abandonment and also the new use of part of the adjacent tract, of which the premises in question were a part, when used as a market place. Paragraphs 9 and 10 of the Stipulation of Facts (Case, pp. 15 and 16) show the use to which the city attempted to devote the lands in question, which use was *not* as a public market.

The use of the land as a market place was abandoned. Although the facts contained in the stipulation clearly show an abandonment, the City

Counsel claims that abandonment is a matter of intention and that the stipulation does not say the City intended to abandon.

The City Counsel cites *Raritan Power Co.* v. *Veghte,* 21 N. J. Eq. 463, page 480, but the Court says:

> "The *facts or circumstances* must indicate such an intention."

The facts set forth in the stipulation certainly (see Secs. 7, 8, 9) show that the market place has been moved, the old buildings demolished in February, 1925, a new market place established elsewhere, a lease granted to private parties to build an office building on part of the old market place, an ordinance adopted to open the land in question as a street. How can the City expect to continue the use of the strip of land in question, 30 feet wide, as a market place? What more "facts and circumstances" should be forthcoming to show an intention to abandon the use of the land as a market place?

The Court below found in two similar cases involving other lands in the same market place as follows: "If it is desirable that I find as a fact the question of whether or not the use for which the property was condemned was abandoned, I will find as a fact from the agreed statement of facts *that the use of the property for market purposes has been abandoned; the fact that the city has already passed an ordinance laying out a street over the property in question would be an abandonment.*" See decision in case of *Jennie Bachman* v. *City of Newark,* decided by Hon. Wm. A. Smith, in Essex County Circuit Court on October 9, 1930, and now on appeal before this Court. Also *Carroll, &c.* v. *City of Newark,* decided by same judge, and also now on appeal.

The stipulation of facts in the *Bachman* and *Carroll* cases and this case are the same with the exception of the statutes and the family history. *Therefore, if there was an abandonment in the Carroll and Bachman cases there must have been an abandonment in this case.*

POINT VII.

The City did not condemn the land for sewers and drains, nor use for sewers and drains.

(*Grounds 6 and 9 of appeal.*)

The Court below in its decision (p. 21) refers to the Act of 1851, which provides:

> "It *may be lawful* for the common council to *take,* for the purpose of *enlarging the present public market place,* called the center market, *and for the purpose of sewers and drains,* such lands, etc., *as the common council determine to be requisite, &c.*" (Italics are ours.)

The Court below says as to the above:

> "Ejectment would not lie in this case even though there were an abandonment for the public market, because the act under which the property was taken provides that it may be used for the maintenance of sewers and drains (p. 23, par. 1). A right would therefore continue to be in the City to maintain sewers and drains in this property * * * this right to maintain sewers and drains would in itself defeat ejectment."

We submit that this is error. (See Stipulation of Facts, p. 11.)

The fact is that the City of Newark *never* condemned for sewers and drains and there is *no evidence* that the lands were *ever used for sewers and drains.* The resolution (Stipulation, p. 13, par. 2)

related to lands "which it was the intention of the Common Council to take *and which were requisite to be taken and appropriated for the purpose of enlarging the then public market place called Centre Market.*"

This same language is repeated—"for the purpose of enlarging the then public market place called Centre Market" (Stipulation, p. 13, par. 1).

And on page 14, Paragraph 1, Stipulation, the Committee on Markets was instructed to "take possession of the property taken for the enlargement of the Centre Market."

And on page 14, Paragraph 6, Stipulation, it is recited that the City of Newark "entered into and upon the aforesaid premises for market purposes."

It *affirmatively* appears therefore that the City condemned, possessed and used the lands *only* for market purposes, and therefore not for sewers and drains. It did not take for sewers and drains. It might have done so. It failed to do so. Therefore any question as to "sewers and drains" is out of this case.

This being so, the Court's reasons for finding lack of abandonment must fall to the ground (Decision, p. 21).

In conclusion, we respectfully submit that by its abandonment of the land for market purposes in 1925, the title, use, enjoyment, and right to possession of the lands, reverted absolutely to the original owner, and we submit that the judgment for the defendant should be reversed.

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