

New Jersey Court of Errors and Appeals

MINNIE B. KIMBLE, Plaintiff-Respondent,	} On Appeal.	10
vs.		
THE MAYOR AND COMMON COUN- CIL OF THE CITY OF NEWARK, Defendant-Appellant.		

BRIEF FOR PLAINTIFF- RESPONDENT.

20

Abstract of Case.

This is an action of ejectment brought by Minnie B. Kimble against The Mayor and Common Council of the City of Newark in the New Jersey Supreme Court, and tried before Judge Silzer and a jury at the September Term of the Passaic Circuit Court. There are two counts in the complaint, one for the recovery of the possession of certain lands therein described, to which both parties claim title; and the other, for damages for the destruction and removal by the defendant of certain buildings on said premises. The possession of the premises is admitted by defendant's answer. At the close of the trial, the Trial Judge directed a verdict for the plaintiff on the first count, and left to the jury the question of damages arising under the claim set up in the second count, which was determined by them to amount to the sum of \$4,500. Judgment was ac-

30

40

cordingly entered that the plaintiff recover of the defendant the possession of the premises, together with the sum of \$4,500 damages and her costs.

- 10 The plaintiff, in prosecuting her case, relied for her title and right to possession upon a certain deed given by one Janett Schulster and husband to Jacob Ralph and Elizabeth Ralph, his wife, and to her heirs and assigns, bearing date February 27, 1897, which grantees were the parents of the plaintiff, from which deed the defendant-appellant also claims its title to the premises in question. The grantee Elizabeth Ralph died intestate on October 6, 1898, leaving the grantee Jacob Ralph, her husband, and leaving also the said Minnie B. Kimble, as her only child and sole heir at law surviving her. The said Jacob Ralph died on March 14, 1915, after having conveyed the premises which are the subject
- 20 matter of this suit to one Wesley Chamberlain, by deed of warranty dated May 10, 1902, in which deed the heir Minnie B. Kimble did not join. Chamberlain in turn conveyed said premises to Louis F. Braun, by deed dated December 2, 1903. By deed dated April 13, 1910, said Louis F. Braun and wife reconveyed the premises in controversy to the said Wesley Chamberlain, who conveyed the same to the defendant, The Mayor and Common Council of the City of Newark, by deed dated April 22, 1911.
- 30 Plaintiff did not dispute the above series of deeds by which defendant came into possession of the premises, but asserted that under the deed given by the Schulsters to her father and mother, the property therein conveyed was granted to her father and mother as tenants in the entirety for their lives, and the life of the survivor of them only, with the fee in the heirs of her mother; and that for that reason, the conveyance by her father to Chamberlain, after her mother's decease, passed nothing
- 40 but the life estate of her father in the premises; and

that the only estate which the Mayor and Common Council of the City of Newark acquired was that same life estate, which was terminated by her father's death on March 14, 1915.

Defendant, on the other hand, contended that under said deed the land and premises were conveyed absolutely to the said Jacob Ralph and Elizabeth Ralph, his wife, as tenants in entirety, and that consequently, upon the decease of the wife, said Jacob Ralph became sole owner of the premises in fee simple, and through him The Mayor and Common Council of the City of Newark are now such owners. 10

The main questions presented to this Court are:

1. The legal effect of the deed executed by Janett Schulster and husband to Jacob Ralph and Elizabeth Ralph and to her heirs and assigns, and the estate created under this deed. 20

2. The right of the plaintiff-respondent in an action of ejectment to stand upon her legal title as expressed in the deed under which plaintiff-respondent and also defendant-appellant claims title, and the contention of the plaintiff-respondent that such deed cannot be construed or anything read into it in a Court of law. 30

3. Whether a grantee who asserts no other title than that conveyed by a common grantor of both plaintiff and defendant is estopped from denying the title of the common grantor as against another person who claims title under the same deed from the common grantor.

4. The amount of damages to which plaintiff was entitled by reason of the taking down and destruction by defendant-appellant of certain buildings upon the premises in question. 40

Argument.

POINT I.

10 The contention of the plaintiff-re-
spondent in this case is that the deed
from Janett Schulster and husband
to Jacob Ralph and Elizabeth Ralph,
his wife, and to her heirs and as-
signs, speaks for itself and cannot be
construed in a court of law nor can
anything be read into it. That in an
ejectment suit the plaintiff has an
absolute right to stand on her legal
title and that the intention of the
parties is a question which a com-
mon law court can neither hear nor
20 determine. That the deed in ques-
tion is clear and not ambiguous in
any sense.

Extrinsic evidence upon the cir-
cumstances attendant upon the exe-
cution, for the purpose of showing
the intention of the parties, was
properly excluded.

30 The deed in question (case, pages 64 to 66, marked
Exhibit P-I) is upon its face clear, harmonious, un-
ambiguous and consistent. It is made between
Janett Schulster and William J. Schulster, her hus-
band, of the first part, and "Jacob Ralph and Eliza-
beth Ralph (his wife) of the second part" and the
grant is "unto the said party of the second part and
to her heirs and assigns forever." The habendum is
"unto said party of the second part, her heirs and
assigns, to the only proper use, benefit and behoof
of the said party of the second part, her heirs and
40 assigns forever." The covenant of seisin is likewise

“to and with the said party of the second part, her heirs and assigns.” The covenant of general warranty is “unto the said Jacob Ralph and Elizabeth Ralph * * * heirs and assigns forever.” It would seem, therefore, that a perfectly proper estate was granted by apt and clear words.

We respectfully call the Court’s attention to the case of Hardenbergh vs. Hardenbergh, 10 N. J. Law, page 42, at the bottom of page 48, in a concurring opinion rendered by Drake, J. In this case the Court states: 10

“The grantees are ‘the party of the second part’ (that is, James Hardenbergh and Eliza, his wife), ‘his heirs and assigns.’ The term party embraces both grantees, and is used for that purpose with strict grammatical accuracy; the word *his* is as definite in its reference to only one of them. More formally expressed, this grant would read, to the said James Hardenbergh and Eliza, his wife, and to the heirs and assigns of the said James Hardenbergh. In Coke on Littleton, Section 285, it is said ‘if lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold, and the other a fee simple; and if he which hath the fee dieth, he which hath the freehold shall have the entirety, by survivor, for *term of his life*.’ See, also, 2 Cruise, 510-11.” 20 30

The estate conveyed in such a manner is not an uncommon event. Two similar cases are shown in the case of Ambler’s Estate, 12 Montgomery County Law Reporter (Pa.), page 117, and also in case of Breed vs. Osborne, 113 Mass., 318.

In the case before this Court there are two grantees for life properly designated as party of 40

the second part and the grant is to the party of the second part, *her heirs and assigns*. There can be no mistake as to which one of the parties of the second part the pronoun *her* refers to. It refers, of course, to the female grantee, Elizabeth Ralph.

10 The defendant-appellant contends in its brief that the original deed from Janet Schulster and husband to Jacob Ralph and wife, should have been produced. In that contention we agree, but with this difference; that if, as defendant claims, Chamberlain, who deeded the property to the Mayor and Common Council of the City of Newark, obtained or thought he obtained a title in fee, then this same Chamberlain was the party who it must be presumed would have the possession of the prior title deeds. The attorney for the plaintiff-respondent (case, page 13, lines 13 and 14), in answer to
20 a question of the Court, stated that the deed was not in the possession of the plaintiff. Further than that the plaintiff duly served a notice upon the defendant to produce this deed and thus laid a legal and proper foundation for the introduction of the record. Section 56 of the Conveyance Act, Compiled Statutes, Vol. 2, page 1555.

The defendant-appellant admits in his brief, page 12, that the statute puts the record of a deed on the same level with the deed itself and in this he
30 is supported by Section 55 of the Conveyance Act, Vol. 2 of the Compiled Statutes, page 1554.

For the purpose of throwing light upon the intention of the parties, the defendant-appellant offered in evidence a deposition of William Roome (case, page 43, lines 8-10), which offer was, we think, properly overruled by the Court (case, page 49, lines 10-12). William Roome was the draftsman of the deed in question, but there is nothing in the evidence to show that the original grantors were
40 not living at the time of the trial of this cause.

The position of the plaintiff-respondent regarding this deposition is well stated in the case of *Foley vs. Kirk*, 33 N. J. Eq., page 170, at the bottom of page 175:

“The defendant has an undoubted right in a Court of law to stand in the strength and vigor of Thomas’s title, as shown by the title papers. The deed from Thomas to the defendant passed all the rights which Thomas had, whether derived from Stanton or Montague, and in the Court that must try the action of ejectment the defendant is entitled to have his right to the possession of the land in dispute adjudged by what is written in his title papers, and not by what the parties to them intended. The question whether the deed from Stanton to Thomas was intended by the parties to be a mortgage, or an absolute conveyance, is one that a common law court can neither hear nor determine. That is a question belonging exclusively to equity tribunals, and over which common law tribunals have no jurisdiction whatever.”

In support of this contention we cite the case of *Adams vs. Ross* (Court of Errors and Appeals), 30 N. J. Law, in which case the opinion of the Court delivered by Whelpley, J., holds at page 510:

“In the construction of a deed of conveyance the question is, not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital, showing the intention, will supply the omission, although it may preserve the rights of the party under the cove-

nant for further assurance or in equity upon a bill to reform the deed.

10 The object of the covenants of a deed is to defend the estate passed, *not to enlarge or narrow it*. To adopt, as a settled rule of interpretation, that deeds are to be construed like wills, according to the presumed intent of the parties making them, to be deduced from an examination of the whole instrument, would be dangerous, and, in my judgment, in the last degree inexpedient. It is far better to adhere to the rigid rules established and firmly settled for centuries, than to open so wide a door for litigation, and render uncertain the titles to lands."

See also

20 Kearney vs. McComb, 16 N. J. Eq., page 189, at page 193, and 65 Atl. Rep., page 747.

The case of Mulford vs. Tunis, 35 N. J. Law, page 256, at page 259, holds that a Court in an action of ejectment could only deal with the legal title.

30 The plaintiff-respondent further respectfully submits to the Court: that the only person who could take advantage of the testimony set forth in the deposition of William Roome which was offered in this case, is the plaintiff, Minnie B. Kimble, formerly Minnie B. Ralph. She is the person in whose favor it is alleged that the deed was originally made and she is the only party who could not come into court and take advantage of the alleged change, for the reason that she would be the only person damaged thereby. With or without this deed Minnie B. Kimble was entitled to the fee in
40 the premises which form the basis of this suit.

We also contend that the City of Newark, having taken title to the property through this very deed as set forth on the records, is now estopped from alleging that the deed is not as it appears on the records. The deed from Wesley Chamberlain to the City of Newark recites the very deed which they seek now to overthrow (page 14, lines 10-21).

10

16 Cyc., 717.

“If a grantee asserts no other right or title than that conveyed by the deed, however, he cannot deny his grantors title as against another person claiming under a deed from the same grantor.”

The above citation is quoted with approval in the case of Philadelphia Brewing Company vs. McOwen, in 76 N. J. L., 636, 640 (Court of Errors and Appeals).

20

In the case of McDonald vs. King, 1 N. J. L., 494 (432), the Court held:

“That as the deed under which the lessor of the plaintiff claimed, was expressly recognized in that which is the foundation of the defendant’s title, the defendant is estopped from questioning or gainsaying it. See Embree vs. Ellis, 2 Johns., 119.”

30

The case of Hudson vs. Inhabitants of Winslow, 35 Law, page 437, states on page 441:

“That a party is concluded by the admissions of his own deed is the admitted rule of law, and such admissions cannot be put in dispute either by the pleadings or evidence. But this rule, I think, has no application to the present case. The principle is applicable only

40

where the existence of the deed as the act of the party is admitted. This is shown by the very definition of an estoppel which arises in the words of Lord Coke, 'when a man's own act or *acceptance* stoppeth or closeth his mouth to allege or plead the truth.'" Co. Litt., 352.

10

The deposition of William Roome as offered is at best ambiguous and contradictory as might well be expected after a lapse of nearly 20 years after the drawing and execution of the deed in question. On page 86 of the deposition, lines 24 to 30, Roome says that all the spaces were filled up, while, as a matter of fact, the warranty clause in the deed has a blank space in it (Exhibits, page 66, line 4). We think it significant that on page 89 of the deposition, lines 1 to 4, it is shown that Ralph bought another lot from Schulster and Roome also drew this deed. The total substance of Roome's deposition is that he does not recollect drawing such a deed as now appears on the record, and under which both appellant and respondent claim title, to these premises.

20

Appellant in its brief sets forth that Roome's testimony is or might be favorable to them. On the other hand, Roome's testimony seems to show that it was the intention of all the parties that Minnie B. Kimble should become the owner of the premises. Mr. Roome in his deposition (Case, page 91, line 14) states that he drew a deed to Minnie B. Ralph (now Minnie B. Kimble). We submit to the Court that there is absolutely no convincing proof that the deed now on record was ever changed, either before or after its execution.

30

The defendant-appellant cannot now deny the very source of title under which they hold. They took with actual knowledge of the record and re-

40

quired their grantor to execute a bond (Defendant's Exhibit III) to guard against this defect in its title. They purchased a title which they had reason to believe belonged to some one else and now they seek to be relieved from their own neglect against the rightful owner.

POINT II.

10

We hold that a conveyance to husband and wife and to her heirs and assigns vests in the husband a life estate and in the wife a fee simple in the land conveyed.

Our contention is that Jacob Ralph held only a life estate in the premises and that upon the death of Ralph, in 1915, the fee became vested in Minnie B. Kimble. The grantees of Jacob Ralph could, therefore, have no greater title than the grantor had and that the only title that the City of Newark ever held was a life estate, for the life of Jacob Ralph.

20

In support of our contention we cite the case of Hardenbergh vs. Hardenbergh, 10 N. J. L., 42, which case holds that a conveyance to husband and wife and to his heirs and assigns vests in the wife a life estate and in the husband a fee simple in the lands conveyed. This case has never been reversed and we believe is still the law of this State. In that case, at page 49, Drake, J., quotes in a concurring opinion from Coke on Littleton, Section 285:

30

“If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold, and the other a fee simple; and if he which hath the fee dieth, he which

40

hath the freehold shall have the entirety, by survivor, *for term of his life*. See also 2 Cruise, 510-11.’”

10 The deed in question is made between Janett Schulster and her husband, of the first part, and Jacob Ralph and Elizabeth Ralph, his wife, of the second part; and the grant is “unto the said party of the second part and to her heirs and assigns forever,” with the habendum in like form. It will be noticed that the phraseology is almost identical with the case of Hardenbergh vs. Hardenbergh, supra, with the sole difference that in the Hardenbergh case the fee went to the heirs of the husband and in the case before the Court our contention is that the fee goes to the heirs of the wife.

20 The case of Hardenbergh vs. Hardenbergh, supra, is supported by the case of Ambler’s Estate, 12 Montgomery County Law Reporter (Pa.), page 117. In that case a farm was conveyed by A to B and C, his wife, her heirs and assigns, C, the wife, being the only daughter of the grantor. The wife died before the husband. Held that only a life estate was given to the husband, the husband and wife being seized by an entirety for life, but the fee descended to the heir of the wife. The opinion of the Court in this case is as follows:

30 “A deed to Mahlon R. Ambler and Alice, his wife, shows a clear intent to give but a life estate to the husband. By holding the husband and wife are both seized of the entirety for life, we carry out the intent of the grantor and at the same time violate no rule of law governing estates or entiresities. This species of tenure arising from the unity of husband and wife, applies to estates in fee, for years

40 or life. Dexter vs. Billings, 110 Pa., 142.

The daughter, Alice Ambler, as the only child, took the Ferry property upon the death of her mother, as her heir subject to the life estate of the father."

The case of Breed vs. Osborne, 113 Mass., 318, is another case in which a similar situation arises. A grantor conveyed land by deed "in consideration of \$5 paid by A and B (A's wife) in her right" * * * "To A and B their heirs and assigns," * * * "To have and to hold to A and B in her right, her heirs and assigns and to their use and behoof forever." B died, A surviving, and left a son. Held that upon her death A had a life estate and that the fee vested in the son. In this case the opinion of the Court in part is as follows:

"By the grant of this deed the fee was conveyed to Henry A. Breed and Katherine H. Breed. Being husband and wife, if there was nothing else in the deed to control or modify its operation the estate would vest in them as joint tenants and the inheritance would be limited to the heirs and assigns of the survivor.

But the recital of the consideration imports an investment of her estate and the habendum declares the estate purchased is to be held by them as her estate, that is 'in her right' with limitation over *to her heirs and assigns*.

This manifest intention of the parties should be carried out in the construction of the deed if it can be done consistently with established rules and principles of law. We think it may be and that it is warranted by the decisions of this Court in Pratt vs. Sanger, 4 Gray, 84, and Shenery vs. Stevens, 97 Mass., 77. The habendum qualifies the limitation as set forth in the premises, but is not repugnant to it.

10

20

30

40

The estate is accordingly now in the demandant for his life but the descent of the inheritance has already been cast by the death of Mrs. Breed. *It has vested in Henry A. Breed, Jr.*, and his estate passed by the deed of his guardian to the tenant, etc.”

10 Judgment for tenant.

We contend that the foregoing cases together with the Hardenbergh case reiterates the rule laid down in Coke on Littleton and clearly and correctly states the law in this State today.

In the appellant's brief considerable stress is laid on the covenants and warranty on the deed from Schulsters to Elizabeth and Jacob Ralph.

20 “A warranty made by a tenant for life of lands, tenements or hereditaments, which shall descend or come to any person in reversion or remainder, shall be inoperative and void.”

The above quotation is taken from Sec. 2 of the Conveyance Act, page 1535 of the Compiled Statutes, Vol. 2.

It seems, therefore, that the covenants and warranties in the deed are not to be considered. They are in fact not part of the grant, nor could they either enlarge or curtail the grant.

30 This position is further upheld in the case of Adams vs. Ross, 30 N. J. Law, page 505, at page 510, in the opinion of the Court, which states:

40 “The covenants only attach to the estate granted, or purporting to be granted. If a life estate only be expressly conveyed, the covenantor warrants nothing more. The conveyance is the principal, the covenant the incident. If they do not expressly enlarge the

estate passed by the operative words of the deed, I cannot perceive upon what sound principle of construction they can have that effect indirectly by throwing light on the intention of the grantor."

The criticism of Justice Whelpley in the case of Adams vs. Ross, supra, speaks for itself and needs no further comment. 10

The case of Snell vs. Young, 25 North Carolina, page 379, holds:

"Where a life estate only is mentioned in the premises and the habendum, it cannot be enlarged into a fee either by a warranty in fee or by a covenant for quiet enjoyment to the grantor and his heirs."

Nor can we see how the warranty could be construed to bear out the contention of the appellant. We have no reason to believe that the word *their* should have been inserted in the warranty any more than we have reason to believe that the word *her* should have been inserted. In either event the warranty would have made sense, the difference being that with the insertion of the word *her* the deed would have been consistent throughout, while if the contention of the defendant-appellant were upheld, we would have a pronoun in the warranty inconsistent with all the other pronouns in the deed. 20 30

POINT III.

Respondent contends that the Trial Judge did not commit harmful error in refusing to allow evidence concerning the condition of the buildings on the premises in dispute at the time Wesley Chamberlain took title to the property.

Our contention is that it is not material in what condition the premises were at the time Chamberlain took title. The interest of Minnie B. Kimble vested in the premises at the time of her father's death and in any and all buildings thereon at that time, in whatever condition they were at the time of her father's death. The condition of the premises at some time prior thereto is wholly immaterial.

My opponent, in his brief, states that Chamberlain purchased the premises in good faith. There is no evidence that such was the case. If so, his relief, if he is entitled to any, is in equity. It is, however, true that Chamberlain took this property with notice of the record, and this record showed that Jacob Ralph had a life estate only in the premises. It is significant to remark that the consideration in the deed to him is stated as \$1 (page 66; Plaintiff's Exhibit II), whereas Chamberlain sold this property, together with a piece of property, 82/100 acres in size, and together with certain covenants (which, with but one exception, he had already disposed of) for a consideration of \$12,500.

It is stated that Chamberlain will be ultimately liable on his warranty. This, however, has no bearing on this case and it is an open question whether such liability exists, inasmuch as Section 2 of the Conveyance Act makes a warranty by a tenant for

life absolutely void and inoperative. However, the Mayor and Common Council of the City of Newark are the defendants in this suit and not Wesley Chamberlain.

The City of Newark took its title with full and actual knowledge that their grantor could convey to them (under the Hardenbergh and other cases herein cited) only a life estate. The actual knowledge is shown by reason of the fact that they required a bond (Defendant's Exhibit III) to be given them in order to protect them against this very defect in title. The bond itself (Exhibits, page 79, lines 33 to 40) states:

"A question has been raised by the City Council of the City of Newark as to whether a fee simple was conveyed thereby and as to whether the said Wesley Chamberlain was seized of an estate in fee simple at the time of the conveyance of the aforesaid first tract to the Mayor and Common Council of the City of Newark."

We contend, therefore, that the City, in view of the above facts, could not now claim that they are a *bona fide* purchaser for value *without notice* of the premises, and cannot now claim in a law court to the detriment of the real owner, the benefit of any improvements placed on the premises.

In support of this view we respectfully submit to the Court the case of *Foley vs. Kirk*, 33 Equity, *supra*. In this case the Court states, at page 179:

"His mistake, if any in fact existed, and I am free to say I think there is grave reason to doubt, was manifestly the result of the most reckless carelessness. The observance of any degree of care, or the practice of the least cau-

tion, would have made it impossible for him to fall in any error. Mistakes committed under such circumstances cannot be made the basis of relief in equity. *Haggerty vs. McCanna*, 10 C. E. Gr., 48."

10 See, also, *Joyce on Damages*, Vol. 3, Par. 2174, last four lines:

"Nor can a recovery be had where the defect of title was apparent of record and would have been discovered except for negligence or incompetency of those employed to examine the record."

20 Defendant-appellant refers to Section 47 of the Ejectment Act, page 2063, Vol. 2. This section is not in point. Plaintiff is not suing for the mesne profits of the premises and the offset for improvements as stated in this very section is allowed against the mesne profits *and no further*. Furthermore, it does not seem that this section would apply to a case where the buildings have been destroyed and removed from the premises, for in such event the remainderman or revisioner would receive no value.

30 We also call attention to the vital fact that defendant has made in his pleadings no claim for improvements of any kind; and further, we submit that *a court of law is not* the proper tribunal to grant defendant the relief asked for.

POINT IV.

We contend that the Trial Court did not commit harmful error in admitting evidence of what it would cost to replace the buildings removed and in refusing to charge the jury that where competent evidence is adduced showing the actual value of the buildings at the time of their destruction, evidence of replacement value must not be considered by them. 10

We also contend that the Court did not commit error in allowing evidence of the value of the 82/100 acre of land.

The Court, in speaking of the replacing to the jury, expressly charged the jury (page 61, lines 30-36) : 20

“The only purpose of introducing that evidence, gentlemen, was to enable you to know how much it would cost to replace the building, and then you can make allowance for the age and condition and determine what the reasonable value was at the time it was destroyed and that is the only way which you may consider that evidence.” 30

Such a charge made it clear to the jury the purpose for which this testimony was introduced. We submit that such testimony was a proper consideration for a jury and that the sole purposes for which they were to consider it were clearly stated to them by the Court.

Sedgwick, in his work on Damages, 9th Edition, Vol. 3, pages 1933-1934, in speaking of the damages for removal or destruction of buildings, says : 40

“It is, however, more commonly held to be the actual value of the building, as such, *in situ*, which is not the cost of replacement, though such cost may be shown as evidence of the value.”

10 And again, on pages 2423-2424 of the same volume, he states :

20 “For arriving at the value of buildings there is no exclusive test, and where buildings have an intrinsic value, e. g., tenement houses, suitable to the locality, the value of the buildings may be proved separately, the latter being established by proof of cost of reproduction, with proper deductions for wear and tear. Add the two amounts together and nothing can be arrived at other than the value of the land as enhanced by the buildings.”

This rule is also held to be true in the case of *Bates vs. Warrick*, 77 Law, page 387, at the bottom of page 388, in which case the opinion of the Court delivered by Bergen, J., in part states :

30 “Aside from this, the probable cost of repairs required to restore the building to its former condition was a proper element to be considered in ascertaining the diminution in value of the realty. The injury in the present case was slight and there is no pretense that the repairs enhanced the property beyond its value at the time of the injury, and it also appears that the building was not available without the repairs. Under such conditions the cost of repairs was some evidence of depreciation in value.”

40 Now passing to the second part of Point IV. The defendant-appellant offered in evidence deed

from Wesley Chamberlain and wife to the Mayor and Common Council of the City of Newark, marked Exhibit DII. This deed was given by Wesley Chamberlain to the defendant and contained two separate tracts of land, the one, the premises in dispute, and the other, a vacant piece 82/100 acre; and this deed also purported to contain a covenant that he, the said Chamberlain, would not acquire, directly or indirectly by lease or otherwise, any lands or any interest therein located in the territory of the Pequannock Watershed and would not dwell or reside within said territory, but would wholly and permanently remove therefrom on or before September 1st, 1916. 10

We respectfully call the Court's attention to the fact that the said Wesley Chamberlain had already conveyed to the City similar rights under deed. (Marked Exhibit P-7, page 68, and more particularly beginning at line 38 at page 72 of Exhibits.) 20

Wesley Chamberlain, therefore, by deed marked Exhibit D-2, on page 76 of the Exhibits, conveyed to the City of Newark two separate parcels of land, one, the premises in dispute, and the other, an 82/100 acre, which was vacant land, and also purported to make certain covenants which he had already conveyed to the Mayor and Common Council of the City of Newark. We contend, therefore, that the plaintiff had a right to ascertain the separate values of each tract conveyed by this deed to the City. By this testimony it was shown that the vacant 82/100 acre piece was worth less than \$100 (Case, page 30, lines 37-38). 30

In further substantiation of our position we refer to the bond (marked Exhibit D-3 on page 79 of Exhibits, lines 7-12) that the consideration of \$12,500 was for two certain tracts of land, and nothing in this bond refers to any covenant on the part of Chamberlain. 40

We further submit to the Court as important that the witness, Chamberlain, in answer to questions put by the Court (Case, page 42, lines 10-20), stated that the consideration of \$12,500 was not divided up between the parcels of land and his covenant.

10

POINT V.

We contend that the verdict of \$4,500 was a reasonable and fair verdict.

20

30

40

The plaintiff-respondent was entitled, as declared by Chief Justice Gummere in *Tate vs. Field*, 57 Equity, 632, to the full value *to the plaintiff* of the buildings removed, with interest from date of their removal. The testimony of Chamberlain (Case, page 37, lines 30 to 40) was by order of the Court stricken out and was properly excluded from the jury, inasmuch as it dealt with the property at the time that Chamberlain took title. In our opinion the best evidence as to the value of this property was the value placed on it by the City of Newark when they bought from Chamberlain on April 22, 1911, and at which time they paid \$12,500 for the premises in question, together with a vacant plot of land amounting to approximately 82/100 acre and which the undisputed evidence of the case shows was worth less than \$100. We contend that the purported covenant was of little or no value inasmuch as Chamberlain had already conveyed away the greater part of his rights when he made similar covenants in a prior deed to the City (Exhibit P-7, at page 73, lines 1-20). That, therefore, the consideration of \$12,500 was the value placed on the two plots, one, now claimed by Minnie B. Kimble with the buildings thereon,

and the other, a vacant piece of property worth less than \$100. The measure of damages, as stated by Chief Justice Gummere in the case of Tate vs. Field, is the full value to the plaintiff of the buildings removed. We submit that in ascertaining this value the fact that the City of Newark would probably (there is no evidence to the contrary) have purchased these premises from Mrs. Kimble at the price of \$12,500 less the value of the 82/100 acre piece is a fact for the jury to consider, and a fact upon which damages are justly based. The defendant-appellant lays stress on the testimony of the witness Post (Case, page 26, lines 10 to 40). It must be borne in mind that the witness, Post, testified (Case, page 26, line 13), referring to the buildings:

"I would not want to give over \$2,000 for the whole of them."

And that his testimony throughout was more of the nature of a personal value to him. We contend that this is not the limit for the measurement of damage, and that the measure of damages is the full value to the plaintiff, Minnie B. Kimble. It should also, we think, be borne in mind that these buildings had already been destroyed and the difficulty in obtaining expert witnesses who had inspected them about the year 1915, at which time the values were important.

We submit that it was within the province of the jury to take into consideration whatever they considered the value of the premises to the plaintiff, Minnie B. Kimble, and any benefits which she would have derived therefrom from the time of her father's death, which benefits might have included the sale of the premises to the City of Newark for approximately \$12,500.

There is absolutely no evidence in the case to support defendant-appellant's contention in its brief that the bottling plant and the shed were trade fixtures. On the contrary, the cases hold that in the absence of a contract to the contrary any fixtures placed on real property by a life tenant are presumed to become the property of the remainderman or reversioner.

10 The case of *Madigan vs. McCarthy*, 108 Mass., 377, in an opinion by the Court holds:

20 "The presumption that buildings belong to owners of the land upon which they state as part of the realty. If one erects a permanent building like a dwelling house upon the land of another voluntarily and without any contract with the owner, it becomes realty and belongs to the owner of the soil."

The case of *Holmes vs. Standard Pub. Co.*, 55 Atlantic, page 1107, further substantiates our position and holds that where a tenant under a lease for five years, with the privilege of renewal and an option of purchase, constructed a frame one-story addition to the leased building in such a manner that it could not be removed without the commission of waste by leaving the building to which it was attached exposed and in need of repairs, and in its present condition the erection was adapted to the use of the remaining buildings, and could not be removed without being cut up into sections, and, if removed, was of little or no value except for the materials to be used in reconstruction, such annexation was a fixture.

30 The cause of *Fortescue vs. Bowler*, 38 Atlantic, page 445, it is held that a tenant, having no contract with or consent from the landlord, constructed a
40 back building, and permanently attached the same

to the rear end of a house on the demised premises, in such manner that its removal will leave the original structure without any inclosure at the rear end. The original building and the added structure have, since the latter was built, been used together for a hardware store, neither being usable for that purpose without the other. At the time the back building was constructed, the tenant had no formed intention either to make a permanent addition to the premises, or to remove the structure. Held, the back building has become part of the freehold. On page 446 the court holds:

“The defendant put this extension there without the invitation of anybody, and without the permission of anybody, and it seems to me the building, when put there, became the permanent addition to the real estate and not a trade fixture in any sense * * *.”

“This merger of the use of the two structures into one, whereby both were coincidentally and dependently used for the same purpose, is an additional reason which leads me to conclude that the extension was made, not as a trade fixture, but as an enlargement of the building then on the premises, thus becoming a part of the realty.”

Our own Court of Errors and Appeals in the case of West Shore R. R. Co. vs. Winters, 75 N. J. Law, on page 496, Chief Justice Gummere, rendering an opinion by the Court, states:

“The rule with relation to the right of a tenant to remove trade fixtures at the expiration of his term has no application to a building erected by a tenant upon the land which he has leased. When so erected the building

becomes a part of the freehold and the property of the landlord, in the absence of an agreement between the parties that it shall remain the property of the tenant. *Howard vs. Fessenden*, 14 Allen, 126; *Madigan vs. McCarthy*, 108 Mass., 376; *Landon vs. Platt*, 34 Conn., 517; *Kutter vs. Smith*, 69 U. S., 491."

10

The case of *Kissam vs. Barclay*, 17 Abb. Practice (N. Y.), page 360, was a case where the lessee erected a house on certain premises. The action was on behalf of the mortgagee of a lease against the reversioner for a portion of the award for damage to the house in course of public improvement. The Court states:

20

"Although the house was erected by the tenant, yet this gave her no further right to it as a part of the realty than the mere use of it during the continuance of her lease. The cases referred to by the plaintiff's counsel are cases where the right of removal was reserved or where the buildings and fixtures were erected by the tenant for the purposes of trade. In all other instances erections of every kind become real estate and are governed by the law which regulates land descending to the heir as a part of the inheritance and passing by deed as a part of the freehold."

30

POINT VI.

We contend further that the jury would not have been justified in awarding merely nominal damages.

40

A presumption arises that buildings which are used for living purposes and manufacturing are

annexed to the soil and become part of real estate. The case of *Madigan vs. McCarthy*, 108 Mass., page 377, in the opinion of the court, above set forth, states that this is a presumption and our New Jersey cases follow this view.

Chief Justice Gummere in the case of *West Shore R. R. Co. vs. Winter*, supra, states:

10

“The rule with relation to the right of a tenant to remove trade fixtures at the expiration of his term has no obligation to a *building* erected by a tenant upon the land which he has leased.”

Our contention in this matter has been supported by the cases outlined in Point V, and it would seem that this Court would, in the absence of any testimony to the contrary, take judicial notice of the fact that buildings used for manufacturing or for dwelling become part of the realty. We might mention also that the City of Newark in any case had no right or title to any of these buildings. The person erecting certain of the outbuildings is not a party to this suit and is not claiming that they are trade fixtures.

20

POINT VII.

30

We contend that the question as to who was entitled to possession was a question of law for the Court to decide.

The contention of the plaintiff-respondent is that there is no ambiguity in the deed from Schulster to Ralph and that the legal effect of the grant therein contained was a matter of law for the Court to determine. That the deed speaks for it-

40

self in a court of law and no extrinsic testimony was proper to show intent or read anything into the instrument. It was not therefore a jury question. That the greater part of the defendant-appellant's citations under Point VII refer to ambiguous description of property in deeds. Such a state of facts does not occur or is any question raised on that point in this case.

10

I might refer to the case of Schmitt vs. Trap-
hagen, 73 N. J. Eq., 399, 400 (Court of Errors &
Appeals); and Lehigh & H. R. Ry. Co. vs. Antalics,
81 Law, 685, 690 (Court of Errors & Appeals), in
which it was held proper for the court to decide
this point.

For the reasons above set forth we think the
judgment of the court below, both as to the pos-
session of the property and damages, should be af-
firmed.

20

Respectfully submitted,

F. HAMILTON REEVE,
of Counsel with Plaintiff-
Respondent,
Englewood, N. J.

30

F. HAMILTON REEVE,
J. FRANK MCDAVITT,
on the Brief.

40

23160

INDEX.

PLEADINGS, ETC.

	PAGE
Notice of Appeal.....	1
Complaint	2
Answer	4
Judgment Record	6
Judgment	7
Certificate of Clerk.....	7
Amendment of Pleadings.....	31
Motion for Non-suit.....	31
Motion for Non-suit Denied.....	37
Motion for Direction of Verdict.....	58
Motion for Direction of Verdict Denied.....	59
Charge of the Court.....	60
Defendant's Requests to Charge.....	63
Grounds of Appeal.....	98

TESTIMONY.

Minnie Kimble:	
Direct	19
Cross	21
Frank Post:	
Direct	21
Cross	25
Redirect	27
John M. Weaver:	
Direct	27
Wesley Chamberlain:	
Direct	37
Cross	53

EXHIBITS.

	PAGE
(Figures in parentheses indicate the page on which the exhibit was admitted in evidence.)	
P-1—Record of a deed, for one acre of land in West Milford township, Passaic County, New Jersey, dated February 27, 1907, from Janett Schulster and William G. Schulster, her husband, to Jacob Ralph and Elizabeth Ralph, his wife (12)	64
P-2—Record of a deed for the same premises, dated May 10, 1902, from Jacob Ralph, widower, to Wesley Chamberlain and wife (13)	66
P-3—Record of a deed for the same premises, dated December 2, 1903, from Wesley Chamberlain and wife to Louis F. Braun (13)	67
P-4—Record of a deed for the same premises, dated April 13, 1910, from Louis F. Braun to Wesley Chamberlain (14) . . .	67
P-5—Record of a deed, reciting the previous deeds, dated April 20, 1911, from Wesley Chamberlain and wife to The Mayor and Common Council of the City of Newark, property described being .82 of an acre (14)	67
P-7—Record of a deed, dated March 29, 1911, conveying six tracts of land from George Chamberlain and others to The Mayor and Common Council of the City of Newark (14)	68
D-1 and D-2—Original deeds from Ralph to Chamberlain and from Chamberlain to Newark, P-2 and P-5 (53)	76
D-3—Bond given by Wesley Chamberlain, George Chamberlain and Theodore Chamberlain to The Mayor and Common Council of the City of Newark (58)	78
—	
Deposition of William Roome (motion to admit in evidence, 43; motion denied, 52)	83

Notice of Appeal.

(Filed December 11, 1916.)

New Jersey Supreme Court

10

MINNIE B. KIMBLE

vs.

THE MAYOR AND COMMON COUN-
CIL OF THE CITY OF NEWARK.

In Ejectment.
Notice of
Appeal.

*To F. Hamilton Reeve, Esq.,
Attorney of Plaintiff:*

20

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Dated, December 6, 1916.

Respectfully,

30

HARRY KALISCH,
Attorney of Defendant.

40

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

MINNIE B. KIMBLE vs. 10 THE MAYOR AND COMMON COUN- CIL OF THE CITY OF NEWARK.	}	Judgment Record. In Ejectment. <i>On Postea.</i> F. HAMILTON REEVE, Attorney.
--	---	---

The Mayor and Common Council of the City of Newark, the defendant in this cause, was summoned to answer unto Minnie B. Kimble, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued July 25, 1916.)

20 Plaintiff, Minnie B. Kimble, of Newfoundland, New Jersey, says that:

First Count:

1. On March 14, 1915, plaintiff was and now is the sole surviving heir of Elizabeth Ralph, deceased, and that plaintiff was on that date seized in fee simple of a tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of West Milford, in the
 30 County of Passaic and State of New Jersey.

Beginning in the middle of the road (formerly the Paterson & Hamburg Turnpike) at an iron bolt sixteen links southerly from a culvert across said road thence running (1) south eighty nine degrees thirty minutes west through a hickory tree three chains sixty eight links to an iron bolt, (2) north one degree fifteen minutes east two chains & eighty nine links to an iron bolt (3) north eighty seven degrees forty minutes east three chains to the middle
 40

Judgment Record.

of aforesaid road (4) along the same south eleven degrees forty five minutes east three chains to the beginning.

Containing one acre.

2. The defendant on March 14th, 1915, wrongfully entered upon and took possession of the above-described land and exercised ownership over and claimed title thereto and still wrongfully exercises ownership over or claims title thereto and keeps plaintiff out of possession thereof. 10

3. Plaintiff's right to the possession of said lands accrued on March 14, 1915.

Second Count:

1. All the statements of the first count are made part of this count. 20

2. While defendant was in possession of said lands as aforesaid and exercised ownership over or claimed title thereto it took down and destroyed a hotel and a bottling plant with certain outbuildings in connection therewith, of the value of \$10,000.00, belonging to plaintiff and standing thereon.

Plaintiff demands:

1. On the first count, judgment for possession of said premises. 30

2. On the second count, the sum of \$10,000.00 judgment.

F. HAMILTON REEVE,
Attorney for Plaintiff.

(Filed Aug. 21, 1916.)

Judgment Record.

The defendant, The Mayor and Common Council of the City of Newark, which has been sued in this action, by the name of the "City of Newark," answering, says:

Defense to first count:

10 It neither admits nor denies that on March 14, 1915, the plaintiff was and now is the sole surviving heir of Elizabeth Ralph, deceased, but it denies that said plaintiff was on said date seized in fee simple of the tract of land in said complaint particularly described.

It denies the matters contained in the second paragraph of the first count of said complaint.

It denies the matters contained in paragraph three of the first count of said complaint.

20

Defense to second count:

It denies the whole of paragraph one of said second count of said complaint.

The defendant admits that it was in possession of the tract of land described in the plaintiff's said complaint, and that while it exercised ownership over and claimed title thereto it took down and destroyed certain buildings thereon, but denies that the value of said buildings was the sum of \$10,000, or that the said buildings belonged to the plaintiff.

30

Dated, August 23, 1916.

HARRY KALISCH,
Attorney of Defendant,
The Mayor and Common Council
of the City of Newark.

(Filed August 24, 1916.)

40

Judgment Record.

The plaintiff denies every allegation in the answer.

F. HAMILTON REEVE,
 Attorney for Plaintiff,
 120 Broadway,
 Manhattan, 10
 New York City,
 and Englewood, N. J.

(Filed Sep. 13, 1916.)

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. 20

Dated, September 11th, 1916.

Respectfully,

F. HAMILTON REEVE,
 Attorney for the Plaintiff.

To:
 HARRY KALISCH, Esq.,
 Attorney for Defendant, 30
 920 Broad Street,
 Newark, N. J.

Judgment Record.

10	Partition of Estate of William Monks, dec'd.	}	Passaic County Orphans Court. Comrs. report of Division dated July 29, 1874. Confirmation dated July 29, 1874. Recorded in Passaic Co. Register's Office in Book H-5 of deeds, page 209, on April 9, 1875.
----	--	---	---

Commissioner's apportion to Janett Schulster, wife of William Schulster, various tracts in which the premises in question are covered.

20	Deed, Janett Schulster and William J. Schulster, her husband, to Jacob Ralph, and Elizabeth Ralph, his wife.	}	Warranty Deed, dated Feb. 27, 1897. Recorded March 26, 1897, in Book S-12 of Deeds for Passaic County, page 80.
----	---	---	--

30 Conveys the premises forming the subject-matter of this suit and described in the complaint herein.

The above conveyance is made to the parties of the second part and to her heirs and assigns, &c.

Habendum to parties of the second part, her heirs and assigns.

(Filed Sep. 13, 1916.)

40 This action was tried before Judge George S. Silzer with a jury at the Passaic Circuit on November sixteenth and November twentieth, nineteen hundred and sixteen.

Judgment Record.

The cause having been heard and submitted to the jury, they returned their verdict as follows:

(1) That the plaintiff recover possession of the premises.

(2) That plaintiff recover forty-five hundred dollars (\$4500) damages.

Damages	\$4500.00
Costs.	53.66
	—————
	\$4553.66

Whereupon it is adjudged that the plaintiff recover of the defendant the possession of said premises mentioned in the complaint, together with the sum of forty-five hundred dollars damages and her costs in said suit expended, which are taxed at the sum of fifty-three dollars and sixty-six cents, making in the whole the sum of four thousand five hundred and fifty-three dollars and sixty-six cents.

Judgment entered November 24, 1916.

WM. S. GUMMERE,
C. J.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

(Seal) In testimony whereof I have set my hand and the seal of said Court at Trenton, this first day of December, A. D. nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

Testimony.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10	<p style="text-align: center;">MINNIE B. KIMBLE, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">THE CITY OF NEWARK, Defendant.</p>	} Before: Hon. GEORGE S. SILZER, J., and a Jury.
----	--	---

Paterson, New Jersey,

November 16th, 1916.

20

APPEARANCES:

F. HAMILTON REEVE, Esq., J. FRANK MCDAVITT,
Esq., J. W. DEYOE, Esq., for the Plaintiff.
JOSEPH G. WOLBER, Esq., Hon. WALTER C. CABELL,
for the Defendant.

A jury being impaneled and found satisfactory,
they were sworn.

30

Mr. DeYoe opens for the plaintiff.
Mr. Cabell opens for the defendant.

40

The Court: I do not seem to understand the situation from the openings. There must be some reason why you disagree. As I understand from Mr. DeYoe's opening, he claims that the property was owned by Jacob Ralph and Elizabeth, his wife, as tenants in common, with a clause in the deed that it should go to her heirs and assigns.

Case.

Mr. DeYoe: They held an estate of entirety during the life estate.

The Court: Then the property went to her heirs and assigns?

Mr. DeYoe: Then the property went to her heirs at the death of the survivor.

The Court: What does the defendant say to that? 10

Mr. Cabell: I say that is not the situation at all. That there was a conveyance in fee simple absolute to Jacob Ralph and his wife, and that on the death of Elizabeth Ralph, the ancestor of the plaintiff, Jacob Ralph was still possessed of the entirety, which he might convey in perpetuity.

The Court: Does the question turn on the construction of the deed?

Mr. Cabell: Yes, sir; it turns on the construction of the deed, and the position I take is this, that this deed may not be construed until the circumstances attending its execution are in evidence, and those circumstances may be only known from the production of the subscribing witness, who was also the officer before whom the acknowledgment was taken. There is an apparent discrepancy in the deed. 20

The Court: What I do not understand is, I would like to have you inform me, as matter of law, how can I set aside a deed? 30

Mr. Cabell: Not set it aside, but construe it.

The Court: You don't want me to take the deed as it is presented and offered in evidence, but you want me to take the testimony of the subscribing witness, who presumably will state it is different than it is written. What right have I to vary it?

Mr. Cabell: Because, instead of submitting the deed itself, which ought to be in their possession, they are submitting a record of that deed. 40

Case.

10 The Court: Suppose they offer the record, which the statute permits as a matter of evidence. They submit the record of the deed. Now, you ask the subscribing witness to come and say that at the time of the execution of the deed there was something else in the deed. What right have I, sitting in a law court, to vary a written instrument? Is not your remedy to go into the court of equity and show that this is not the deed, that the deed does not contain the true phraseology? Have I the right to reform the deed in this court?

20 Mr. Cabell: I think the situation is this: The interlineations and writings of the deed will assist the Court in construing the deed. Every Court that ever construed a contract looked to just such matters as that to determine what the instrument meant. Now, any changes made will not show upon the record, but they will show during the testimony of the subscribing witness.

The Court: Then is not your relief to go into the Court of Chancery and ask to have the deed reformed and declared to be a deed which does not give the fee to the heirs of Elizabeth Ralph?

30 Mr. Cabell: I think if we had the case properly proved I would be able to submit authorities to the Court on that very subject, that the law court must consider the circumstances attending the execution of the instrument, the circumstances attending its making and attending its execution.

The Court: The instrument is offered in evidence and says certain things on its face. Now, must I not take that instrument as it comes to me? Can I say, either myself or direct the jury to say, that the instrument is not what it purports to be?

Mr. Cabell: Yes. Testimony may be offered to show that it was not acknowledged in that form.

Case.

The Court: In other words, aren't you trying to vary a written instrument, which, of course, is against the decisions?

Mr. Cabell: No; because, I take it, though the statute makes the record evidence, nevertheless we can easily see that the record may not show exactly what the instrument looked like. We may not see the character of the paper; we may not see the way the words are written, or it may not be clearly written, and we are entitled to the original manuscript, so that we may show that the original instrument was written in an obscure fashion. 10

The Court: Do you mean to prove that after the instrument had been executed that new words were put in?

Mr. Cabell: Yes; you may show that it was done either after or before. I may show that the deed, after it was drawn for one purpose, then it was changed for another purpose, either before or after execution. Just to indicate the importance that I think courts have laid upon such facts I have been informed that the *Hardenberg* case, reported in 10 *N. J. L.*, is the authority upon which the plaintiff relies. 20

Mr. DeYoe: No; we have not told you that. I will agree that it is a good thing for our side.

Mr. Cabell: Under that case the Court, in stating the facts, lays some stress upon the fact that one name apparently had been first written in and another interlined after the deed had been written, not necessarily after the execution, though; it was before the execution, in fact; but they show that first the deed was drawn one way and then amended in one particular only afterwards, and they regard that as important, and so in numerous cases. 30

Case.

The Court: Of course, our courts undoubtedly have considered it important to see that things are done as they ought to be done. The question with me is whether this is the Court that can do it. Whether it is not the court of equity.

Mr. Cabell: These are law cases I refer to.

10 The Court: I would like to have any authorities you have.

Mr. Cabell: I am afraid I have not got them in any shape to submit to the Court. Mr. Wolber has most of the material here in an undigested form and not convenient to hand to the Court.

The Court: Perhaps as you are going along he can cull from it those things which you think are important.

20 Mr. DeYoe: We gave the other side notice to produce this deed, of which we have a certified copy, of Schulster to Ralph, dated the 27th day of February, 1907. Have you that deed?

Mr. Cabell: No; we have not.

Mr. DeYoe: We notified you to produce a couple of other deeds. Have you got those?

Mr. Cabell: Yes.

Mr. DeYoe: Let me have them, please.

Mr. Cabell: Which one do you want?

30 Mr. DeYoe: I want the one the City of Newark got.

(Mr. Cabell produces deed.)

40 Mr. DeYoe: I offer in evidence the record of a deed dated the 27th day of February, 1907, made by Jeanette Schulster and William G. Schulster, her husband, to Jacob Ralph and Elizabeth Ralph, his wife, and to her heirs, for an acre of land situated in the Township of West Milford, County of Passaic, State of New Jersey, described fully in said deed, which deed is recorded in the Register's

Case.

office of the County of Passaic in Book S-12 of Deeds, at pages 80, etc., on March 26th, 1897.

Mr. Cabell: I object to the offer. The best evidence is the deed itself, and until the plaintiff accounts for the failure to produce the original deed the best evidence should go in evidence despite the statute.

10

The Court: I understand you have not got the original deed, Mr. DeYoe?

Mr. DeYoe: No, sir; we have not got the original. We noticed the defendant to produce it.

Objection overruled. Defendant excepts.
(Admitted and marked "Plaintiff's Exhibit P-1" of this date.)

Mr. DeYoe: I also offer in evidence the record of a deed made by Jacob Ralph, widower, to Wesley Chamberlain, dated May 10th, 1902, which conveys the same premises described in the former deed, Exhibit P-1, and is recorded in Book R-15 of Deeds in the Register's office of the County of Passaic, at pages 16, etc., on June, 20th day of June, 1902.

20

(Admitted and marked "Plaintiff's Exhibit P-2" of this date.)

Mr. DeYoe: I next offer in evidence the record of a deed made by Wesley Chamberlain and wife to Louis F. Braun, dated December 2nd, 1903, conveying the same premises described in the former deed, Exhibit P-2, and recorded on the 9th day of December, 1903, in the Passaic County Register's office in Book H-16 of Deeds, at pages 307, etc.

30

(Admitted and marked "Plaintiff's Exhibit P-3" of this date.)

Mr. DeYoe: I then offer in evidence deed dated April 13th, 1910, made by Louis F. Braun and

40

Case.

wife to Wesley Chamberlain, conveying the same premises, recorded on April 28th, 1911, in Book Y-21 of Deeds in the Passaic County Register's office, at pages 138, etc.

(Admitted and marked "Plaintiff's Exhibit P-4" of this date.)

10

Mr. DeYoe: I now offer in evidence the record of a deed made by Wesley Chamberlain and wife to the Mayor and Common Council of the City of Newark, dated April 20th, 1911, consideration \$12,500, and conveys the premises in question and also a tract containing .82 of an acre, and recites the deed made by Jeanette Schulster and William J. Schulster, her husband, to Jacob Ralph and wife, dated February 27th, 1897, recorded in Book Z-21 of Deeds, at pages 374, etc., in the Passaic County Register's office on the 13th day of October, 1911.

20

(Admitted and marked "Plaintiff's Exhibit P-5" of this date.)

The Court: What is the claim you make, Mr. Cabell, that the alteration took place before or after the deed was executed?

Mr. Cabell: My opinion is the alteration was made after the execution of the instrument; but, for the purposes of interpretation, I think that it is immaterial whether it was made before or after the actual execution, as long as it was made after the first drawing or completing of the instrument, with all its parts correlated.

30

The Court: Suppose the deed is now the way it was when it was executed?

Mr. Cabell: If the change was made after the instrument had been duly made out and all the blanks filled up, but not executed, it would affect the interpretation of the instrument, because

40

Case.

it would be a fact to enable the Court to see how the discrepancies in filling out the blanks arose.

The Court: Suppose the deed was executed with the alteration in it. Is not that the act of the person executing the deed?

Mr. Cabell: Yes, sir.

The Court: Then how can the Court go back of that deed by any construction of the changes in it? 10

Mr. Cabell: Except that it would show the intent of the parties.

The Court: The intent is presumed from what the parties did?

Mr. Cabell: Yes; but this is the situation: I think the courts have frequently held that where there is a discrepancy, there is inaccurate language used in the instrument, the Court may look to the deed. 20

The Court: But that is not this case, as I understand.

Mr. Cabell: Oh, yes. The instrument is clearly inaccurate, and an inspection of the instrument shows how the inaccuracy arose.

The Court: I understand the only inaccuracy you claim is that it is made to Ralph and his wife and to her heirs and assigns, and you say it should have been made to "their heirs and assigns."

Mr. Cabell: I say this: An inspection of the record as it now is puts upon the Court the difficulty of interpreting the instrument, which is inharmonious. 30

The Court: What is there which is inharmonious?

Mr. Cabell: There are two grantees, and the deed grants to the party of second part, her heirs and assigns.

The Court: Why can't they do that?

Mr. Cabell: "The parties of the second part," 40
the expression "grantees," the names which have

Case.

gone before, regard them as a unit, and until that unit is broken a singular pronoun is improper, and that improper expression clearly requires construction by the Court.

10 The Court: Supposing the parties intended to do just exactly what counsel for plaintiff says they intended to do, does not the deed carry that out?

Mr. Cabell: That is for the Court. If the parties did not clearly say just what they meant, it is for the Court to construe it on its face. They grant to the parties of the second part and to the heirs of one of them. If the Court were disposed to construe the word "heirs" as it appears in the instrument on the record, in that way, I should say that the disposition to construe it that way would be affected by this fact, that the instrument
20 at first was drawn with reference to a single grantee, the party of the second part was at the time of the making of the instrument singular, and they subsequently made it plural.

The Court: No doubt that would be so in equity, but would it be so in law?

Mr. Cabell: Of course, it is a slight matter, but I can point out that in the warranty there is no filling-in of the blank at all. They do not say either to her heirs and assigns or to their heirs
30 and assigns; they simply say "the party of the second part, heirs and assigns forever"; the blank is not filled in.

The Court: Then, as I understand it, what you intend to prove is that the alteration on the paper occurred before the deed was executed?

Mr. Cabell: No; I wish to prove, for my purpose, that the alteration, the change, from a singular grantee to a plural grantee, was made after the instrument had been fully made up.

40 The Court: But before the execution?

Case.

Mr. Cabell: Whether made before the execution or after the execution is immaterial for my purpose; but I am informed that it was actually done after the execution.

The Court: That is, the alteration was made after the execution?

Mr. Cabell: Yes; after the subscribing witness had subscribed it and taken the acknowledgment. 10

The Court: You intend to prove that after the execution an alteration was made?

Mr. Cabell: Yes.

The Court: What have you to say about the question of estoppel?

Mr. Cabell: The City of Newark is not compelled to go beyond the possessory title of Jacob Ralph. He was there. He claimed title. Why, we were in no position to investigate, and under a claim of that title he was in possession. He executed a full warranty deed, assuming to convey the fee simple absolute. That is all we need to consider. If he had been our immediate grantee we might have more to go through, but he is not. 20

The Court: Don't you take that as notice of the fact that the man you bought from, or his predecessor in title, had a deed which read the way it now appears?

Mr. Cabell: No. He might have come into possession under some other claim entirely. 30

The Court: The record shows a return upon it in your chain of title.

Mr. Cabell: I think not; I think we can depend upon the possessory title.

The Court: The fact that that deed is on record, isn't that notice to you? For instance, when the City of Newark knew there were certain deeds on record, one of which, or this deed, said "to her heirs and assigns," that was notice to you that Mr. 40

Case.

Ralph got it in that way. Having taken this title, based upon a deed which read that way, aren't you estopped now from denying it?

10 Mr. Cabell: I think not. I think, while we had legal notice of the existence of this deed, we did not know but that he had some other reason for being in possession.

The Court: In the absence of anything else, is not that what you based your title on? Aren't you estopped from denying your deed from which you got title yourself?

Mr. Cabell: We are not estopped, because we can ignore, for the purposes of this proceeding, the matter of that deed.

The Court: How can you ignore the foundation upon which you build?

20 Mr. Cabell: We can ignore his paper title and only take possession on his possessory title.

The Court: How can you ignore the deed when it is right there staring you in the face?

Mr. Cabell: Because he was not our immediate grantor. Chamberlain was our immediate grantor, and we can go back no further than the grantor of our immediate grantor in possession and claiming title.

30 The Court: Have you got any authority which sustains you in that?

Mr. Cabell: I have not them right at hand. I will submit them possibly when we come into court after recess. I take it for granted that this case cannot be completed to-night.

The Court: I suppose you ought to have your authorities ready when you come into court to try the case.

40 Mr. Cabell: It was only at the last minute that the burden of this trial was unexpectedly thrown upon me. I expected the City Counsel of Newark

*Case.**Minnie Kimble—For Plaintiff—Direct.*

to try the case, and I expected to be associated with him for certain purposes.

Mr. DeYoe: In order to make it clear to the Court: It is a fact that your client took a bond to indemnify the City of Newark?

Mr. Cabell: Yes; we took a bond for \$1,000 to indemnify them against lawsuits arising under this very situation. 10

The Court: In the face of that you certainly cannot say that you were relying on the possessory title.

Mr. Cabell: They are entitled, as a matter of law, to rely on his possession.

MINNIE KIMBLE, the plaintiff, sworn as a witness on her own behalf, testifies as follows: 20

Direct examination by Mr. DeYoe.

Q. Where do you live? A. In Newfoundland.

Q. How long have you lived there? A. Thirty-eight years.

Q. What was your father's name? A. Jacob Ralph.

Q. And your mother's name? A. Elizabeth Ralph. 30

Q. Can you tell me when your mother died? A. In 1898.

Q. Do you know the day and month in 1898 when she died? A. October 6th.

Q. When did your father die? A. In 1915.

Q. What time in 1915? A. The 14th of March.

Q. Are the Jacob Ralph and Elizabeth your father and mother; are they the same persons who are named in this deed made by Jeanette Schulster 40

Minnie Kimble—For Plaintiff—Direct.

and William J. Schulster, her husband, to Jacob Ralph and Elizabeth Ralph, his wife, dated the 27th day of February, 1897? A. Yes, sir.

Q. They are the same persons? A. Yes, sir.

10 Q. What buildings were on that property in the year 1910, just before the City of Newark took possession of it; do you know? A. Well, the same buildings were left on when we were there.

Q. What buildings were they? A. Well, there was the dwelling, barns, icehouse and little out-buildings.

Q. What was the building, the dwelling house, used as? A. When we left there?

Q. Yes. A. It was a house.

Q. A private residence? A. No. My father kept a bottling business.

20 Q. And he kept a saloon? A. Yes, sir.

Q. When your father left the place and Mr. Chamberlain went there, he kept the place, didn't he? A. Yes, sir.

Q. What did he run the property as? A. A hotel. He had a license; we did not; we had a bottling.

Q. What became of the buildings; do you know? A. The City tore them down.

30 Q. When was it they took them down; do you know; what year? A. No. I could not tell you that.

Q. Do you know when it was that Mr. Chamberlain left the property, how long it was before the City of Newark tore them down? A. Mr. Chamberlain—

Q. How long after he had turned that property over to the City of Newark was it that the City of Newark tore down the building? A. I guess not very long; I could not tell you.

The Court: That is not disputed, is it?

Minnie Kimble—For Plaintiff—Direct—Cross.

Frank Post—For Plaintiff—Direct.

Mr. DeYoe: It is admitted in the interrogatories.

Q. Did your mother leave any will? A. Not that I know of.

Q. How many children did she have? A. Just the one. 10

Q. You were the only child? A. Yes, sir.

Cross-examination by Mr. Cabell.

Q. You say that your father occupied the premises about which you are suing? A. Why, certainly he did; I lived there with him.

Q. What business did he conduct there? A. He had a bottling works. 20

Q. Bottling what? A. Why, beer.

Q. What other business did he conduct there? A. Well, the bottling works is all I know.

Q. Your counsel asked you a question which you did not answer; didn't he conduct a saloon there? A. Yes; a saloon; but bottling works, and we had the house up over the top of it, a six-room house.

Q. And he conducted a saloon also? A. Yes, sir.

Q. When did he put up those buildings; do you know? A. No; I could not tell you that. 30

FRANK POST, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. DeYoe.

Q. Where do you live? A. At Bloomingdale.

Q. Where did you live before you went to Bloomingdale to live? A. At New Foundland. 40

Frank Post—For Plaintiff—Direct.

Q. When did you move from New Foundland to Bloomingdale? A. A year ago the 1st of this August, last August past.

Q. That would be August, 1915? A. Yes, sir.

Q. How long did you live in New Foundland? A. I lived there eight years.

10 Q. Were you familiar with the property known as the Wesley Chamberlain Hotel? A. Yes, sir.

Q. How long have you known it? A. Well, I have known it practically all the while I live there, going by it, and once in a while on the property; very seldom, though, on the property.

Q. How far did you live from the property? A. Oh, probably five or six hundred feet.

Q. What is your business? A. Now?

20 Q. Yes. A. I am working as a bridge and trestle builder.

Q. Have you also built houses? A. Once in a while; not very often.

Q. You have built them some years back? A. Yes, sir; some years ago I built some houses.

Q. And you were in the contracting business then for building houses? A. No; not now.

Q. I mean then, some years ago? A. Yes.

30 Q. How recently is it that you have worked on a house? A. Oh, I have not put any houses up now in the last three or four years. I partly built a house this last spring, along in May. A gentleman had started a house and I finished it, up at Smith Mills.

Q. That is about how far from New Foundland? A. About five miles, I should judge.

Q. What buildings were on this Chamberlain property; do you know? A. Why, there was a hotel, barn, bottling works, a small shed and a small ice-house; that is all I remember of.

Frank Post—For Plaintiff—Direct.

Q. Do you know about what it would cost to reproduce that hotel? A. At the present day?

Q. Yes.

Mr. Cabell: Objected to. The present day is not the criterion. It is the value of the buildings.

10

Q. March 15th, 1915, the date of the death of the life tenant?

Mr. Cabell: Objected to.
Objection overruled. Defendant excepts.

A. Why, I should judge to put those buildings on this property—

Mr. Cabell: I object. That is not the cost of reproducing at that time. That is not the criterion.

20

Mr. DeYoe: Yes; it is the cost of reproducing at that time.

Mr. Cabell: I object to the testimony as to the cost of reproduction; what we want is the value of the buildings as they existed.

Mr. DeYoe: I quote from Sedgwick on Damages, ninth edition, volume three, "It is more commonly held to be the actual value of the buildings as such *in situ*. Which is not the cost of replacement, though such cost may be shown as evidence of the value."

30

The Court: It is not the measure of damage, but it may be some evidence of the value to have them replaced, which, of course, would give you a new building in place of the old.

Mr. DeYoe: Of course, there has to-day to be allowance made between the value of the new building and the old building.

40

Frank Post—For Plaintiff—Direct.

The Court: You have not yet shown the condition it was in at the time.

Mr. DeYoe: I expect to show that.

The Court: Then I will permit this proof.

10 Q. What would it cost to reproduce it at that time? A. 1915, or now?

Q. March, 1915? A. Well, if you bought all new material and paid for the labor, I should judge that building—of course I—

The Court: You are speaking now of the dwelling house?

The Witness: Certainly; and the buildings just as they were there.

The Court: All of them?

20 The Witness: Yes; all the buildings.

The Court: They would cost how much?

The Witness: To build them up with new material and pay for the work like it was in 1915 would cost around \$6,000, I should think.

Q. As to the appearance of the buildings at the time they were destroyed in 1911; what was the appearance of the buildings at that time? A. Well, they were not very good, to my eye.

30 Q. Were they in repair? A. Well, practically; yes; tenantable; but that is about all you could say.

Q. Were they under paint? A. Well, I think the barn had a coat of red paint, and the houses was not any too good; they needed paint; and the little bottling works, that I most forget how that was, and the shed and icehouse, the icehouse was not very much, the shed was a very cheap affair.

40 Q. Do you know about the dimensions of the house, about how large it was? A. I could not tell exactly; no; not the dimensions.

Frank Post—For Plaintiff—Direct—Cross.

Q. Near to it, approximately, is what I want. A. Well, you mean the rooms into it?

Q. No; I mean just the outside dimensions. A. Just the outside. I should think it was around twenty or twenty-two feet by about fifty, forty-five or fifty.

The Court: Two stories or three? 10

The Witness: Two stories.

Q. What kind of a roof did it have on? A. Well, the roof, if I remember, I think was a slate roof.

Q. Was it a peaked roof or a flat roof? A. A peaked roof.

The Court: In what condition of repair was it inside? Tell the jury what condition it was in in detail.

The Witness: It was, I think there was some plaster in it, and ceiling, put up very cheaply. That is about all I can say. I never was in it very much, only in the bar-room, and I walked once or twice through the house. That is about all I can say about it. I noticed it more when the water company tore it down. 20

Q. You were living there when they tore it down? A. Yes, sir.

Q. Where was the property located? On what road? A. The Paterson and Hamburgh Turnpike, on the westerly side. 30

Cross-examination by Mr. Cabell.

Q. You knew the Ralph buildings pretty well, didn't you? A. Well, just as I have stated I knew them.

Q. In 1911, at the time they were torn down, you knew them, did you not? A. When they were torn down? 40

Frank Post—For Plaintiff—Cross.

Q. Yes. A. Yes. I passed by there, and was in there, I think, once or twice.

Q. Can you tell what the buildings were worth at that time? A. What they were worth?

Q. Yes. What was the house worth at that time, considering all the elements, its condition? A. Well, I can tell what I think. It was not worth very
10 much then. It was a cheap affair, at that time, when I saw them tore down; it was very cheap.

Q. What was it worth then? A. I would not want to give over \$2,000 for the whole of them.

Q. All the buildings? A. All the buildings.

Q. What was the value of the house at that time, in your opinion? A. Oh, I should judge around about—I am taking the way it was built and all—

Q. Yes. A. About thirteen or fourteen hundred
20 dollars.

Q. And all the other buildings; how much were all the other buildings worth? A. Well, the icehouse ain't worth speaking of very much, and the shed was little better.

Q. What was the shed worth? A. About \$50.

Q. The bottling plant was a little building they bottled in; what was that worth? A. The bottling works? I most forget how that was worth. That was worth more than really the rest. I should judge
30 around about two hundred or two hundred and fifty dollars.

Q. What was the barn worth? A. About a hundred and fifty dollars; you could fix that barn.

Q. Then you say the icehouse was not worth anything? A. I would not give anything for it, for me. Of course, for practical use, all that they wanted, it was worth something, I suppose, but if I remember right it was a very cheap affair. I would not put any price on the icehouse. I would not say
40 what the icehouse was worth.

Frank Post—For Plaintiff—Redirect.
John M. Weaver—For Plaintiff—Direct.

Redirect examination by Mr. DeYoe.

Q. You could keep ice in the icehouse all right?

A. I could not say whether they did or not at the last.

Q. You don't remember whether they did or not?

A. I don't remember whether they did or not. 10

Q. The house was occupied as a hotel, was it?

A. Yes; it was occupied; I believe Mr. Chamberlain was into it.

Q. As a hotel? A. Yes, sir; sometimes it might be; he was in there when they tore it down.

JOHN M. WEAVER, sworn as a witness on behalf of the plaintiff, testifies as follows: 20

Direct examination by Mr. DeYoe.

Q. You live in New Foundland? A. Yes, sir.

Q. How long have you lived there? A. For forty-eight years.

Q. Have you ever bought and sold any real estate there? A. Well, I bought my brothers and sisters out.

Q. Did you buy of anyone else? A. Nobody else; 30
 I bought by our house, as long as they had dealings with the water shed.

Q. How recently have you bought there? A. A little less than a year.

Q. You are also assessor? A. Assessor for the township, fourth term; no hard fight.

Q. In the deed dated the 22nd day of April, 1911, made by Wesley Chamberlain and wife to the Mayor and Common Council of the City of New-ark, I find the following description: "First Tract: 40

John M. Weaver—For Plaintiff—Direct.

10 Beginning in the middle of the road (formerly the Paterson and Hamburg Turnpike) at an iron bolt sixteen links southerly from a culvert across said road; thence running (1) south eighty-nine degrees thirty minutes west through a hickory tree three chains and sixty-eight links to an iron bolt; (2) north one degree fifteen minutes east two chains and eighty-nine links to an iron bolt; (3) north eighty-seven degrees forty minutes east three chains to the middle of the road; (4) along the same south eleven degrees forty-five minutes east three chains to the Beginning. Containing one acre." Do you know what that property was? A. The Chamberlain property at New Foundland, one acre.

Q. Was that the property where the buildings in question were erected on? A. Yes, sir.

20 Q. Now, there is another tract of land in the deed contain .82 acre? A. Yes, sir.

30 Q. And the description of that tract reads: "Second Tract. Beginning in the middle of the public road at the beginning corner of a tract of land conveyed by Janette Schulster and William Schulster, her husband, to Jacob Ralph and wife, by deed dated February twenty-seventh, 1897; running thence as the compass pointed December seventeenth, 1908, (1) along the first line of said tract eighty-nine and three-quarters degrees west three chains and sixty-eight links to the second corner thereof; thence (2) south two degrees west along a fence three chains and five links to the corner of the fence; thence (3) along the fence north eighty-seven degrees east four chains and thirty-six links to the middle of the aforesaid public road; thence (4) along the middle of the said public road north eleven degrees west one chain and thirty-three links to the place of Beginning." Do you know where that tract is located? A. Adjoining the first acre.

40

John M. Weaver—For Plaintiff—Direct.

Q. How does the land of the two plots compare, the land of the acre plot and the land of this .82 acre plot? A. Well, about, most the same.

Q. It is the same class of land? A. It is the same class of land, swampy land; it is low land.

Q. The .82 tract, is that swampy land? A. Part of it; yes, sir. 10

Q. The other acre is the land where the buildings were on? A. Yes, sir.

Q. How do they compare in value? A. Well, there is about no difference in value; the land there is about the same.

Q. What is the acre lot worth? A. Oh, I suppose a hundred dollars.

Q. What is the .82 of land worth?

Mr. Cabell: I object to the question, what was the value of the acre of land. 20

The Court: That is the one with the buildings on it, is it not?

Mr. DeYoe: That is the one had the buildings on it.

The Court: What is the purpose of that?

Mr. DeYoe: I want to get at the value of the land itself, as separate from the buildings.

The Court: Why? 30

Mr. DeYoe: I think it is very material; they produce here a deed with a consideration, which is the value which they place upon the property, \$12,500.

Mr. Cabell: That deed contains several properties and also the covenants.

Mr. DeYoe: I don't think that makes any difference.

Mr. Cabell: It contains two tracts of land and also the covenants. 40

Case.

Mr. DeYoe: That is right.

Mr. Cabell: And it also contains a covenant by Chamberlain to remove from the water shed, neither to live there nor to do business there, in the whole water shed, nor to acquire any property in the water shed.

10

The Court: Let us hear what it says?

20

Mr. DeYoe: It describes these two tracts of land, and then says: "The foregoing two described tracts being the entire individual holdings of property of the said party of the first part in the territory of the Pequannock Watershed, and the said party of the first part, in consideration of the covenant of the said party of the second part to purchase the lands and real estate hereinbefore described, further covenants and agrees to and with the said party of the second part not to acquire, directly or indirectly by lease or otherwise, any lands or real estate or any interest therein located in the territory of what is known and designated as the territory of the Pequannock Watershed, above or northerly of the southerly point of the Macopin Intake Reservoir of the party of the second part, and not to dwell or reside within the territory of said watershed, and to wholly and permanently remove from said territory on or before September first, nineteen hundred and eleven."

30

The Court: I will allow the question.

Objection overruled. Defendant excepts.

Q. Now, what is the .82 acre of land worth?

A. About the same rate.

40

(No cross-examination.)

Motion for Nonsuit.

Mr. DeYoe: As I understand from the interrogatories, you agree that the City of Newark destroyed the buildings on this property?

Mr. Wolber: That is in the answer.

Mr. DeYoe: You admit that?

Mr. Wolber: We put that in the answer.

Mr. DeYoe: Then I notice in the pleadings, the complaint is made against the City of Newark, and the answer sets out that they are sued as the City of Newark, but that their correct name is the Mayor and Common Council of the City of Newark; I wish to amend the pleadings to that extent.

Mr. Cabell: I would be delighted to consent to that amendment if the adjournment that I spoke of for the purpose of getting additional testimony were consented to.

The Court: How is the answer filed?

Mr. Cabell: The answer is filed by the City of Newark, and explains it in this way (reads the answer).

The Court: I will allow the amendment.

PLAINTIFF RESTS.

Mr. Cabell: If the Court please, I move for a nonsuit in this action, and, while I have not the evidence respecting the deed itself in such form as I would like to have it before asking the Court's ruling upon the matter, I think that on an inspection of the deed by the Court—

The Court: On a motion for a nonsuit the presumption is, for the purposes of the motion, that everything that has been sworn to

Motion for Nonsuit.

is true. The Court has not anything before it except the record.

Mr. Cabell: But an inspection of the deed itself.

10 The Court: How can I assume anything of that kind? I have got to take it on what is here.

Mr. Cabell: But on this motion you can take this deed as offered and construe it to determine whether or not this case can go on, whether on the face of this deed the claimant has any title.

The Court: Yes; that is what we shall have to do.

20 Mr. Cabell: This deed is between Janette Schulster and her husband to Jacob Ralph and Elizabeth Ralph, his wife, and witnesseth that the said parties of the first part for and in consideration of the sum of \$125, lawful money, etc., have given, granted, bargained, sold, aliened, etc., and by these presents do give, grant, bargain, sell, alien etc., unto the parties of the second part and to her heirs and assigns forever the property described.

30 There is an inaccuracy of language there, and it is for the Court to construe it.

It is plain that the parties of the second part is plural; we have reached a point where we are dealing with plural parties of the second part, and then the parties of the second part is the antecedent of the pronoun that next occurs. The proper pronoun for that antecedent is "their." It is not "their," it is "her." And at once we find an inaccuracy, and that inaccuracy must be dealt with somehow or other by the Court, and,

40

Motion for Nonsuit.

of course, a mere clerical inaccuracy is not to defeat an instrument, where the Court can arrive at the intention of the parties, but that intention of the parties must not be ascertained only from the original sources, and the Court will grant relief where it appears that the right word has not been used, but a wrong word in its place. 10

The Court: Have you looked up the statute on that?

Mr. Cabell: There is no statute that will fit the case.

The Court: It just comes to me now that I remember some lawyer speaking to me some four or five years ago about a case that I thought was very similar to this, and there was some legislation enacted to cure it; whether it was a joint resolution or not, I don't know. 20

Mr. Cabell: But the Court has the power to insert the right word for the wrong word where it is clear that the wrong word is used.

The Court: I would hardly put it that way. I have not the right to insert it, but I might read it that way.

Mr. Cabell: But the Court will not substitute or interpolate words that the parties did not use and make a contract that the parties did not make. To get the sense that they desire it would be necessary to say, not "the parties of the second part," which is both, but it would be necessary to say "one of the parties of the second part, her heirs and assigns forever." It is necessary to interpolate a new antecedent for this pronoun here. Now, that is a much more difficult 40

Motion for Nonsuit.

10 thing to do than to read a wrong word right, because, as I say, the Court will not interpose new words, entirely new words, and make a new contract, because it is a rather violent assumption that a mistake like that could be made. It is easy to slip a little word like "his" or "her" here or there for the word "their," but it is a difficult thing to slip such a group of words such as is necessary to pass from a plural antecedent to a singular one—that is, to give this pronoun a proper antecedent; it is much easier to make a proper pronoun for the antecedent already there.

The Court: That phrase appears later in the *habendum* clause, doesn't it?

20 Mr. Cabell: Yes; it appears throughout.

The Court: How does it read there?

30 Mr. Cabell: The same way, to have and to hold all and singular the above-described premises, with their appurtenances, unto the said parties of the second part, her heirs and assigns. Now, you will note that this word here, this inaccurate word here, occurs before "assigns," as well as before "heirs," and if their contention were upheld, why, Jacob Ralph had no right to convey or sell; the sole right of conveyance was in his wife. Yet by their pleadings they admit that Jacob Ralph had the right of assignment, and it is quite clear that the doctrine of *expressio unius est exclusio alterius* would lead to the conclusion that from the fact that one may assign and the other may not, while their pleadings admit that this deed permitted Jacob Ralph to assign.

40 There is a case in this State that I have mentioned before, the old *Hardenburg* case,

Motion for Nonsuit.

which is a highly important case upon other matters, and relates to the estate possessed by the husband and wife with respect to the deed. It is a case almost on all fours with this case, the only difference being that there the pronoun was "his" when the grantees were plural and here is is "her."

10

The Court: What do you say about the *Hardenburg* case?

Mr. Cabell: The *Hardenburg* case I carefully examined. It does not construe this point at all. The *Hardenburg* case I call careful attention to. It emphasizes the change made in the instrument after it had first been completed.

The Court: The *Hardenburg* case I have before me, and at page 48 it reads as follows (reading the case).

20

Mr. Cabell: But that is not the opinion of the Court. That is the dissenting opinion.

Mr. DeYoe: In the main opinion also it says the same thing.

Mr. Cabell: The opinion of the Court is to the effect that it is not necessary for the purposes of this action to determine the duration of the plaintiff's estate, but only its extent, whether it is a half interest or a full interest.

30

The Court: In the main opinion they say, on page 44 (reads opinion).

Mr. Cabell: The Court definitely refrains from expressing any opinion as to the duration of the title claimed, whether it is an estate merely for life or whether it goes on as an estate in fee simple.

The dissenting opinion, for the very purpose of doing what the majority of the Court

40

Motion for Nonsuit.

through the Chief Justice refused to do, filed this opinion, that we may call a concurring opinion, because he concurs in the conclusion of the Court, but only differs in one respect, that he insists upon giving a construction to this deed that the majority refused to give, and I hold in that respect that this very decision upholds our contention.

10

The Court: Have you any cases which construe identical language of this kind?

Mr. Cabell: I have them, but not ready for submission to the Court.

The Court: Have you any, Mr. DeYoe?

Mr. DeYoe: I have another case here in which similar language was involved, in the Montgomery County Reports, N. Y. Reports, in which there was a conveyance by A. to B. and C., his wife, her heirs and assigns, the wife being the only daughter of the grantor. The wife died before the husband and held that a life estate was given to the husband and wife, the husband and wife were seized of an entirety for life, but after that it descended to the heirs of the wife, just the same as in the other case.

20

In this case in question it may very well have been that the husband was not a proper party to have the fee. He may have been addicted to patronizing his own bar, or something of that kind, and for that purpose it may have been fixed with the fee in the wife, so that it would go to her children. We cannot go into that question. We have to take the deed just as it stands and give it effect.

30

The Court: Do you find any other cases? This must have arisen many times.

40

*Motion for Nonsuit.**Wesley Chamberlain—For Defendant—Direct.*

Mr. DeYoe: I find quite a number, but I did not bring quotations from them. They are old English authorities, and I thought the ones I brought were amply sufficient.

Mr. Cabell: If I may speak of this very authority presented by my learned and diligent adversary, the quotation from the deed here is to "Marian R. Crater and Alice, his wife, her heirs and assigns." There the immediate antecedent is Alice, his wife, and the pronoun is proper to such an antecedent, but in our case we have the immediate antecedent, "the parties of the second part," which is plural antecedent, and may not be divided without considerable verbiage. 10

Mr. DeYoe: There is no difficulty about it at all; there is a male party of the second part and a female; "her" means female, just as good as if they had repeated the name. 20

Motion denied. Defendant excepts.

WESLEY CHAMBERLAIN, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Cabell. 30

Q. You are the person named in the deed from Jacob Ralph to Wesley Chamberlain? A. Yes, sir.

Q. You took possession of the property shortly after the deed was given you by Mr. Ralph? A. Yes. Right away.

Q. What was the condition of the property at the time that you took it, as to improvements? A. Well, it was in a dilapidated condition. 40

Wesley Chamberlain—For Defendant—Direct.

Q. What buildings were there at that time? A. One building only.

Q. Name the buildings that were there when you took possession? A. The one main building, afterwards the hotel, which was built on the same construction, and an old icehouse there, two buildings.

10

Q. There was the hotel and the icehouse? A. Yes; those were the only two.

Q. Anything else? A. Nothing, to my recollection; no; that is all.

Q. Describe the hotel? A. The size?

Q. When you say "hotel" what do you mean by it? A. I mean the building that was afterwards converted into a hotel.

Q. What business was it used for at that time?

20

A. Well, for bottling and retailing generally.

Q. It was not used for the entertainment of travellers by giving them sleeping accommodations? A. No, sir.

Q. What was the general condition of this so-called hotel? A. Well, it was in a rotten condition. The sills were rotted out, the floor had all rotted out, so that it tilted over to one side; that was the condition when I saw it, and the roof was partly off, to such an extent that they had to put some tar paper on it before they could use it.

30

Mr. DeYoe: I object to the testimony on this line. We took by this deed on the death of the life tenants, and we took by that deed what the condition of the buildings were at that time, and what the condition of the buildings was at the time this witness bought is not material.

Mr. Cabell: I hold that this is a proper inquiry. There is a count here for waste. There is a life tenant. Jacob Ralph was

40

Wesley Chamberlain—For Defendant—Direct.

the life tenant, and he claimed the fee. He claimed besides the life estate the fee.

Mr. DeYoe: I object to the statement of counsel about his claiming the fee. There is no evidence of his claiming the fee.

Mr. Cabell: There is the deed in the record given by him to Wesley Chamberlain wherein he asserted that he was the sole owner, and he conveyed in fee simple absolute and warranted the title. 10

Mr. DeYoe: Suppose he did.

Mr. Cabell: But that has not anything to do with the question. Counsel has objected to a statement of mine; I said that the action is for waste. He has a life estate and he claims in this way, through warranty, a larger estate, and at the time he has the life estate he conveys to Wesley Chamberlain, and Wesley Chamberlain reconveys according to the purport of his deed in fee simple absolute; he believes that is the estate he is possessed of, and he makes the improvements. Now, I hold that where a life tenant in good faith makes permanent improvements, and if it subsequently develops or is subsequently determined that his title is not a permanent one, or merely a life estate, that those improvements that he made while rightfully in possession as life tenant and in good faith, claiming the fee simple absolute, are not the subject of damages in waste. 20 30

The Court: I will overrule the question for the purpose for which it is offered by defendant's counsel.

Defendant excepts.

Wesley Chamberlain—For Defendant—Direct.

Q. Did you do anything about the property as to its improvement, after you took possession? A. Oh, yes; considerable.

Mr. DeYoe: I object to this.

The Court: Is this offered for the same purpose?

10 Mr. Cabell: Yes.

Objection sustained. Defendant excepts.

Q. You are the Wesley Chamberlain named in the deed to the City of Newark, dated April 22nd, 1911? A. Yes, sir.

Q. You conveyed the property then to the City of Newark? A. Yes, sir.

Q. Can you tell us how the \$12,500 was made up? A. Yes; I can. The City of Newark—

20 Mr. DeYoe: I don't know that it is material.

The Court: Yes. It was brought out by your own examination, and I will permit it.

A. (Continuing) The City of Newark awarded to the Chamberlain heirs for the entire Chamberlain estate and my individual estate the sum of \$37,500—

30 The Court: Does that deal with this particular deed?

The Witness: It is for the entire property.

The Court: I will order that stricken out. The question is what was the consideration of this money mentioned in this deed, how that consideration mentioned in the deed was divided.

40 Mr. Cabell: I think that statement is preliminary, and he cannot explain it otherwise. I object to its being stricken out.

Wesley Chamberlain—For Defendant—Direct.

The Court: It will be stricken out.
Defendant excepts.

Q. What was this \$12,500 made up of? A. It was a division of the money by agreement between myself and the heirs; the heirs were awarded \$37,500 for the whole property, including my own—

10

Mr. DeYoe: I object to it. The deed specifies the particular tracts of land they were to buy, and that he is not to buy any more property in that valley nor live there. That is all. Now, he cannot come in and say that there was some other property that was taken into consideration, and I ask that that be stricken out.

Motion granted. Defendant excepts.

The Court: The question asked is how was the consideration in this particular deed made up? 20

Mr. Cabell: As he seems unable to answer that without bringing in matter which the Court rules is irrelevant, I would like to withdraw it for a moment and ask a preliminary question.

Q. You were interested in other property in this water shed, were you not? 30

The Court: Is that mentioned in the deed?

Mr. DeYoe: No. The clause in the deed says he is not to buy any land in that valley nor to live in the valley. I object to this question.

The Court: But the deed says he owns other land, doesn't it?

Mr. DeYoe: It says that this deed conveys all the land he owns in the valley—that is, these two tracts. 40

Case.

Mr. Cabell: I am asking if he was interested in other property.

The Court: Perhaps I can get at it in this way:

By the Court.

10 Q. This deed calls for a consideration of \$12,500, doesn't it? A. Yes, sir.

Q. It says that you are conveying two pieces of property, and that you are agreeing to do certain other things? A. Yes, sir.

Q. Now, we want to know how you divided that up? How much you make it for the property and how much do you make it for the covenant you agreed to keep? A. Well, there was no division, as I recollect about that.

20

Mr. Cabell: If I may make a preliminary statement to the Court, Mr. Chamberlain was interested with his co-heirs in large tracts of land——

Mr. DeYoe: He had disposed of them to somebody else, I think.

Mr. Cabell: But this covenant relates to that very thing.

30

The Court: We will adjourn now so that counsel can frame up this matter and provide the other evidence he desires to gather.

(The Court thereupon adjourned to Monday, November 20th, 1916, at 10 o'clock A. M.)

40

SECOND DAY.

PATERSON, N. J., November 20th, 1916.

The trial proceeded this day pursuant to adjournment.

Mr. Cabell: We now offer to read the deposition of Mr. William Roome, taken since the last hearing. 10

Mr. DeYoe: I shall object to the reading of the deposition. He is a very methodical man, or it seems he was, and he made a survey, and then he says he made a memorandum or outline of a deed which he was asked to draw. He drew the deed, and he says he drew the deed to Minnie Bell Ralph, our client, and he says he does not remember making any change. He says, he knows, if there was a change made, if he had made a change, he could see it, he could tell. But to the best of his recollection he don't remember any. He was not sure, he said, not from the memorandums, but as it was twenty years ago he could not tell who were in the room at the time the deed was drawn. That is practically the testimony now offered to the Court, and we claim that that testimony is entirely immaterial. 20 30

The Court: Does he say there was any change made?

Mr. DeYoe: He don't know. He says, he sees this exemplified copy of the deed, and says that was not as he originally drew it.

Mr. McDevitt: He says if there had been a change made he would make a memorandum of it.

Mr. DeYoe: He says he would have made a note of it and he does not find any such 40

Case.

note, and if he did not make a note of it he could not tell till he saw the deed.

The Court: He says the certified copy is not as he drew it?

10 Mr. DeYoe: He is not sure of that. He says if he saw the deed he would be sure of it. He says he thinks it was not the way it was executed, but, nevertheless, I claim that is entirely immaterial for this reason, that the only person affected by it is our client, the deed was made to her, she is the only one who can go into court to have that deed set aside on account of any change, or she can ratify it. It is clearly a question of ratification.

20 The Court: The deed was to Jacob Ralph and Elizabeth, his wife, that is the mother of the plaintiff?

Mr. DeYoe: Yes, sir.

The Court: You said the deed was made to Mrs. Kimble?

Mr. DeYoe: He said it was made to Mrs. Kimble originally. That is, Minnie Ralph, Minnie Bell Ralph, otherwise Minnie Kimble.

30 The Court: But it does not seem to be that way at all. It seems to be made to Elizabeth Ralph.

Mr. DeYoe: You get the idea. He says the original deed was drawn by him on that date in that way, and he is not sure whether it was changed before it was executed or not.

The Court: He says it was drawn to Minnie Kimble?

40 Mr. DeYoe: It was drawn to Minnie Ralph, who is now Kimble. Supposing that is the fact. Supposing it was changed. How

Case.

can this man be hurt? Let us suppose that Ralph was right here to-day and contesting this matter, what would be his position if he changed it in his favor? Would the Court listen to him by saying, "This deed cannot be offered in evidence because I changed it, and changed it in my favor"? He could not come into court; he would be taking advantage of his own wrong. Our party is the only one who would be injured by the change and if our client is the only one injured by the change she is the only one who can raise the question. Now, the position of Wesley Chamberlain to-day is just the same as that of Ralph; he took that deed and took it with knowledge.

10

The Court: The deed was drawn to Mrs. Kimble?

20

Mr. DeYoe: Yes. She is the only one who can raise the question.

The Court: If it was drawn to Mrs. Kimble, then Chamberlain would not be helped any.

Mr. DeYoe: Yes. That is exactly the position. His right of possession came from Ralph. He took by the deed that was on record. He took it with notice. He cannot come in to-day and say the deed should be different. He cannot come in to-day and say that he did not get any title under that deed, because the deed is changed. Our action here is ratification under that deed, ratification as against our interest, and we are the only ones who can raise the question. I have a number of decisions on that matter which I can present to the Court if the Court desires them.

30

Mr. Cabell: Mr. DeYoe's recollection is

40

certainly inaccurate as to the contents of the depositions.

We offer this testimony, not for the purpose of varying, altering, or even explaining the instrument but for the purpose of showing the appearance of the instrument.

10 In the interpretation of any instrument wherein need for interpretation may exist, the physical appearance of the instrument must be considered in such interpretation. Now, I think from these depositions, for instance, it appears that first the deed was made out to Minnie Bell Ralph and all the blanks were filled in appropriately to that grantee. That afterwards when, to me it is immaterial for the purposes of this form of
20 argument, it was changed with respect to the grantee. Instead of one person being the the grantee, it was made to two persons grantees, two persons not originally in there, neither of which persons was originally named as grantee.

The Court: Must we not assume, then, that if the deed was changed that they changed it the way it appears to be changed?

30 Mr. Cabell: I think not. I think we may show that the deed was changed with respect to that one particular; if they meant to change it throughout, they meant to make the grantee take under the same terms the original grantee took.

The Court: You mean change the word "her" to "their"?

Mr. Cabell: Yes.

The Court: But I must assume that the parties did what they intended to do.

40 Mr. Cabell: That is what you must infer from the appearance of the instrument. That

Case.

is the reason for inspecting the instrument.

The Court: Suppose the instrument did show that very thing, that it was filled out originally to Minnie Ralph and then for some reason or other the parties decided not to give it to her and decided to give it to some other to some other parties, and they changed the deed accordingly. Then why must I not assume that they did what they purported to do? Namely, to give it to Ralph for life, and after his death to her heirs? How can we construe their act as being anything else? That when they made the change they did exactly what they themselves wanted? 10

Mr. Cabell: The Court endeavors to ascertain what was the intent from within the four corners of the instrument. One of the elements that enters into that is this change. 20

The Court: That being so, and the fact appearing that there was a change, why have I not got to take it the way they did it? Have I the right to say that they did not intend to do the very thing they did?

Mr. Cabell: But, I say, the deed does not do that, and when you come to consider what the deed did do, or to consider these circumstances of personal erasure, that is the way you have of arriving at the intent. The intent shows a substitution of grantees after all the blanks were filled out. The question then is, were those blanks filled out with reference to the state of facts finally existing? 30

The Court: Suppose the parties decided, after they had made the deed to Minnie Ralph, that they would not want the deed 40

Case.

10 that way, she might disappoint them, she might desert them in their old age, and they decided that instead of giving it to the daughter they should make it to the mother and father to have it during their lifetime, and on their death it should go to the heirs of the mother. They therefore determined that the deed as it was drawn was "hers" and remained "hers" because that carried out exactly what they wanted.

Now, can I infer from the mere statement that the deed was something else on the start that they intended something else?

20 Mr. Cabell: You can, of course, because the deed itself is obscure. I argued this matter fully on the other motions and I will not try your Honor's patience again.

The Court: Have you any authorities?

30 Mr. Cabell: No, I have not had the opportunity to look them up. We must consider what was the state of facts in this case. Minnie Bell Ralph was as well Jacob Ralph's heir as Elizabeth Ralph's heir. She was the heir of both. Would these people have any reason, is there anything before the Court to show that they would for a moment call Minnie Bell Ralph the heir of her mother and not the heir of her father? In construing the instrument we must consider that, we must consider the situation of the parties. She was not alone the heir of her mother.

40 In the depositions, the scrivener said he knew the people, he said they were plain country people. On the cross-examination he was asked if they did not make some suggestion as to the deed, and he said no, they were plain country people.

Case.

Mr. DeYoe: He said that was not on his record, the only thing he could remember.

Mr. Cabell: I think you will find that fact, I have not seen it since it was written, but I know what was said upon the examination.

The Court: I will overrule the offer to read the testimony of William Roome. 10

Defendant excepts.

Mr. Cabell: I now offer it for the purpose of showing that there was no such deed.

The Court: If there was no such deed, then there was a deed to Minnie Kimble and she is the plaintiff now.

Mr. Cabell: No, sir; no deed at all.

Mr. DeYoe: That does not make any difference. You cannot claim it. You are in possession you say. How did you get possession? You took possession by deed. From whom did you take possession by deed? From Ralph, and you are in Ralph's shoes, and if Ralph changed that deed to his advantage he is the only one who can be called upon to explain, and we are the only ones who can bring him to account. Here is your deed, it recites our deed, the deed to the City of Newark recites our deed and refers to it and it is the deed on which we rely. 20 30

The Court: Why is not the defendant estopped? It recognized this deed and the way it got possession is by recognizing that deed?

Mr. Cabell: It is material in this way. This plaintiff must come into court and show that she has title. We are in posses- 40

Case.

sion. How we came into possession is immaterial for the purposes of this suit.

The Court: I think it is very material.

Mr. Cabell: We got possession under a claim of right. We got possession by deed from Wesley Chamberlain.

10 The Court: Which recognizes the deed that you are now attacking.

Mr. Cabell: It recites it. The same premises. It may recite it.

Mr. DeYoe: Their deed refers to this very same deed made by Shulster. Read the second tract.

Mr. Cabell: The second tract is another tract.

20 Mr. DeYoe: It don't make any difference, it refers to this deed.

Mr. Cabell: That is another deed.

Mr. DeYoe: That is not another deed, that is the same deed.

Mr. Cabell: If the Court cares to hear it we will read it.

The Court: Yes.

30 Mr. Cabell: In this deed, Chamberlain to Newark, dated April twenty-second, 1911, a record of which is already in evidence by the plaintiff, the first tract is described as follows—

The Court: That covers what?

Mr. Cabell: The tract now in dispute (reading):

40 "First Tract. Beginning in the middle of the road (formerly the Paterson and Hamburg Turnpike) at an iron bolt sixteen links southerly from a culvert across said road; thence running (1) south eighty-nine degrees thirty minutes west through a hickory

Case.

tree three chains and sixty-eight links to an iron bolt; (2) north one degree fifteen minutes east two chains and eighty-nine links to an iron bolt; (3) north eighty-seven degrees forty minutes east three chains to the middle of the road; (4) along the same south eleven degrees forty-five minutes east three chains to the beginning. "Conveying one acre. Being the same premises conveyed to the siad Wesley Chamberlain by Louis F. Braun and Stella Braun, his wife, by deed, dated April thirteenth, 1910." 10

Then they go on to the second tract which has nothing whatever to do with this.

Mr. DeYoe: Read it. Don't be afraid of it.

Mr. Cabell: The second tract is another tract. 20

"Second Tract: Beginning in the middle of the public road at the beginning corner of a tract of land conveyed by Janett Schulster and William Schulster, her husband, to Jacob Ralph and wife, by deed dated February twenty-seventh 1897——"

Mr. DeYoe: That is our deed.

Mr. Cabell: That is not your tract. That is the other tract. It is the 82-100 acre tract. 30

The Court: In the second tract in that deed is the title derived from the plaintiff?

Mr. DeYoe: No, sir.

Mr. Cabell: So your Honor will see that the second tract has nothing whatever to do with this ejectment suit.

Mr. DeYoe: It is a deed to Wesley Chamberlain reciting this deed to Ralph under which he took title before. 40

Wesley Chamberlain—For Defendant—Direct.

Mr. Cabell: The second tract is an entirely different tract.

Mr. DeYoe: It begins at the same beginning corner as the other tract and refers to this deed for its point of beginning.

10 The Court: And your second offer is to show that there was no such deed?

Mr. Cabell: Yes, sir.

The Court: I will exclude the testimony. Defendant excepts.

WESLEY CHAMBERLAIN resumes the stand:

Direct examination (continued) by Mr. Cabell.

20 Q. What business were you in, if any, at New Foundland, in the early part of 1911? A. Well, I was managing the business of the Chamberlain estate, a hotel, tenant house business, farms, etc.

Q. Where was that hotel of the Chamberlain estate? A. In the Village of New Foundland, near the County line, on the Paterson and Hamburg Turnpike.

Q. How far from the premises which you had bought of Ralph?

30 Mr. DeYoe: Objected to as irrelevant.

The Court: I don't see how it is material

Mr. Cabell: It has reference to this covenant.

The Court: He already explained that and said he could not divide the consideration up.

Mr. Cabell: I am just trying to show that there were other considerations.

The Court: I think that is apparent.

40 Objection sustained; defendant excepts.

W. Chamberlain—For Defendant—Direct—Cross.

Q. Did you ever receive from Jacob Ralph a deed which he had from Schulster?

Mr. DeVoe: Objected to as immaterial.
Objection overruled.

A. No. I never saw it.

The Court: You never had it? 10

The Witness: I never had it.

The Court: You have not got it now?

The Witness: No, sir.

Mr. Cabell: If the Court will permit me I will put the deeds in evidence now. The deed from Ralph to Chamberlain and from Chamberlain to Newark.

Mr. DeVoe: We have offered them already.

Mr. Cabell: I think you only offered the records, not the deeds. 20

Mr. DeVoe: Yes, we offered the deeds.

Mr. Cabell: Well, we now offer the originals.

The Court: The originals will be admitted.

(Admitted and marked "Defendant's Exhibits D-1 D-2 of this date.)

Mr. Cabell: Mr. DeVoe put this deed in evidence but it was not marked, Braun to Chamberlain. 30

Mr. DeVoe: We put the record in evidence.

Mr. Cabell: You offered the deed, did you not?

Mr. DeVoe: No, we offered the record.

Cross-examination by Mr. DeVoe.

Q. You bought of Mr. Schulster or of Mrs. Schulster and her husband, in 1909, the .82 of an 40

Wesley Chamberlain—For Defendant—Cross.

acre which is described in this deed? A. Yes, I presume so.

Q. Which is described in the deed made by you to the City of Newark? A. Yes, one parcel.

Q. Who surveyed the .82 acre plot for you at the time you bought it? A. I think it was my
10 brother George Chamberlain.

Q. I find in that deed in the description of the second tract—

Mr. Cabell: If the Court please, I object to this testimony about another tract of land not the subject of this suit, the .82 acre tract.

The Court: As I understand it refers to the deed by which Mr. Chamberlain gets title which you have offered in evidence and
20 it is subject, of course, to cross-examination.

Q. I find in the description of the second tract a recital as follows: "Beginning in the middle of the public road at the beginning corner of a tract of land conveyed by Janette Schulster and William Schulster, her husband, to Jacob Ralph and wife, by deed dated February twenty-seventh, 1897." Now, didn't you have that deed in your possession at the time that survey was made for you?

30 A. No, sir.

Q. Did your brother have it in his possession at the time he made the survey for you? A. I don't know whether he did or not. I could not say whether he did. I never asked him about it.

Q. I have here the record of a deed made by George Chamberlain and others to the Mayor and the Common Council of the City of Newark, dated the twenty-ninth day of March, in the year of our Lord one thousand nine hundred and eleven and
40 in which as one of the parties of the first part is

Wesley Chamberlain—For Defendant—Cross.

Wesley Chamberlain, and the deed further contains this agreement, "and the party of the first part, in consideration of the purchase of the lands and the real estate hereby conveyed to the party of the second part further covenant and agree to and with the party of the second part as follows, to wit, not to acquire, directly or indirectly, by purchase, lease or otherwise, any lands or real estate or any interest therein, located in the territory of what is known and designated as the territory of the Pequannock Water Shed, above or northerly of the southerly point of the Macopin Intake Reservoir; of the party of the second part, and not to dwell or reside within said territory of said watershed, and to wholly and permanently remove from said territory on or before May first, 1911. The foregoing covenant, in so far as it applies to the removal from the Pequannock watershed shall not apply to Wesley Chamberlain and to Sarah Jane his wife." Are you the Wesley Chamberlain who is named in that covenant? A. Yes, sir.

Mr. DeYoe: I wish to have that deed identified, it is recorded in Book 021 of Deeds, at pages 417, etc., in the Register's office of Passaic County.

Mr. Cabell: That is the transaction that we attempted to go into on direct examination and we were barred. We shall probably ask to go into it now.

The Court: I understand the deed is in evidence?

Mr. DeYoe: No, sir. It is a prior deed for other property. Where he entered into a covenant, so that he had already disposed of that right at the time he made our deed.

Mr. DeYoe: Is there any objection to our offering it now?

Wesley Chamberlain—For Defendant—Cross.

Mr. Cabell: No, sir.

The Court: It may be admitted.

(Admitted and marked "Plaintiff's Exhibit P-7" of this date.)

10 Mr. Cabell: Has there been some minute of the admission of the counsel in answer to the question of counsel for the plaintiff that the City of Newark had taken a bond? Is there a record of that?

The Court: I think the question was asked and if it was during the trial the stenographer has it down.

Mr. Cabell: The question and answer was so indefinite that it might possibly be better to get the bond itself. Do you wish to have the bond?

20 Mr. DeYoe: You are conducting the defendant's case and must decide for yourself.

Mr. Cabell: I offer in evidence the bond made by Wesley Chamberlain as principal and George Chamberlain and Theodore Chamberlain, sureties, to the Mayor and Common Council of the City of Newark, dated April second, 1912.

Mr. DeYoe: I object to it as immaterial.

The Court: For what purpose is it offered?

30 Mr. Cabell: For the purpose of explaining an admission of counsel in answer to a question of counsel for the defendant.

The Court: My recollection is that the plaintiff secured an admission for the purpose of showing that the defendant the City of Newark knew of some infirmity in the title, didn't you?

40 Mr. DeYoe: Counsel was arguing his point, the point in the case, to the Court, and I said, "Now, you ought to tell the whole story."

Wesley Chamberlain—For Defendant—Cross.

The Court: But, it was for the purpose of demonstrating to the Court and the jury that the City of Newark recognized that there was an infirmity in the title and took a bond from its grantor.

Mr. DeYoe: It was at the time, as I remember, when he asked for an adjournment, when he spoke about that, and claiming surprise, I said, "You knew about it, because you took a bond." And he said, "Yes." They took a bond. But, the fact that they took a bond is one thing, the statement of everything in the bond is another. 10

Mr. Cabell: It was in the progress of the case and I offer this for the purpose of explaining it.

The Court: I will admit the bond in evidence. I think, in view of the situation that has developed, that this bond ought to go in, to show what the parties did. That, of course, does not bind the plaintiff to any sum and does not bind the jury, so far as the sum named is concerned. 20

Mr. DeYoe: That is one of my objections and I think it is entirely irrelevant on that account.

The Court: In view of the fact that the plaintiff secured an admission from the defendant that there was a bond and that they took it, they have a right to show how far they went. 30

Mr. DeYoe: That might be true if I secured the admission by asking a question of the witness, but when I told counsel he was not presenting the full case to the Court and he then made the admission, I do not think it is made relevant. 40

Motion for Direction.

The Court: I will allow it in evidence.
 Objection overruled; plaintiff excepts.
 (Admitted and marked "Defendant's Exhibit D-3" of this date.)

DEFENDANT RESTS.

TESTIMONY CLOSED.

10

Mr. Cabell: I ask for the direction of a verdict for the defendant on the construction of the deed.

20

I have somewhat fully argued various features of it, and I think that I argued somewhat on the subject this morning, but there is one phase of the question that I wish to present to the Court, and that is what is the natural construction of the deed where there are two parties grantees. The natural inference is that those two parties are like takers and it must take strong words to overcome that presumption, that is if there are any two persons who appear to be named without distinction as the grantees, and something more than the loose use of an inappropriate pronoun must be brought forward to rebut that presumption. And that presumption is much stronger in a case where the grantees are husband and wife, because the law has held that there is a legal unity between husband and wife, and the Courts in some jurisdictions have gone so far as to hold that that unity is so strong that it may not by any combination of words in the same grant break the unity and create one estate in one and another estate in another. I admit that

30

40

it may be that the authorities in this State

Motion for Direction.

will overrule my contention as far as that goes, as far as I say that it is illegal to create such estate or impossible to create such estate, but I do say that when the grant is made to the husband and wife, it takes very clear language to create the inference that the grant was not alike to both. That is so with any two persons as grantees, but it is much stronger in the case where the two grantees are husband and wife. 10

Motion denied; defendant excepts.

Mr. Cabell: I ask the Court to strike out the second count in this declaration for damages for the removal of the buildings. There is no evidence in the case that those buildings were fixtures. There is not a scintilla of proof that those buildings were affixed to the soil and became a part of the freehold. 20

Motion denied; defendant excepts.

The Court: Is there any other question in the case than the question of damages?

Mr. Cabell: The only question to argue now, I presume, is the question of damages.

(Mr. Cabell then sums up for the defendant.)

(Mr. DeYoe then sums up for the plaintiff.) 30

Charge.

The Court then charge the jury as follows:

THE COURT:

10 Gentlemen of the jury, in this case the plaintiff brings her action to acquire possession of certain property, which she claims belongs to her and not to the City of Newark; and, in addition to that, she seeks to recover the value of the buildings that were upon that property, the buildings having been destroyed.

 There are certain responsibilities, gentlemen, that the jury has to take, and there are certain other responsibilities that the Court has to take; and in this case the Court takes the responsibility of determining that the plaintiff is entitled to the possession of the property. So that that question is eliminated from your discussion.

20 If the property still had the buildings on it, that would end the whole case; because if she is entitled to the possession of the property, she is also entitled to the possession of the buildings that are on it. But in this case it appears that the buildings have disappeared, and therefore, although the Court declares that the plaintiff is entitled to the possession of the property, it is the function of the jury to determine what was the reasonable value of those buildings as of the date of Mr. Ralph's death. And that is your problem, gentlemen. How much is the plaintiff entitled to as compensation for the buildings that have been destroyed? So that the case is within very narrow limits when it comes to your hands.

30 You have heard the testimony on both sides as to the value of the property, the reasonable value of it at the time of the death of Mr. Ralph. For, you will see, Mrs. Kimble was entitled to the property upon the death of her father, and, whatever state it was in at that time, and whatever was the

40

Charge.

reasonable value of it at that time, is the amount that you should award. So you will take the testimony of all the witnesses, and all the testimony, and determine what is the reasonable value, what sum you shall award for that. You have heard the testimony of the witnesses for the plaintiff, as to the condition of the buildings, and what they thought their value was, and you have also heard the value given by the witnesses called for the defendant. There has also been some testimony introduced and some sum mentioned as the cost of reproducing the buildings. My recollection is the sum was six thousand dollars, but you will remember the amount. That testimony was only introduced for the purpose of helping and guiding you and not for the purpose of having you find that the cost of reproducing the buildings is the value that should be allowed. For, you can see, gentlemen, there was a building upon the property that was old and had been there a number of years, and they could not ask to have it replaced by a new building, because the new building would be worth a great deal more than the old one, for the old building only had a certain length of life remaining to it, and the new building had an additional length of life to which the plaintiff would not be entitled. The only purpose of introducing that evidence, gentlemen, was to enable you to know how much it would cost to reproduce the building and then you can make allowance for the age and condition and determine what the reasonable value was at the time it was destroyed, and that is the only way in which you may consider that evidence.

Take the case, gentlemen. The Court cannot help you very much on the question of value, that is something that is a common sense question for twelve men to decide on the evidence that you have

10

20

30

40

Charge.

heard. You will return a verdict for the plaintiff, gentlemen, for such sum as you think is reasonable and fair considering the condition of the property at the time of the death of Mr. Ralph.

Mr. Cabell: May it be stated to the jury what the date of the death of Mr. Ralph was?

10 The Court: The date of the death of Mr. Ralph, I understand, was March fourteenth, 1915. I think I have covered your first request, haven't I?

I refuse to charge requests for the defendant numbers three and four, and I refuse to charge request number one, except as I have charged. Number two I have covered.

Mr. Wolber: Yes, request number two is covered.

20 Mr. DeYoe: As I remember the Court charged that the jury should take into consideration the value of the buildings at the time Mr. Ralph died, but the buildings were destroyed before he died. The building were destroyed in 1911, so that we are entitled to the buildings which were upon the lands at the time of their destruction; or their value.

The Court: Yes, at the time of their destruction, if they were not there in 1915, of course, you cannot take them into consideration as of that date.

30 Mr. Cabell: What they thought the property was worth?

The Court: Gentlemen, you will take into consideration the value of the buildings at the time they were destroyed, which is 1911, and consider the fact that as Mr. Ralph died in 1915, it would have made four years' more life on the buildings. You will take all those facts into consideration.

(The jury then retire.)

40 Mr. Wolber: The defendant excepts to the refusal of the Court to charge requests Nos. 1, 3, 4;

Defendant's Requests to Charge.

and also to the charge of the Court in which the Court charged the jury that the plaintiff is entitled to the possession of the property.

DEFENDANT'S REQUESTS TO CHARGE.

10

The Court is requested to charge:

1. That where competent evidence is adduced showing the actual value of the buildings at the time of their destruction, evidence of replacement value must not be considered by the jury.

2. That the jury must allow in any verdict for the plaintiff, for depreciation in the value of the buildings at the time of their destruction, up to the time of the death of Jacob Ralph on March fourteenth, 1915.

20

3. That there can be no verdict of damages for removal of the buildings by the defendant, if the jury finds for the plaintiff, because no proof has been adduced that the buildings were affixed to the real estate and were part thereof.

4. That there can be no verdict of any other damages than nominal damages for the removal of the buildings by defendant, if the jury finds for the plaintiff, because no proof has been adduced that the buildings were affixed to the real estate and were part thereof.

30

40

Exhibit P-1.

THIS INDENTURE, made the twenty seventh day of February, in the year of our Lord, One thousand eight hundred and ninety seven, BETWEEN Janett Schulster and William J. Schulster, her husband, of the Township of West Milford, in the County of Passaic and State of New Jersey, of the first part, AND Jacob Ralph and Elizabeth Ralph (his wife) of the Township of West Milford, in the County of Passaic and State of New Jersey, of the second part, WITNESSETH, that the said party of the first part, for and in consideration of the sum of One hundred and twenty five dollars, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at, or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm, unto the said party of the second part, and to *her* heirs and assigns forever.

All that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of West Milford, in the County of Passaic and State of New Jersey.

Beginning in the middle of the road (formerly the Paterson & Hamburg Turnpike) at an iron bolt sixteen links southerly from a culvert across said road thence running (1) south eighty nine degrees thirty minutes west through a hickory tree three chains sixty eight links to an iron bolt, (2) north one degree fifteen minutes east two chains & eighty nine links to an iron bolt, (3) north eighty seven degrees forty minutes east three chains to the

Exhibits.

middle of aforesaid road, (4) along the same south eleven degrees forty five minutes east three chains to the beginning.

Containing one acre.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining: 10

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, *her* heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, *her* heirs and assigns forever, and the said Janett Schulster does for herself, her heirs, executors and administrators, covenant and agree to and with the said party of the second part, *her* heirs and assigns, that she, the said Janett Schulster, is the true, lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever: 20 30

And Also, that the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. 40

Exhibits

And Also, that she, the said Janett Schulster, will
 Warrant secure and forever defend the said land
 and premises unto the said Jacob Ralph and Eliza-
 beth Ralph—heirs and assigns, forever, against the
 lawful claims and demands of all and every person
 or persons, freely and clearly freed and discharged
 10 of and from all manner of encumbrance whatsoever.

In Witness Whereof, the said party of the first
 part have hereunto set their hands and seals the
 day and year first above written.

JANETT SEHULSTER (L. S.)
 WILLIAM J. SEHULSTER (L. S.)

Signed, sealed and delivered
 in the presence of

20 WM. ROOME.

Exhibit P-2.

Record of a deed, dated May 10, 1902, from
 Jacob Ralph, widower, to Wesley Chamberlain;
 consideration, one dollar; same property as in P-1.
 Received in the Clerk's Office of Passaic County
 30 June 20, 1902, and recorded in Book R-15 of Deeds
 for said County on pages 160, etc.

Exhibit P-3.

Record of a deed, dated December 2, 1903, conveying the same property from Wesley Chamberlain and wife to Louis F. Braun.

Exhibit P-4.

10

Record of a deed, dated April 13, 1910, for the same property, from Louis F. Braun and wife to Wesley Chamberlain; consideration, one dollar; received in the Register's office of Passaic County April 28, 1911, and recorded in Book Y-21 of Deeds for said County on pages 138, etc.

Exhibit P-5.

20

Record of a deed, dated April 22, 1911, from Wesley Chamberlain and wife to The Mayor and Common Council of the City of Newark, conveying two tracts of real estate. (The original of this deed was offered by the defendant and is marked Exhibit D-2.)

30

40

Exhibit P-7.

Deed from George Chamberlain and others to The Mayor and Common Council of the City of Newark. Received in the office of the Register of Deeds and Mortgages of the County of Passaic April 5, 1911, and recorded in Book O-21 of Deeds for said County on pages 417, etc.

10

THIS INDENTURE, made the twenty-ninth day of March, in the year of Our Lord One Thousand Nine Hundred and Eleven, BETWEEN George Chamberlain and Ruth E. Chamberlain, his wife, of the City of Paterson, County of Passaic and State of New Jersey; Frank H. Chamberlain (single), of the City of Paterson, County of Passaic and State of New Jersey; Ella Armand and William Armand, her husband, of Suffern, County of Rockland and State of New York; Amos Chamberlain and Alice Chamberlain, his wife, of the City of Newark, County of Essex and State of New Jersey; Irvin Chamberlain (single), of the City of Paterson, County of Passaic and State of New Jersey; Frances La Roe (widow), of the Borough of Sussex, County of Sussex and State of New Jersey; Nellie B. Norman (single), of Milton, Township of Jefferson, County of Morris and State of New Jersey; Cyrus C. Norman and Minnie Norman, his wife, of Martins Creek, County of Northampton and State of Pennsylvania; Willard Lee Norman and Leonora Norman, his wife, of Wortendyke, Township of Franklin, County of Bergen and State of New Jersey; Edward N. Norman (widower), of Milton, Township of Jefferson, County of Morris and State of New Jersey; Wesley Chamberlain and Sarah Jane Chamberlain, his wife, of Newfoundland, Township of West Milford, County of Passaic and State of New Jersey; and Theodore Chamberlain and Lillie

20

30

40

Exhibits.

Chamberlain, his wife, of Dundee Lake, Township of Saddle River, County of Bergen and State of New Jersey, party of the first part, AND The Mayor and Common Council of the City of Newark, a body corporate of the State of New Jersey, party of the second part,

WITNESSETH, That the said party of the first part, for and in consideration of Twenty-five thousand dollars (\$25,000), lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, its successors and assigns forever, ALL those certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of West Milford, in the County of Passaic and State of New Jersey.

FIRST TRACT. Beginning at a heap of stones and a large white oak stump; thence south forty degrees east six chains sixty links to a heap of stones; thence south thirty degrees west twenty-four chains to a heap of stones; thence north forty-seven degrees west six chains sixty links; thence north twenty-two degrees east twenty-four chains to Beginning. Containing sixteen and 20/100 acres.

SECOND TRACT. Called the Saw Mill Lot in said Township of West Milford, situate between the Buck Mountain and Cedar Pond.

Exhibits.

10 Beginning at a stake standing four chains on a course of north fifty-four degrees west from a stone heap on the west bank of a brook called West Brook, the stone heap is between two Hemlock trees and a Pine tree and about two feet from each; thence south fifty-four degrees east seven chains; thence north fifty-five degrees east twenty-nine chains ninety links; thence north forty-three degrees west twenty-six chains eighty links; thence south twenty degrees west thirty-four chains eighty links to Beginning.

Containing fifty-one and $\frac{33}{100}$ acres strict measure.

20 **THIRD TRACT.** Called and known as the Tavern Stand situate in said Township of West Milford lying on the north side of the Paterson & Hamburg Turnpike road and on the east side of the Long Pond Road, containing thirty acres more or less, said land formerly belonged to Samuel Laroe, now deceased.

Being the same premises conveyed to Amos Chamberlain by Nathaniel Lane, Sheriff, by deed dated April 12, 1852, and recorded in the Clerk's office of Passaic County February 28, 1855. in Book W of Deeds for said County, page 425.

30 **FOURTH TRACT.** Beginning in the Main Road leading from the Paterson & Hamburg Turnpike Road to Long Pond in front of the dwelling house of Ebenezer Cobb, Esq., and at the distance of fifty links on a course of south twenty degrees east from a spring of water formerly called Martin Brown's Spring; thence south fifty-one degrees forty minutes east one chain twelve links; thence north ten degrees east two chains forty-five links; thence north seventy-three degrees west one

40

Exhibits.

chain twelve links to the aforesaid road; thence along same south eight degrees thirty minutes west two chains five links to Beginning.

Containing 25/100 acres strict measure.

FIFTH TRACT. Beginning at the northeast corner of a small lot of land belonging to John W. Bigelow, said corner being in a northeasterly direction from a spring known as Martin Brown's spring and along east side of the road leading from Newfoundland to Long Pond; thence from said corner north twenty-one and one-half degrees east six chains forty links to the middle of said road; thence along same as the compass pointed in 1856 south thirty-five degrees west five chains; thence along said road south ten and one-half degrees west one chain seventy links to the northwest of the aforesaid lot of land belonging to John W. Bigelow; thence south seventy-three degrees east one chain twelve links to Beginning.

10

20

Containing 40/100 acres more or less.

The Fourth and Fifth Tracts above described being the same premises conveyed by Estill Beaty and wife to said Amos Chamberlain by deed dated April 2, 1867, and recorded April 8, 1867, in Book F 3 of Deeds for Passaic County, page 1.

30

SIXTH TRACT. Beginning at a stake supposed to stand in said Chamberlain's line, which stake is distant thirty links on a course south sixty-two and one-quarter degrees west from a cross on a large rock; thence north twenty-eight degrees east twenty-five links to a stake; thence south sixty degrees east three chains twenty-five links to a wild cherry tree; thence south sixty-five degrees east five chains seventy links to the middle of the Public Road; thence south twenty-eight degrees west

40

Exhibits.

twenty-five links to a point in said road; thence north sixty-five degrees west five chains seventy links; thence north sixty degrees west three chains twenty-five links to Beginning.

Containing 22/100 acres more or less.

10 Being the same tract conveyed to the said Amos Chamberlain by Jane Davenport by deed bearing date November 10, 1886, and recorded November 24, 1886, in Book M 8 of Deeds for said County of Passaic, page 220.

20 SEVENTH. Also all right, title and interest of the said party of the first part hereto in and to the right and privilege of landing passengers on a switch which shall pass over a tract containing two and 8/100 acres more or less conveyed by the party of the first part and others to Edward R. Greenwood by deed bearing date May 25, 1907, and recorded July 15, 1907, in Book P 18 of Deeds for Passaic County, page 633, in which said deed the grantors reserved said right in said railroad switch.

30 The above described premises being the same of which Amos Chamberlain died seized intestate on February 6, 1907, leaving him surviving George Chamberlain, Frances La Roe, Wesley Chamberlain and Theodore Chamberlain, and his grandchildren, Frank H. Chamberlain, Ella Armand, Amos Chamberlain and Irvin Chamberlain, children of a deceased son, Ira Chamberlain, and grandchildren Nellie B. Norman, Cyrus C. Norman, Willard Lee Norman, children of Caroline Augusta Norman, a deceased daughter of said Amos Chamberlain, deceased, and Edward N. Norman, husband of said Caroline Augusta Norman, deceased, all of whom are joined herein, as his only heirs at law.

40 And the party of the first part, in consideration of the purchase of the lands and real estate hereby

Exhibits.

conveyed to the party of the second part, further covenants and agrees to and with the party of the second part as follows, to wit: not to acquire, directly or indirectly, by purchase, lease or otherwise, any lands or real estate, or any interest therein, located in the territory of what is known and designated as the territory of the Pequannock Watershed above or northerly of the southerly point of the Macopin Intake Reservoir of the party of the second part, and not to dwell or reside within the said territory of said Watershed, and to wholly and permanently remove from said territory on or before May first, 1911. The foregoing covenant insofar as it applies to removal from the Pequannock Watershed shall not apply to Wesley Chamberlain and Sarah Jane, his wife.

10

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in any wise appertaining;

20

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever; and the said party of the first part do for themselves, their heirs, executors and administrators, covenant and agree to and with the said party of the second part, its successors and assigns, that they, the said party of the first part, are the true, lawful and right

30

40

Exhibits.

10 owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever;

20 AND ALSO that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

AND ALSO, that said party of the first part will WARRANT, secure, and forever defend the said land and premises unto the said party of the second part, its successors and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

30 IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

	GEORGE CHAMBERLAIN	(Seal)
	RUTH E. CHAMBERLAIN	(Seal)
	FRANK H. CHAMBERLAIN	(Seal)
	ELLA ARMAND	(Seal)
	WILLIAM ARMAND	(Seal)
	AMOS CHAMBERLAIN	(Seal)
	IRVIN CHAMBERLAIN	(Seal)
40	FRANCES LA ROE	(Seal)

Exhibits.

NELLIE B. NORMAN	(Seal)	
CYRUS C. NORMAN	(Seal)	
MINNIE NORMAN	(Seal)	
WILLARD LEE NORMAN	(Seal)	
LEONORA NORMAN	(Seal)	
WESLEY CHAMBERLAIN	(Seal)	
SARAH JANE CHAMBERLAIN	(Seal)	10
THEODORE CHAMBERLAIN	(Seal)	
LILLIE CHAMBERLAIN	(Seal)	

Signed, Sealed and Delivered in the Presence of :

JOSEPH G. MOLLOY,
WESLEY CHAMBERLAIN,
THEODORE CHAMBERLAIN,
GEORGE CHAMBERLAIN.

20

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

BE IT REMEMBERED, That on this twelfth day of April, in the year of our Lord One Thousand Nine Hundred and Eleven, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared GEORGE CHAMBERLAIN and RUTH E. CHAMBERLAIN, his wife; FRANK H. CHAMBERLAIN (single); ELLA ARMAND and WILLIAM ARMAND, her husband; AMOS CHAMBERLAIN; IRVIN CHAMBERLAIN (single); FRANCES LA ROE (widow); NELLIE B. NORMAN (single); CYRUS C. NORMAN and MINNIE NORMAN, his wife; WILLARD LEE NORMAN and LEONORA NORMAN, his wife; WESLEY CHAMBERLAIN and SARAH JANE CHAMBERLAIN, his wife; and THEODORE CHAMBERLAIN and LILLIE CHAMBERLAIN, his wife; who, I am satisfied, are the grantors men-

30

40

Exhibits.

tioned in the within indenture, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; And the said RUTH E. CHAMBERLAIN, ELLA ARMAND, ALICE CHAMBERLAIN, MINNIE NORMAN, LEONORA NORMAN, SARAH JANE CHAMBERLAIN and LILLIE CHAMBERLAIN, wives as aforesaid, being by me privately examined, separate and apart from their said husbands, further acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, FREELY, without any fear, threats or compulsion of their said husbands.

10

JOSEPH G. MOLLOY,
Master in Chancery of New Jersey.

Exhibit D-1.

The original of P-2, being a deed, dated May 10, 1902, from Jacob Ralph, widower, to Wesley Chamberlain.

20

Exhibit D-2.

The original of P-5, being a deed, dated April 22, 1911, from Wesley Chamberlain and Sarah Jane, his wife, to The Mayor and Common Council of the City of Newark. Received in the Register's office of Passaic County October 13, 1911, and recorded in Book Z-31 of Deeds for said County, on pages 374, etc. Consideration, \$12,500.00. The property conveyed is described as follows:

30

40

Exhibits.

FIRST TRACT. Beginning in the middle of the road (formerly the Paterson and Hamburg Turnpike) at an iron bolt sixteen links southerly from a culvert across said road; thence running (1) south eighty-nine degrees thirty minutes west through a hickory tree three chains and sixty-eight links to an iron bolt; (2) north one degree fifteen minutes east two chains and eighty-five links to an iron bolt; (3) north eighty-seven degrees forty minutes east three chains to the middle of the road; (4) along the same south eleven degrees forty-five minutes east three chains to the Beginning.

10

Containing one acre. Being the same premises conveyed to the said Wesley Chamberlain by Louis F. Braun and Stella Braun, his wife, by deed dated April thirteenth, 1910.

20

SECOND TRACT. Beginning in the middle of the public road at the beginning corner of a tract of land conveyed by Janett Schulster and William J. Schulster, her husband, to Jacob Ralph and wife, by deed dated February twenty-seventh, 1897; running thence as the compass pointed December seventeenth, 1908 (1) along the first line of said tract eighty-nine and three-quarters degrees west three chains and sixty-eight links to the second corner thereof; thence (2) south two degrees west along a fence three chains and five links to the corner of the fence; thence (3) along the fence north sixty-seven degrees east four chains and thirty-six links to the middle of the aforesaid public road; thence (4) along the middle of said public road north eleven degrees west one chain and thirty-three links to the place of Beginning.

30

Cotnaining eighty-two hundredths of an acre be the same more or less. Being the same premises conveyed to the said Wesley Chamberlain by Janett Schulster and William J. Schulster, her husband,

40

Exhibits.

by deed dated May twenty-fifth, 1909, and recorded in Book F-20 of Deeds for Passaic County, in page 458.

Exhibit D-3.

10

Bond given by Wesley Chamberlain, principal, George Chamberlain and Theodore Chamberlain, sureties, to the Mayor and Common Council of the City of Newark.

20

KNOW ALL MEN BY THESE PRESENTS that we, WESLEY CHAMBERLAIN, of the City of Paterson, in the County of Passaic, and State of New Jersey, principal, and GEORGE CHAMBERLAIN, of the City of Paterson, in the County of Passaic, and State of New Jersey, and THEODORE CHAMBERLAIN, of the Township of Saddle River, in the County of Bergen, and State of New Jersey, sureties, are held and firmly bound unto THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, a municipal corporation of the State of New Jersey, in the sum of One thousand dollars (\$1,000.00), lawful money of the United States States of America, to be paid to the said The Mayor and Common Council of the City of Newark, or to its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

30

Sealed with our seals and dated the second day of April, nineteen hundred and twelve.

40

WHEREAS, the above bounden WESLEY CHAMBERLAIN and SARAH JANE CHAMBERLAIN, his wife, by

Exhibits.

deed of warranty bearing date the twenty second day of April, A. D. 1911, and recorded in Book Z 21 of Deeds for Passaic County, New Jersey, on page 374, conveyed to The Mayor and Common Council of the City of Newark, for and in consideration of the sum of Twelve thousand five hundred dollars, two certain tracts of land located in the Township of West Milford, in the County of Passaic and State of New Jersey, the first tract being more particularly described as follows: 10

FIRST TRACT: Beginning in the middle of the road (formerly the Paterson and Hamburg Turnpike) at an iron bolt 16 links southerly from a culvert across said road; thence running (1) south 89 degrees 30 minutes west through a hickory tree 3 chains and 68 links to an iron bolt; (2) north 1 degree 15 minutes east 2 chains and 89 links to an iron bolt; (3) north 87 degrees 40 minutes east 3 chains to the middle of the road; (4) along the same south 11 degrees 45 minutes east 3 chains to the beginning. Containing one acre. 20

AND WHEREAS, the above described tract of land is the same property heretofore conveyed by Janett Schulster and William J. Schulster, her husband, to Jacob Ralph and Elizabeth Ralph, his wife, by deed bearing date the 27th day of February A. D. 1897 and recorded in Book S 12 of Deeds for Passaic County, New Jersey, on page 80, and by reason of the form of said deed a question has been raised by the City Counsel of the City of Newark as to whether an estate in fee simple was conveyed thereby, and as to whether the said Wesley Chamberlain was seized of an estate in fee simple at the time of the conveyance of the aforesaid first tract to the Mayor and Common Council of the City of Newark; 30 40

Exhibits.

AND WHEREAS, by reason of the questions having been raised as aforesaid to the title of the said Wesley Chamberlain to the said first tract above described, the sum of Three thousand dollars (\$3,000.00) has been withheld by the City of Newark as an indemnity against any claim or claims whatsoever by any person or persons to the
10 said tract of land;

AND WHEREAS, the said Wesley Chamberlain has requested the City of Newark to pay over to him the said sum of Three thousand dollars (\$3,000.00) withheld out of the purchase price for the property heretofore conveyed to the City of Newark, upon the delivery by him of a bond of indemnity in the penal of One thousand dollars (\$1,000.00) with two approved sureties, and the said City of Newark being therewith satisfied;
20

NOW, THEREFORE, the condition of this obligation is such that if the above bounden Wesley Chamberlain shall indemnify and save harmless the said The Mayor and Common Council of the City of Newark of and from any and all loss or damage which may arise by reason of any defect or defects in the title of the said City of Newark in and to the first tract of land hereinabove described, or which may be occasioned to said The Mayor and
30 Common Council of the City of Newark by reason of any litigation whatsoever relating to or in any wise concerning the same, and shall and will appear and defend, without cost to said The Mayor and Common Council of the City of Newark, any and all suits at law or in equity which may hereafter be prosecuted by reason of the premises, and in which The Mayor and Common Council of the City of Newark may be made a party, and shall
40 and will warrant, secure and forever defend the said land and premises hereinbefore described unto

Exhibits.

said The Mayor and Common Council of the City of Newark, its successors and assigns, forever, against the lawful claims and demands of all and every person, freely and clearly freed, and discharged of and from all manner of encumbrance whatsoever;

THE THIS OBLIGATION TO BE VOID, otherwise to remain in full force and virtue. 10

WESLEY CHAMBERLAIN (Seal)
 GEORGE CHAMBERLAIN (Seal)
 THEODORE CHAMBERLAIN (Seal)

Signed, sealed and delivered
 in the presence of
 W. CARRINGTON CABELL.

In line 14, page 1, words "successors and assigns" stricken out and "heirs, executors and administrators" interlined, before execution. 20

GEO E CARPENTER

STATE OF NEW JERSEY, }
 COUNTY OF PASSAIC, } SS.:

On this third day of April, one thousand nine hundred and twelve, before me, a Master in Chancery of New Jersey, personally appeared WESLEY CHAMBERLAIN, GEORGE CHAMBERLAIN and THEODORE CHAMBERLAIN, who are, I am satisfied the individuals named in and who executed the within bond, and I having first made known to them the contents thereof, they thereupon acknowledged that they signed, sealed and delivered said bond, as their respective voluntary act and deed, for the uses and purposes therein expressed. 30

W CARRINGTON CABELL 40
 Master in Chancery
 of New Jersey.

Exhibits.

STATE OF NEW JERSEY, }
 COUNTY OF PASSAIC, } SS. :

10 GEORGE CHAMBERLAIN, of full age, being duly sworn according to law, on his oath says that he is one of the sureties named in the foregoing bond; that he is a resident of, and a freeholder in the City of Paterson, in the County of Passaic and State aforesaid, and that he is worth in real estate in his own name and right in fee, situate in the said City of Paterson, the sum of One thousand dollars (\$1,000.) over and above all encumbrances and liens on said real estate, and over and above all his just debts and liabilities and property exempt by law from execution.

GEORGE CHAMBERLAIN

20 Sworn and subscribed to before me at Passaic, N. J., this third day of April 1912.

W CARRINGTON CABELL
 Master in Chancery
 of New Jersey.

30 STATE OF NEW JERSEY, }
 COUNTY OF BERGEN, } SS. :

40 THEODORE CHAMBERLAIN, of full age, being duly sworn according to law, on his oath says that he is one of the sureties named in the foregoing bond; that he is a resident of, and a freeholder in the Township of Saddle River, in the County of Bergen and State aforesaid, and that he is worth in real estate in his own name and right in fee, situate in the said Township of Saddle River, the sum of one thousand dollars (\$1,000.) over and above all encumbrances and liens on said real estate, and over

Exhibits.

and above all his just debts and liabilities and property exempt by law from execution.

THEODORE CHAMBERLAIN

Sworn and subscribed to before me at Dundee Lake N. J., this third day of April, 1912.

10

W CARRINGTON CABELL
Master in Chancery
of New Jersey.

Deposition of William Roome.

NEW JERSEY SUPREME COURT.

MINNIE B. KIMBLE.

VS.

THE MAYOR AND COMMON COUN-
CIL OF THE CITY OF NEWARK.

20

Deposition of WILLIAM ROOME taken *de bene esse*, upon notice, before me, Edward O'Byrne, Supreme Court Examiner, at the home of the said William Roome, Butler, New Jersey, on November 18, 1916, at 2 o'clock in the afternoon, in the presence of Hon. W. Carrington Cabell, attorney of defendant, and J. W. De Yoe, Esq., attorney of plaintiff.

30

EDWARD O'BYRNE,
Supreme Court Examiner.

40

Deposition of William Roome.

WILLIAM ROOME, sworn as a witness on the part of the defendant, being examined, testifies as follows:

Direct examination by Mr. Cabell.

10 Q. What is your business? A. My business has been, since 1872, land surveyor.

Q. Anything else? A. Land surveyor and conveyancer.

Q. Are you a commissioner of deeds? A. Commissioner of deeds for forty years.

Q. For the last twenty-five years where have you resided? A. I have resided in Butler since 1889, I think.

Q. Did you know Janet Schulster? A. Yes.

20 Q. Did you know William J. Schulster? A. Her husband?

Q. Yes. A. Yes.

Q. Where did they live when you knew them? A. They lived at Newfoundland.

Q. In what county? A. Why, it is in Passaic County.

Q. Did they ever appear before you to acknowledge a deed? A. They did.

Q. Where? A. At their house.

30 Q. In Newfoundland? A. In Newfoundland.

Q. When? A. I don't remember the date.

Q. Have you any way of fixing that date? A. Yes, sir.

Q. What is that book that you have in your hand? A. A memorandum book of mine—a diary.

Q. It is your diary? A. Yes.

Q. How long have you kept a diary? A. Sixty years. I can tell where I have been every day for sixty years.

Deposition of William Roome.

Q. Did you keep a diary during the year 1897?
 A. I did. This book is from January 1, 1897, to March 22, 1898.

Q. Of course, the diary that you speak of, the one in your hand, is not the only book you have?

A. No. I suppose there are over fifty books of them.

10

Q. Will you turn to the proper page in your diary, and— A. I just happen to open right by it. This is the diary.

Q. You are now able to tell us on what date the acknowledgment was taken by you, of which you have just spoken? A. Twenty-seventh of February, 1897.

Q. Besides taking the acknowledgment, did you have anything else to do with that deed?

Mr. De Yoe: I object to this line of testimony, on the ground that it is incompetent, irrelevant and immaterial, and not pertinent to the issue.

20

Q. Did you make the survey?

Mr. De Yoe: It is understood that the same objection applies to all of these questions.

Mr. Cabell: Yes.

30

A. I made the survey of the property and I wrote the deed.

Q. Was that all the same day? A. All the same day.

Q. Did you see them sign the deed yourself? A. I did.

Q. Who was the attesting witness, if there was an attesting witness? A. I took the acknowledgment and witnessed the signatures.

40

Deposition of William Roome.

Q. Was there any other person present in the room besides you and the Schulster's? A. The grantee.

10 Q. Was the grantee present? A. I am not sure of that, but when I write a deed—when I make a survey for parties and write the deed—the whole of the parties are generally present. I presume they were in this case.

Q. Do you know whether any persons were present besides Janet Schulster and William J. Schulster, her husband? A. Not absolutely positive.

Q. On what paper did you draw this deed?

20 Mr. De Yoe: I object to this on the grounds already stated. It is understood that my objection applies to all of this testimony, without my repeating it on each question.

Mr. Cabell: Yes; that is understood.

A. On an ordinary warrant deed blank.

Q. With proper blank spaces? A. Yes; spaces to be filled up.

Q. You filled out the blank spaces? A. Yes; everything; consideration and everything else; \$125 consideration and other things.

30 Q. What date did that deed bear? A. February 27, 1897.

Q. And did you sign the certificate of acknowledgment? A. I did.

Q. What date did the certificate of acknowledgment bear? A. The whole thing was done at the same time.

Q. And that bore that date, the 27th of February, 1897? A. That date.

40 Q. Can you give us the description of the property described in that deed? A. In the first place

Deposition of William Roome.

I made just a rough minute of the survey. It was a very cold day, and I just made a rough minute of the survey, and then I went in the house and wrote it out: Beginning in the middle of the road—

Q. One moment. You are reading now from your note book? A. From the book; from the diary. 10

Q. I will ask you a new question: Was the description in that deed for one acre of land lying in the Township of West Milford, in the County of Passaic, and State of New Jersey? A. It was.

Q. Was the description as follows:—

Mr. De Yoe: Let him read it.

A. I can read it. Shall I read? Beginning in the middle of the road sixteen links southerly from the middle of a stone culvert through a hickory—this is abbreviated— 20

Q. Your description is abbreviated? A. It is a little abbreviated.

Q. Go on. A. Thence south 89, 30 west three chain and sixty-eight links; thence north one, fifteen east two chains and eighty-nine links; thence third north eighty-seven, forty east three chains to the middle of the road; thence (4) along the road, south ten, forty-five, east three chains. Now, that description was written from these notes, and it was amplified after I got in the house. 30

Q. You mean they were the notes made out in the cold? A. The notes were made out in the cold. I keep my memorandums all by neighborhoods, and when I make a survey I do it in the rough, and if it is very cold I write it there and abbreviate, and then when I get in the house I write it out, and then when I go home I put it in a little book of the neighborhood. Now, this amplified, is: "Beginning at an iron bolt in the middle of formerly 40

Deposition of William Roome.

the Paterson and Hamburg Turnpike Road sixteen links southerly from a culvert crossing the road; thence running, first, running through a hickory tree, south eighty-nine degrees, thirty minutes, east three chains and sixty-eight links to an iron bolt; (2) North one degree fifteen minutes, east two chains and eighty-nine links to an iron bolt; (3) North eighty-seven degrees forty minutes, east three chains to an iron bolt in the middle of the road; (4) along the same, south ten degrees, forty-five minutes, east three chains to the beginning. Containing one acre." That was the description that was written in the deed. It might be a little bit different in the deed from that description. Sometimes when I come to write them over—

10
20 Q. For instance, you do not abbreviate in the deed? A. No; I do not abbreviate in the deed.

Q. In that deed who was named as party of the first part? A. Janet Schulster and William J., her husband.

Q. How many persons were named as party of the second part? A. One.

Q. Was that person male or female? A. Female.

Q. That was as you drew the deed? A. That was as I drew the deed.

30 Q. Was any change made with respect to the party of the second part before acknowledgment? A. No, sir.

Mr. De Yoe: Why don't you ask him who the party of the second part was?

Q. Who was named as party of the second part?

Mr. Cabell: I will withdraw that question.

40 Q. Did you, on the twenty-seventh day of February, 1897, draw any other deed wherein the names of Janet Schulster and William J. Schulster ap-

Deposition of William Roome.

peared? A. I don't think I did. Ralph bought another lot of him, but I think it was another date—on the other side of the road, but I do not think it was the same date.

Q. It was on the other side of the road? A. On the other side of the road.

Q. Did you ever draw any other deed wherein the names of Janet Schulster and William J. Schulster, her husband, appeared, respecting the property, the description of which you have just read? A. No, sir. 10

Q. Did you ever take the acknowledgment to any deed other than the one we have just been discussing wherein the name of Janet Schulster and William J. Schulster, her husband, appeared, respecting this same acre of land, the particular description of which you have just read? A. No, sir. 20

Q. Did you ever take the acknowledgment of any deed wherein the description of one acre of land that you have just described is described, and the names of Janet Schulster and William J. Schulster, her husband, and the names of Jacob Ralph and Elizabeth Ralph, his wife, also appear? A. I have no recollection or record of ever taking any such acknowledgment or writing any such deed.

Q. After you had drawn this deed and had seen it signed, did you sign the certificate of acknowledgment? A. Certainly. 30

Q. After you had signed the certificate of acknowledgment what did you do with the deed? A. Passed it over to the parties, the parties of the first part—they were all in the house there together. I have a box which I carried with me, that had the various blanks, seals and matters pertaining to writing deeds, small lots; I took that along, made the survey, wrote the deed, and when I got done came home and gave the deed to the parties. 40

Deposition of William Roome.

10 Q. I am handing you what purports to be a certified copy of the record of a deed between Janet Schulster and William J. Schulster, her husband, of the first part, and Jacob Ralph and Elizabeth Ralph, his wife, of the second part, bearing date on the twenty-seventh day of February, in the year of our Lord one thousand eight hundred and ninety-seven, and I ask you if you did take the acknowledgment of the original of such a deed? A. I never took any acknowledgment of a deed from Schulster to Ralph; I took it to another party; that is, I have no recollection of doing it at all; it is twenty years ago.

Q. Examine also the certificate of acknowledgment which sets forth the date. A. I suppose that is my acknowledgment.

20 Q. When you took that acknowledgment did these names appear as parties of the second part; I am pointing to the names in this certified copy of deed?

Mr. De Yoe: I object to the question as leading.

A. Not in the deed that I wrote and acknowledged.

Cross-examination by Mr. De Yoe.

30 Q. How long ago was that? A. Why, it is 1897.

Q. About twenty years ago, is it not? A. Twenty years ago.

Q. You don't remember? A. All I know is by my record.

Q. You do not remember, outside of your record, exactly what transpired—every iota? A. Not every iota.

40 Q. You cannot tell us positively who was in the room at the time the deed was signed, can you? A. No; there might be more persons or less.

Deposition of William Roome.

Q. Did you ever draw a deed at any time and have it all completed, when they would ask you to make changes in the deed? A. You mean these parties?

Q. No, no. Anybody. A. Yes.

Q. That does happen? A. That does happen.

Q. You will have a deed completely drawn when they may ask you to add another party? A. Yes. 10

Q. Or make changes? A. Yes.

Q. You say you drew this deed from Schulsters to whom? A. To Minnie Belle Ralph his daughter.

Q. The daughter of whom? A. The daughter of Jake Ralph.

Q. The daughter of Jacob Ralph? A. Yes.

Q. You are sure it was the daughter of Jacob Ralph? A. No; I aint sure. They told me she was his daughter; that is all. 20

Q. And do you know whether she was there that day? A. No.

Q. You cannot tell positively? A. I cannot tell positively whether she was there or not.

Q. Do you know whether Jacob Ralph was there that day? A. He was there when I was running out the lines; I know that; and I presume he went in the house. There is no question in my mind that he went in with us.

Q. What time in the day was it that you got there? A. Oh, I left here after breakfast; it was around in the forenoon. 30

Q. What time was it, if you know, when you finished your survey; about what time was it when you got through with your survey? Do you know? A. No. I say here: "Wrote deed and went home; cold." That is my remark here (indicating diary) on that.

Q. You did not go back to Schulster's house the next day, did you? A. No. 40

*Deposition of William Roome.**By Mr. Cabell.*

Q. Look at your memorandum book and see.

Mr. De Yoe: He says he did not.

A. The next day was Sunday.

10 *By Mr. De Yoe.*

Q. Where were you when you wrote the deed—in what part of the house? A. Why, I think we went right in the kitchen.

Q. In the kitchen? A. Yes; I think so.

Q. You are not sure of that? A. No; I ain't sure.

Q. After you had the deed drawn, do you know to whom you gave it? A. Why, I generally lay them down on the table and say: "There are your papers," or something to that effect. I don't know
20 who took it; no.

Q. You don't know who took it? A. No.

Q. Do you know, after you had drawn the deed, whether any question was raised as to the making of the deed, whether any changes were wanted in it? A. No; if there were any changes—no; there were no changes made. The deeds I draw are copies. I always draw a rough draft and then copy them. If there are any changes after they are
30 written a memorandum by me will appear on my copies.

Q. It might not appear on your copies? A. It might not appear on my copies, but there is no such change made.

Q. That is, you say there was no change made because it does not appear on your copy; is that it? A. Yes; that is it.

Q. That is the reason? A. That is the reason.

Q. There might have been such a thing that you did not put it on your copy? A. That is possible.
40

Q. That is possible? A. It is possible; yes.

Deposition of William Roome.

Q. It was a cold day? A. We were in the house when we were doing that.

Q. You first made this draft which you have in your book, which you have testified from; is that correct? A. Yes.

Q. You made that first? A. That I made first.

Q. After you made that you drew the deed, did you? A. Yes. 10

Q. Did you read the deed to the parties? A. I always do.

Q. Can you tell any questions that were asked about the deed after you had read it over to the parties? A. It is very rare they ask any questions—these country people.

Q. They may have? A. Yes.

Q. They may have asked for some changes to be made in the deed? A. Well, I don't remember of any. 20

Q. You are not positive that they did not, are you? A. Why, no; not absolutely positive; but, as I say, if they had asked for changes and I had made changes I would have made a notation of them in my papers.

Q. You say you would have made a notation? A. Yes.

Q. Is it not possible that you might have forgot to make the notation? A. Almost anything is possible. 30

Q. Does it not happen sometimes that things you expected to do you do not do—sometimes? A. I guess that is so.

Q. This was twenty years ago, and you cannot remember whether on this occasion you were asked to change the deed in some way, can you? A. No.

Q. You say that Jacob Ralph was there? A. He was there when I did the survey, and he went—unquestionably, he went in the house. 40

Deposition of William Roome.

Q. Do you know who gave you the instructions how to make the deed? A. Either Schulster or Ralph.

10 Q. You are not sure which one gave you the instructions, are you—not absolutely positive? A. Mr. Ralph must have been along and gave the instructions, because the Schulsters would not know. No; Ralph was the man that told to make it to Minnie.

Q. Is that the only way you remember, because you think that was the way? A. Why, only as my notes prompt me.

Q. How do your notes prompt you to say that it was Ralph gave you the instructions instead of Schulster gave you the instructions? A. Why, Ralph would naturally be the man.

20 Q. Who engaged you to make the survey—Schulster or Ralph? A. That I cannot tell.

Q. Suppose Schulster asked you to make the survey, he might have told you how the deed was to be made? A. He might have done so.

Q. You cannot tell positively but what he did, can you? A. No. Unquestionably, though, the people that we write deeds for, that is, the grantees, are the parties who tell how the deed is to be written up.

30 Q. That is the usual way? A. Why, certainly.

Q. But it is not always the way? A. Well, it might not be always the way.

Q. Certainly not. I don't doubt but what you have had lots of deeds that you have drawn where you have taken the instructions from the party who came and told you they were the parties to the deed? A. Oh, yes.

40 Q. How do you know but what, after you had the deed drawn, Jacob Ralph asked you to have his name put in the deed? A. Well, simply because I have no notation of anything of that kind.

Deposition of William Roome.

Q. That is your only reason? A. That is the reason, yes. No; there is another reason.

Q. What is your other reason? A. I think if it had been drawn to other parties—if I had drawn it to other parties—the pronoun would have been changed from “her” to “their.”

Q. Supposing if they said they wanted her to have it, then the pronoun would have been “her,” would it not, that is, if they wanted her heirs to inherit, then it would have been “her,” would it not? A. I would have put “their” in always. 10

Q. No matter if they wanted her heirs to have it?

Mr. Cabell: Whom do you mean by “her heirs”?

Mr. De Yoe: Whoever the party was.

Q. You would not have put in “their” when it was to go to her heirs, would you? A. I have never had such a question occur. 20

Q. You never had it occur that you remember of? A. No. We generally fill up the blank in a grammatical way, and it goes—

Q. Do you say that that is not a grammatical way to say “her” when you refer to a woman? A. Not if it refers to two parties.

Q. If it refers to one party, that is, to the woman of the parties; if the parties are a man and a woman, and you want to refer to the woman, you would refer to the woman as “her,” would you not? A. You would in that instance, but this, I understand, was jointly. 30

Q. Whom do you understand that from—Judge Cabell? A. No; I understand it from the language of the deed being written to Ralph and his wife.

Q. Judge Cabell told you it was written that way, didn't he?

Deposition of William Roome.

Mr. Cabell: We have been talking about such a deed, have we not?

A. Mr. McDavitt told me before I saw Judge Cabell.

10 Q. Then, Judge Cabell told you about it, didn't he? A. Yes. The certified copy of the deed says that.

Q. That is, the certified copy that Judge Cabell showed you? A. Yes.

(At this point the certified copy of deed shown witness is marked by Examiner with the initials "E. O'B" for Identification.)

20 Q. The only thing McDavitt asked you was how the deed was drawn, was it not? You say you spoke to McDavitt? A. Mr. McDavitt did not know anything about Minnie Belle Ralph until he came here and I told him. I told him I drew the deed to Minnie Belle Ralph.

Q. He asked you about the deed—how the deed was drawn? A. I think not. He said he had a certified copy of the deed and stated it was from Schulster to Ralph and his wife.

30 Q. What is Ralph's wife's first name? A. I don't remember.

Q. Mr. Roome, you told Mr. McDavitt that you had no recollection of making any change in such deed after its execution; that is correct, is it not? You told McDavitt that, did you not? A. Yes.

Q. That is true? A. That is true. I have no record and no recollection.

Q. No recollection of having made the change? A. No. If they could find that deed I guess they could very soon find whether I changed it.

Deposition of William Roome.

Q. Of course, if you could find the change in your handwriting, you would know that you made it?

A. Certainly; sure.

Q. You cannot tell positively unless you could see the old deed, can you—that is, positively? A. No, except as I rely emphatically on my records.

DEPOSITION CLOSED.

10

EDWARD O'BYRNE,
Supreme Court Examiner.

STATE OF NEW JERSEY, }
COUNTY OF PASSAIC, } ss. :

To his Honor George S. Silzer, Judge of the Passaic County Circuit Court:

20

I, EDWARD O'BYRNE, Supreme Court Examiner, do certify to your Honor the foregoing deposition of William Roome which was taken before me, *de bene esse*, on November 18, 1916, at 2 o'clock in the afternoon, at the home of the said William Roome, in the presence of W. Carrington Cabell, Esq., appearing for the defendant, and J. W. De Yoe, Esq., appearing for the plaintiff. I further certify that the said William Roome was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the questions put by counsel to the said witness and the answers given by the said witness, both on direct examination and on cross-examination, were taken down by me verbatim in shorthand notes, and I certify that the foregoing is a true transcript of my said shorthand notes.

30

EDWARD O'BYRNE,
Supreme Court Examiner.

Dated, Paterson, N. J., November 18, 1916.

40

Grounds of Appeal.

(Filed Feb. 10, 1917.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

MINNIE B. KIMBLE,
Plaintiff-Respondent,

vs.

THE MAYOR AND COMMON COUN-
CIL OF THE CITY OF NEWARK,
Defendant-Appellant.On Appeal
from Supreme
Court.

GROUNDS OF APPEAL.

20

The appellant states the following grounds of
appeal:

30

1. Because the record of a deed marked "Plain-
tiff's Exhibit P-1," dated February 27, 1897, made
by Janett Schulster and William J. Schulster, her
husband, to Jacob Ralph and Elizabeth Ralph, his
wife, for an acre of land situated in the Township
of West Milford, Passaic County, New Jersey,
which deed is recorded in the Registers' Office of
the County of Passaic, in Book S-12 of Deeds, on
pages 80, &c., on March 26, 1897, was admitted in
evidence.

2. Because the Court erred in refusing to grant
defendant's motion for a nonsuit upon the evi-
dence given at the trial.

40

3. Because the Court erred in overruling the
offer of the defendant to read the deposition of
William Roome into the case.

Grounds of Appeal.

4. Because the Court erred in refusing to grant defendant's motion for a direction of a verdict by the jury for the defendant upon the evidence given at the trial.

5. Because the Court erred in refusing to grant defendant's motion at the close of the taking of testimony in the case, to strike out the second count in the complaint, for damages for the removal of the buildings, because there was no evidence in the case that the buildings were affixed to the soil and became a part of the freehold, or fixtures. 10

The following questions were overruled:

6. To the witness Wesley Chamberlain:
"What was the general condition of this so-called hotel?" 20

7. To the witness Wesley Chamberlain:
"Did you do anything about the property as to its improvement, after you took possession?"

8. To the witness Wesley Chamberlain:
"Can you tell us how the Twelve Thousand Five Hundred Dollars (\$12,500) was made up?"

9. To the witness Wesley Chamberlain: 30
"What was this Twelve Thousand Five Hundred Dollars (\$12,500) made up of?"

10. To the witness Wesley Chamberlain:
"How far from the premises which you had bought of Ralph?"

The following questions were admitted:

11. To the witness Frank Post:
"Do you know about what it would cost to reproduce that hotel?" 40

Grounds of Appeal.

Answer: "At the present day?"

Question: "Yes."

Question: "March 15, 1915, the date of the death of the life tenant."

12. To the witness John M. Weaver:
"What is the .82 of land worth?"

10 The Court charged the Jury:

13. "There are certain responsibilities, Gentlemen, that the Jury has to take, and, there are certain other responsibilities that the Court has to take; and, in this case, the Court takes the responsibility of determining that the plaintiff is entitled to the possession of the property. So that that question is eliminated from your discussion."

20 14. "There has also been some testimony introduced, and some sum mentioned as the cost of reproducing the buildings. My recollection is the sum was Six Thousand Dollars (\$6,000), but you will remember the amount. That testimony was only introduced for the purpose of helping and guiding you and not for the purpose of having you find that the cost of reproducing the buildings is the value that should be allowed. For, you can see, Gentlemen, there was a building upon the property that was old and had been there a number of years, and they could not ask to have it replaced by a new building, because the new building would be worth a great deal more than the old one, for the old building only had a certain length of life remaining to it, and the new building had an additional length of life to which the plaintiff would not be entitled. The only purpose of introducing that evidence, Gentlemen, was to enable you to know how much it would cost to reproduce the building and then you can make allowance for the age and condition and determine what the reason-

30

40

Grounds of Appeal.

able value was at the time it was destroyed, and that is the only way in which you may consider that evidence."

The Court refused to charge the Jury:

15. That where competent evidence is adduced showing the actual value of the buildings at the time of their destruction, evidence of replacement value must not be considered by the jury. 10

16. That there can be no verdict of damages for removal of the buildings by the defendant if the jury finds for the plaintiff, because no proof has been adduced that the buildings were affixed to the real estate and were part thereof.

17. That there can be no verdict of any other damages than nominal damages for the removal of the buildings by defendant, if the jury finds for the plaintiff, because no proof has been adduced that the buildings were affixed to the real estate and were part thereof. 20

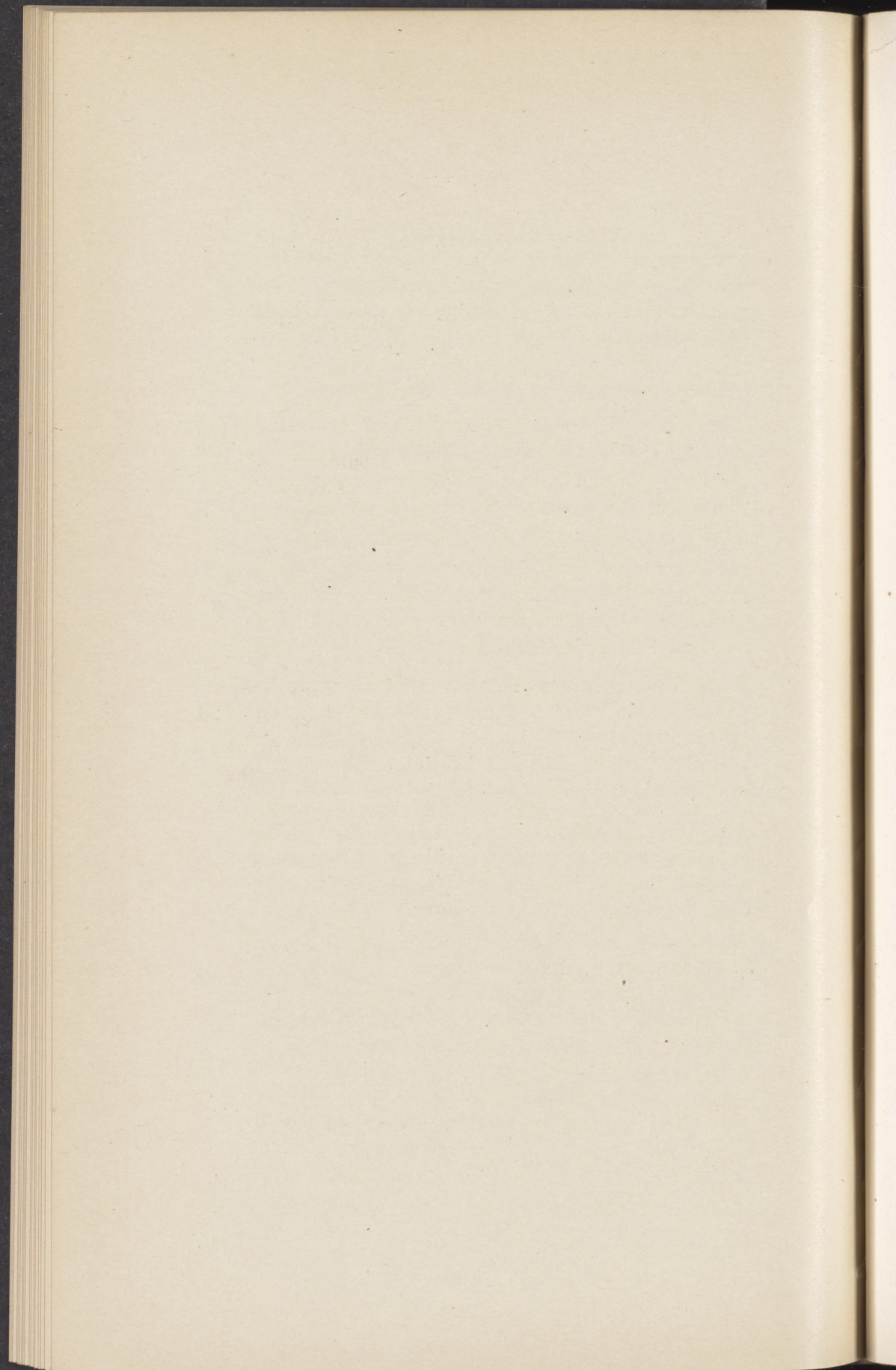
18. Because there was no evidence in the case to support the verdict of Four Thousand Five Hundred Dollars (\$4,500) by the Jury.

19. Because the verdict rendered against defendant is contrary to law. 30

20. Because the judgment rendered is contrary to law.

HARRY KALISCH,
Attorney for Appellant.

Dated, January 8, 1917.



New Jersey Court of Errors and Appeals

MINNIE B. KIMBLE,
Plaintiff-Respondent,

vs.

THE MAYOR AND COMMON COUN-
CIL OF THE CITY OF NEWARK,
Defendant-Appellant.

On Appeal.

BRIEF FOR DEFENDANT-APPELLANT.

Abstract of Case.

This is an action of ejectment brought by Minnie B. Kimble against The Mayor and Common Council of the City of Newark in the New Jersey Supreme Court, and tried before Judge SILZER and a jury at the September Term of the Passaic Circuit Court. There are two counts in the complaint, one for the recovery of the possession of certain lands therein described, to which both parties claim title; and the other, for damages for the removal by the defendant of certain buildings on said premises. At the close of the trial, the Trial Judge directed a verdict for the plaintiff on the first count, and left to the jury only the question of damages arising under the claim set up in the second count, which was determined by them to amount to the sum of \$4,500. Judgment was accordingly entered

that the plaintiff recover of the defendant the possession of the premises, together with the sum of \$4,500 damages and her costs.

The plaintiff in prosecuting her case, relied for her title and right to possession upon a certain deed given by one Janett Schulster and husband to Jacob Ralph and Elizabeth Ralph, his wife, bearing date February 27, 1897, which grantees were the parents of the plaintiff. The grantee Elizabeth Ralph died intestate on October 6, 1898, leaving the grantee Jacob Ralph, her husband, and leaving also the said Minnie B. Kimble, as her only child and sole heir at law surviving her. The said Jacob Ralph died on March 14, 1915, after having conveyed the premises which are the subject-matter of this suit to one Wesley Chamberlain, by deed of warranty dated May 10, 1902, who, in turn, conveyed said premises to Louis F. Braun, by deed dated December 2, 1903. By deed dated April 13, 1910, said Louis F. Braun and wife reconveyed the premises in controversy to the said Wesley Chamberlain, who conveyed the same to the defendant, The Mayor and Common Council of the City of Newark, by deed dated April 22, 1911. Plaintiff did not dispute the above series of deeds by which defendant came into possession of the premises, but asserted that under the deed given by the Schulsters to her father and mother, the property therein conveyed was granted to her father and mother as tenants in the entirety for their lives, and the life of the survivor of them only, with the fee in the heirs of her mother; and that for that reason, the conveyance by her father to Chamberlain, after her mother's decease, passed nothing but the life estate of her father in the premises; and that the only estate which The Mayor and Common Council of the City of Newark acquired was that same life estate, which was terminated by her father's death on March 14, 1915.

Defendant, on the other hand, contended that under said deed the land and premises were conveyed absolutely to the said Jacob Ralph and Elizabeth Ralph, his wife, as tenants in entirety, and that consequently, upon the decease of the wife, said Jacob Ralph became sole owner of the premises in fee simple, and through him, The Mayor and Common Council of the City of Newark are now such owners.

The main questions involved in the controversy are: (1) the true construction of the deed executed by the Schulsters to the said Jacob Ralph and Elizabeth Ralph; (2) the right of the defendant to introduce evidence of the circumstances surrounding the execution of that deed in aid of the true construction thereof; and (3) the amount of damages, if any, to which plaintiff was entitled for the removal by defendant of the buildings upon the premises.

Such other questions as incidentally arose will hereafter be discussed in connection with the above main questions.

Specifications of Grounds of Appeal.

We rely upon the following grounds for reversal:

I.

The record of a deed marked "Plaintiff's Exhibit P-1," dated February 27, 1897, made by Janett Schulster and William J. Schulster, her husband, to Jacob Ralph and Elizabeth Ralph, his wife, for an acre of land situated in the Township of West Milford, Passaic County, New Jersey, which deed is recorded in the Register's Office of the County of Passaic, in Book S-12 of Deeds, on pages 80, etc., on March 26, 1897, was erroneously admitted in evidence (Case, p. 12, ll. 30-40; p. 13, ll. 1-19).

The Court erred in overruling the offer of the defendant to read the deposition of William Roome into the case (Case, p. 43, ll. 9, etc.; pp. 45-48 and especially p. 49, ll. 10-12, and ll. 13-40; and pp. 50, 51 and 52, ll. 9-13).

(These two reasons are discussed under Point I of the argument.)

II.

The Court erred in refusing to grant defendant's motion for a non-suit upon the evidence given at the trial (Case, p. 31, ll. 30-40, and pp. 32-36, and especially p. 37, l. 34).

The Court erred in refusing to grant defendant's motion for a direction of a verdict by the jury for the defendant upon the evidence given at the trial (Case, p. 58, ll. 10-40, and p. 59, ll. 1-22).

(These reasons are discussed under Point II of the argument.)

III.

The following questions were overruled:

To the witness Wesley Chamberlain:

“What was the general condition of this so-called hotel?” (Case, p. 38, ll. 24-40; p. 39, ll. 1-40).

To the witness Wesley Chamberlain:

“Did you do anything about the property as to its improvement, after you took possession?” (Case, p. 40, ll. 1-11).

(These reasons are discussed under Point III of the argument.)

IV.

The following questions were admitted:

To the witness Frank Post:

“Do you know about what it would cost to reproduce that hotel?” (Case, p. 23, ll. 1-15).

Answer: “At the present day?”

Question: “Yes.”

Question: “March 15, 1915, the date of the death of the life tenant.”

To the witness John M. Weaver:

“What is the .82 of land worth?” (Case, p. 29, ll. 18-40; p. 30, ll. 1-40).

Exception is also taken to that part of the Judge's charge (Case, p. 61, ll. 13-37) in which he says:

“There has also been some testimony introduced, and some sum mentioned as the cost of reproducing the buildings. My recollection is the sum was Six Thousand Dollars (\$6,000), but you will remember the amount. That testimony was only introduced for the purpose of helping and guiding you and not for the purpose of having you find that the cost of reproducing the buildings is the value that should be allowed. For you can see, gentlemen, there was a building upon the property that was old and had been there a number of years, and they could not ask to have it replaced by a new building, because the new building would be worth a great deal more than the old one, for the old building only had a certain length of life remaining to it, and the new building had an additional length of life to which the plaintiff would not be entitled. The only purpose of introducing that evidence, gentlemen, was

to enable you to know how much it would cost to reproduce the building and then you can make allowance for the age and condition and determine what the reasonable value was at the time it was destroyed, and that is the only way in which you may consider that evidence."

The Court refused to charge the jury:

"That where competent evidence is adduced showing the actual value of the buildings at the time of their destruction, evidence of replacement value must not be considered by the jury" (p. 62 of Case, ll. 13-16).

(These reasons are discussed under Point IV of the argument.)

V.

There was no evidence in the case to support the verdict of Four thousand five hundred dollars (\$4,500) by the jury.

(This reason is taken up under Point V of the argument.)

VI.

The Court erred in refusing to grant defendant's motion, at the close of the taking of testimony in the case, to strike out the second count in the complaint, for damages for the removal of the buildings, because there was no evidence in the case that the buildings were affixed to the soil and became a part of the freehold, or fixtures (Case, p. 59, ll. 15-21).

The Court refused to charge the jury :

“That there can be no verdict of damages for removal of the buildings by the defendant if the jury finds for the plaintiff, because no proof has been adduced that the buildings were affixed to the real estate and were part thereof” (Case, p. 63, ll. 23-28, and p. 62, ll. 13-17).

“That there can be no verdict of any other damages than nominal damages for the removal of the buildings by defendant, if the jury finds for the plaintiff, because no proof has been adduced that the buildings were affixed to the real estate and were part thereof” (Case, p. 63, ll. 24-29 and p. 62, ll. 13-17).

(These reasons are discussed under Point VI of the argument.)

VII.

The Court charged the jury :

“There are certain responsibilities, gentlemen, that the jury has to take, and there are certain other responsibilities that the Court has to take; and, in this case, the Court takes the responsibility of determining that the plaintiff is entitled to the possession of the property. So that that question is eliminated from your discussion” (Case, p. 60, ll. 14-20).

The verdict rendered against the defendant is contrary to law.

The judgment rendered is contrary to law.

(These reasons are discussed under Point VII of the argument.)

ARGUMENT.

I.

We contend that in view of the peculiar ambiguity and inharmoniousness of the language used in the deed from Janett Schulster and husband to Jacob Ralph and Elizabeth, his wife, such extrinsic evidence of the circumstances attendant upon the execution of the deed as would have thrown light upon the intention of the parties as expressed by the language of the deed ought to have been admitted to enable the Court to view the instrument from the standpoint of the parties who executed it. Such evidence was excluded.

This contention takes up the reasons set forth under Caption I of Specification of Grounds of Appeal and is the first and third Grounds of Appeal in Case, page 98.

The deed in question (Case, pp. 64-66) is obscure and inconsistent. It is between Janett Schulster and William J. Schulster, her husband, of the first part, and "Jacob Ralph and Elizabeth Ralph (his wife), of the second part"; and the grant is "unto the said party of the second part, and to *her* heirs and assigns forever." The *habendum* is "unto the said party of the second part, *her* heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, *her* heirs and assigns forever." The covenant of seisin is likewise "to and with the said party of the second part, *her* heirs and assigns." The covenant of general warranty is "unto the said Jacob Ralph and Elizabeth Ralph, * * * heirs and assigns, forever."

There are, therefore, two grantees, properly designated as "the party of the second part," and the grant is "to the party of the second part, *her* heirs and assigns." "The party of the second part" (the antecedent of the pronoun) is plural; and the pronoun itself is singular. It is apparent, therefore, that the parties have not said precisely what they meant. Under these circumstances, the deed requires just construction in order to ascertain the true meaning of the inconsistent words used by the parties; and extrinsic evidence of the circumstances surrounding the execution of the instrument is admissible in aid of construction.

That the language employed is confused is further evidenced by the circumstance that the covenant of general warranty is "unto the said Jacob Ralph and Elizabeth Ralph, * * * heirs and assigns," without any pronoun whatever.

In order to ascertain the true intent of the parties as expressed by the language of the deed, the defendant insisted that the original deed be produced and not the record thereof, in order that the Court and jury might examine the document with reference to erasures, interlineations and general physical appearance (Case, p. 10, ll. 15-22, and p. 12, ll. 30-40, and p. 13, ll. 1-19). On this point the defendant was overruled.

In further aid of construction, defendant offered in evidence the deposition of William Roome (Case, p. 43, ll. 8-11), which offer was overruled (Case, p. 49, ll. 10-12). William Roome was the draftsman of the deed in question; and the purpose of this offer was to show that that instrument, as drawn by him, contained but one grantee, and that grantee was of the feminine gender, namely, Minnie Ralph, who was the daughter of the said Jacob and Elizabeth Ralph (Case, p. 46, ll. 14-18), and to show further that all the blank spaces in the deed,

including the spaces for pronouns, were properly filled out for that grantee; and to show further that afterwards the deed was changed so that it contained, not a single female grantee, but the two present grantees, Jacob Ralph and Elizabeth Ralph, his wife, without altering the pronouns to harmonize with the change so made.

The offer of this deposition was, we think, improperly refused, as it would have thrown light upon the intention of the parties as expressed by the language of the deed.

The following cases and authorities seem to sustain our position :

Northeastern Telephone Company v. Hepburn et als., 73 N. J. Eq., 657 (Court of Errors).

“No doubt in construing deeds the question is, not what interest did the grantor intend to pass, but what did he pass by apt and proper words. Therefore, extrinsic evidence, *except such as throws light upon the circumstances* and the subject matter, is to be disregarded. But language is used in a deed because it expresses a purpose, *and the general rule of construction applicable to conveyances, as to other written instruments, is, in the language of Shepard's Touchstone, that it be favorable and as near the minds and apparent intents of the parties as it possibly may be and the law will permit.*”

13 Cyc., 607, g. *Extrinsic Circumstances.*

“For the purpose of enabling it to ascertain the intention of the parties and to construe the deed, but not in a manner incon-

sistent with the words used so as to add to or detract from or alter the intent, the court will place itself as nearly as possible in the position of the parties when the instrument was executed, and will consider * * * all the attendant circumstances or the existing state of facts, the situation of the parties and of the property, or the condition and state of things granted at the time."

Fowler v. Black, 11 L. R. A., 670 (Ill. Supreme Court, 1891).

"In giving construction to the deed we are necessarily confined to the terms of the instrument itself, the object being to ascertain the intention of the parties as expressed by the language used, and not the intention which may at the time have existed in their minds. *True, where the language is otherwise obscure or doubtful, resort may be had to oral evidence of the circumstances surrounding the parties at the time the instrument was executed*, but this can never be done for the purpose of varying the language actually employed, but merely to enable the court to view the instrument from the standpoint of the parties who executed it, and be thereby better enabled to determine the sense in which the words used were intended to be understood."

Am. & Eng. Encyc. of Law, 2nd Edition, Volume 17, 21, (and cases there cited).

"In interpreting a writing, the court, in order to determine its meaning, will consider all the facts and circumstances attending its execution. Among the circumstances

so considered are the relations of the parties, the nature and situation of the subject matter, and the apparent purpose of making the instrument or contract in question. These surrounding circumstances, however, cannot be considered when the instrument is in itself plain and unambiguous without reference to them, since their only possible effect in such a case would be to give the instrument a meaning inconsistent with the language used therein. It is but another statement of the same rule to say, as is frequently done, that *the court will, if necessary, put itself in the place of the parties and read the instrument in the light of the circumstances surrounding them at the time it was made and of the objects they evidently had in view.*"

Upon the above authorities we insist that the original deed should have been put in evidence and not the record thereof, and that the deposition of Roome should have been admitted.

We well understand that the statute puts the record of a deed on the same level with the deed itself; but in cases of obscurity and doubt, like the one under consideration, a physical examination of the deed itself would necessarily be the best evidence. The record of the deed would disclose neither erasures, nor interlineations, unless they were noted either on the margin of the deed or above the signature of the subscribing witness. Defendant was entitled to have the best evidence, and the best evidence would have unquestionably been the deed itself. There is no evidence in the case to show that the plaintiff made diligent search, or in fact any search, for the deed; nor did she undertake to account at all for its non-production.

II.

We further contend that the grant in the conveyance from Janett Schulster and husband to Jacob Ralph and Elizabeth Ralph, his wife, was of an absolute estate in fee simple to them as tenants in the entirety, and that as a consequence of Jacob Ralph surviving his wife, he became seized absolutely of the property in dispute; and that there was error, therefore, in the refusal of the Court to grant defendant's motion for non-suit and its motion to direct a verdict at the close of the case in its favor.

This contention takes up the reasons designated under caption II of the Specification of Grounds of Appeal, and the second and fourth Grounds of Appeal, on pages 98 and 99.

(The motion for non-suit appears on pp. 31-37, inclusive, of the Case and the motion for direction of verdict on pp. 58 and 59 of Case.)

As before stated, the deed is between Janett Schulster and her husband, of the first part, and Jacob Ralph and Elizabeth Ralph, his wife, of the second part; and the grant is "unto the said party of the second part, and to her heirs and assigns forever," with *habendum* in the like words. The covenant of seisin is also "unto the said party of the second part, her heirs and assigns forever," whereas the covenant of warranty is "unto the said Jacob Ralph and Elizabeth Ralph, * * * heirs and assigns, forever."

The covenant against encumbrances reads that the said lands and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgages,

judgment or limitation, or by any encumbrances whatsoever, by which the title of *the said party of the second part* hereby made or intended to be made, for the above-described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever; and the deed also contains the covenant that "the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in the manner aforesaid" (Case, pp. 64-66).

When the covenant against encumbrances, the covenant that the grantor has good right to convey, etc., and the covenant of warranty are considered together, it would seem that the only rational construction of the entire deed would be that there was an absolute conveyance to both Jacob and Elizabeth Ralph. Otherwise, the words in the covenant of warranty, warranting, securing *and forever defending* the said lands and premises *unto the said Jacob Ralph and Elizabeth Ralph, * * * heirs and assigns forever*, would seem to be meaningless. If the intention was that Jacob Ralph should only take a life estate, surely such an estate would not have to be forever defended; and the words of warranty would have been restricted, in so far as he was concerned, to a life estate.

That the covenants in a deed are to be considered in construing the same in a case like the one at bar is supported by the following authorities:

13 Cyc, 620, f.

"The covenants cannot control the premises, although they may be important and sometimes decisive, *and may appropriately be considered by the court when a question*

arises as to what is granted for the purpose of aiding the construction to be given to the instrument."

Ross v. Adams, 28 N. J. L., 160, 170.

"Although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were intended."

(The vigorous criticism of the foregoing statement of the law by Justice WHELPLEY, in reversing the decision in the Court of Errors, 30 N. J. L., 505, is apparent rather than real, and seems to have gone to the application of the principle rather than to the principle itself.)

Not only is the covenant of warranty repugnant to the interpretation placed upon the deed by the Court below, but in considering the entire deed, such interpretation requires the reading into the deed of whole phrases or of many words, whereas our contention requires only the reading of the word "her" as "their." In other words, in order to adopt the construction of the Court below, there would have to be interpolated into the deed the following words, which we print in italics: In the granting clause, unto the said party of the second part, *for life, and to the heirs and assigns of the said Elizabeth Ralph, forever*; and likewise and twice in the *habendum*. And so in the covenant of seisin.

And in order to make the covenant of warranty conform with this view of construction, that covenant would require even greater revision than the ones above named.

Our own Supreme Court, in the case of *Den v. Hardenbergh*, 10 N. J. L., page 42, would not go so far. There a deed made between A, party of the

first part, and C and D, his wife, party of the second part, granted "unto the said party of the second part, his *heirs* and assigns," a piece of land; and C died, his wife D him surviving. D (the widow) brought ejectment, and Chief Justice EWING, delivering the majority opinion of the Court in an age when Judges were wont to grapple with and decide, not only a single determinative question in the case, but every important question fairly raised thereby, refused to decide that the widow did not take more than a life estate.

In short, a greater and more extensive violence, involving more ingenuity must be done to the language of the instrument under the construction followed by the Trial Court, than under the interpretation for which we contend.

Obviously there is a mistake in grammar in this deed, the singular "her" being used instead of the plural "their." Such error may be corrected in a court of law in construing the instrument.

Am. & Eng. Encyc. of Law (Second Edition, Vol. 17, 19, &c.).

"It is now generally agreed that *courts of law* or of equity may correct, *merely as a matter of construction*, obvious mistakes of a verbal or clerical character, so as to bring all parts of the instrument into harmony with the manifest intent of the parties as gathered from the instrument itself, since greater regard is to be paid to the clear intent of the parties than to any particular words which they may have used in the expression of their intent * * *. On the same principle one word will be substituted

for another which is plainly erroneous, this being in effect merely the giving to a word the meaning called for by the context. Grammatical inaccuracies are immaterial, provided the intention appears."

Jackson v. Topping, 19 Am. Dec., 515.

"Grammatical sense of words need not be adhered to in construing a deed where the contrary intent is apparent from the whole instrument."

Smith v. Packhurst, 3 Atk., 136.

In this case Lord Chief Justice WILLES declared :

"Another maxim is, that such a construction should be made of the words of a deed as is most agreeable to the intention of the grantor; words are not the principal thing in a deed, but the intent and design of the grantor; we have no power in a deed to alter the words, or insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are insensible. These maxims are founded upon the greatest authority, Coke, Plowden and Lord Chief Justice Hale; the law commends the astutia, the cunning of judges in construing words in such a manner as shall best answer the intent."

This brings us to our last point under this argument.

The intention in this deed is obvious, and the error plain. To take any other position in reference to this instrument is to run counter to the

general practice of mankind. Perhaps the question may be confidently put, which member of this court, in his former practice, ever knew a husband and wife, with a common heir born of their marriage, to take title to themselves for life, *with remainder to the heirs of the wife only?* The thing is, of course, possible, and in isolated and rare instances may be found to have been done. But every such case is, and must remain, an extreme singularity, if not eccentricity. The Court, in a case of doubt, ought not lightly to presume an intention so widely at variance with the normal practice of men. It will take judicial notice that such an intention is not normal; and ought to be persuaded of its existence only when shut off from any other view.

III.

We further contend that the Trial Judge committed harmful error in refusing to allow evidence concerning the condition of the buildings on the premises in dispute at the time Wesley Chamberlain took title to the property.

This contention includes caption III of the Specifications of Grounds of Appeal, and Reasons 6 and 7 of Grounds of Appeal in Case, page 99.

Wesley Chamberlain took title to the premises in dispute by deed of warranty from Jacob Ralph, widower, dated May 10, 1902 (Case, p. 66, Exhibit P-2; and p. 13, ll. 19-26). There is no question but what he bought the property in good faith, and in the belief that his grantor, the said Jacob Ralph, owned the same absolutely. It appears from evidence subsequently stricken out that at the time

Chamberlain purchased the property, the main building thereon, designated as the hotel, was in a rotten condition; the sills were rotted out; the floor had rotted away; the building tilted over to one side, and the roof was partly off (Case, p. 13, ll. 24-30).

This information was received in answer to the question asked of Wesley Chamberlain as to what was the general condition of this so-called hotel (Case, p. 38, l. 24). After ruling out that question and the answer, the Court also overruled the question asked of Chamberlain, "Did you do anything about the property as to its improvement after you took possession?" and the answer thereto, "Oh, yes, considerable" (Case, p. 40, ll. 1-10).

Chamberlain, in good faith, made improvements in the buildings upon the premises which he believed he had purchased in fee. Had he not made such renovations, the buildings would have been worth less at the time of their removal by the defendant. It would seem inequitable and unfair that the plaintiff, if entitled to recover damages for the removal of the structures, should reap advantage from such enhanced value. Neither she, nor anyone under whom she claimed, had anything to do with the repairs made. Whatever damages, if any, are eventually recovered by plaintiff against defendant will have to be paid ultimately by said Chamberlain under his deed of warranty to the defendant (Case, p. 67, Exhibit P-5).

Under the Ejectment Act (*Compiled Stat.*, pp. 2054, &c.), where a plaintiff sues for *mesne* profits the defendant who has made permanent improvements in good faith on the premises is allowed to set off the value of such improvements.

In *Joyce on Damages*, Vol. 3, par. 2173, it is said that the value of improvements can be recovered

by one purchasing the lands under the belief that his title is good. So permanent improvements, in so far as they enhance the value of the land, should be allowed, when made by one holding the land as his own under a belief that his title was good.

These principles ought to be applied to the case at bar, and the jury had a right to consider to what extent the value of the buildings, when removed by defendant, was affected by the repairs made by Chamberlain.

IV.

We further contend that the Trial Judge committed harmful error in admitting evidence of what it would cost to replace the buildings removed and in afterwards refusing to charge the jury that where competent evidence is adduced showing the actual value of the buildings at the time of their destruction, evidence of replacement value must not be considered by them. He also erred in allowing evidence of the value of the .81 acre of land, which is not the subject-matter of this suit.

This argument includes the reasons under Point IV of the Specification of Grounds of Appeal and reasons 11, 12, 14 and 15 in State of Case, pages 100 and 101.

We are discussing these reasons together as they all relate to the question of damages.

In *Tate v. Field*, 57 N. J. Eq., page 632 (Court of Errors and Appeals, November Term, 1898), Chief Justice GUMMERE lays down the rule that

the sum the defendant should pay by reason of the waste as between tenant for life and remainderman, where the same is committed by the former, should be the full value to the defendant of the building removed, with interest from the date of removal.

Frank Post, plaintiff's witness, sworn for the purpose of proving the amount of damages by removal of the buildings, swears on cross-examination that the value of all the buildings removed was not \$2,000 (Case, p. 26, ll. 13-15). He afterwards takes the buildings up one by one and arrives at practically the same value (Case, p. 26, ll. 17-40).

Inasmuch as the jury had before them the actual value of the buildings and that too from plaintiff's own witness, it was most harmful and prejudicial to defendant to allow the jury to consider the evidence given by the same witness that it would cost \$6,000 to replace the buildings with new material and pay for the work (Case, p. 24, ll. 20-24).

The Court should have charged the jury that inasmuch as they had before them the evidence of the true value of the buildings removed they should not consider the evidence of the replacement value. That the refusal to so charge resulted in the finding by the jury of an unreasonable amount of damages, we think substantiates this argument.

Unmistakably the best evidence is the testimony of experts, acquainted with the buildings, as to the actual value of the same when standing. Evidence of the cost of their replacement, whether by the same expert, as here, or others, would draw the jury into a field of boundless speculation. Under the latter evidence, they have to determine, not the veracity or knowledge of the expert, but the exact state of disrepair and future life of the buildings in question. Such speculation must always amount

to little more than vague conjecture; and to permit the consideration of replacement value under these circumstances is to couple the vaguest possible kind of evidence with the most exact and certain; and is contrary to the elementary rules.

It was also harmful error to admit the evidence of the value of the .82 acre of land.

On page 29 of Case, line 16, plaintiff's witness, Weaver, was asked: "What is the .82 acre of land worth?" And on page 30 of Case, lines 34-40, the Court admitted the question and answer over objection.

The deed given by Wesley Chamberlain to the defendant contained two tracts of land, the one the premises in dispute, and the other the .82 of an acre, and also contained a covenant that he, the said Chamberlain, would not acquire, directly or indirectly by lease or otherwise, any lands or any interest therein located in the territory of the Pequannock Watershed, and would not dwell or reside within said territory, but would wholly and permanently remove therefrom on or before September 1, 1911 (Case, p. 30, ll. 10-36). The obvious reason for the plaintiff desiring this evidence was to have the jury subtract from the consideration of the deed, to wit, \$12,500, the land value of the one acre in dispute, which was testified to be worth \$100 (Case, p. 29, ll. 16-17), and also the land value of the .82 of an acre, and to infer that the difference was the value of the buildings.

That program would leave out of consideration the value of the covenant referred to, which covenant may have been, in the view of the defendant, of the very greatest importance and value. It effectually exiled the grantor, Chamberlain, from that territory; and prevented his acquiring, for the purpose of a speculative resale to the defendant, other lands in the same region. That program

would also leave out of consideration the notorious fact that the defendant was engaged in the enterprise of buying up all the land within the territory of the Pequannock Watershed, and removing all structures and fences therefrom, and in so doing, was paying high prices in order to avoid delay and condemnation proceedings, the basis of which high prices was especially the land, not the buildings, as they were afterwards removed by it. Save for that restrictive covenant, the defendant, in every instance of its acquisition of a title, placed in the hands of its grantor a large sum of ready money, with which such grantor might tempt his less shrewd neighbors to convey their land to him, and then hold up the defendant for an exorbitant price. It appears, therefore, that this covenant was of great consequence to the defendant, and may have made up, from its viewpoint, a substantial part of the consideration paid in this instance.

Under the circumstances of the purchase, the admission of the question as to the value of the .82 of an acre was most harmful.

V.

We further contend that the verdict of \$4,500 damages was excessive.

This contention covers Point V of the Specification of Grounds of Appeal, and Grounds of Appeal 18 in Case, page 100.

On page 22 of Case, lines 35-40, plaintiff's witness Post testifies that the buildings on the property were a hotel, barn, bottling works, small shed and small ice house. On page 24, lines 25-37, he swears that the buildings were tenantable, "but that is about all you could say." On page 26, lines 10-40,

he says that all the buildings were together worth not more than \$2,000; that the house (hotel) was a cheap affair, worth about \$1,300 or \$1,400; that the ice house was not worth speaking of very much; and that the shed was but little better, and worth \$50; that the bottling plant was a little building, and worth between \$200 and \$300; and that the barn was worth \$150.

It should be borne in mind that this proof came from the plaintiff's own chosen witness.

On page 37 of Case, lines 30-40, Wesley Chamberlain testifies that when he took the property from Ralph, the buildings were "in a dilapidated condition"; that there were only two buildings on the place, the one main building which was afterwards the "hotel," *and built on the same construction*, and an old ice house; that at that time the main building was used for bottling; that the sills thereof were rotted out; the floor had all rotted out so that the building tilted to one side, and the roof was partly off.

(This testimony of Chamberlain was afterwards stricken out, its exclusion being covered in one of our former arguments.)

We think it significant enough to call to the attention of the Court that Weaver, plaintiff's witness, who testified to the value of the *land*, was asked nothing concerning either the state or value of the buildings, notwithstanding that he had lived in the very neighborhood for forty-eight years, and was then in his fourth term as Tax Assessor for that township (Case, p. 27, ll. 20-40). The condition and value of those buildings would have been especially known by him, not only on account of his long residence in the vicinity, but also because it was his official duty yearly to appraise them.

This embraces all the evidence on the value and condition of the buildings.

Taking for the basis of the damages the full value of \$2,000 placed upon the buildings by the plaintiff's own witness as of the time of their removal, and excluding entirely the fact that their condition was due in part to the repairs and improvements made in good faith by Chamberlain, the verdict of \$4,500 was plainly excessive and unwarranted.

If the rule declared by Chief Justice GUMMERE in *Tate v. Field*, above cited, was applied in this case, then we would have as a measure of damages, under the above assumption, the amount of \$2,000, plus the interest thereon from March 14, 1915; that date being the date of the decease of Jacob Ralph, and consequently the beginning of the time when plaintiff, if her contention be sound, should have begun to enjoy the use of the buildings. Not even quite that, because the value of the buildings is fixed by plaintiff's witness as of the time of their removal, to wit, 1911, and Ralph did not die until 1915, and hence there would have been four more years' life on the buildings, and consequently some depreciation (Case, p. 62, ll. 30-38).

Should our former contention be upheld that the value of repairs and improvements made by Chamberlain be considered by the jury in dealing with the \$2,000 valuation placed upon the buildings at the time of their removal, this working basis of \$2,000 would have been entirely too large.

Looking at it from either angle, the damages awarded were unconscionably excessive; and did not take into consideration the fact that the shed (worth about \$50) and the bottling plant (worth about \$250) were both trade fixtures, erected by Chamberlain, and should not have been included in their computation of damages.

19 *Cyc.*, 1064, *F.*

“After the death of a tenant for life who has annexed fixtures, * * * there arise questions as to the right to them by his personal representative, or his legatee, and the reversioner or remainderman. The decisions are not numerous, but as regards permanent improvement the life tenant is treated as owner of the land; as regards trade fixtures and articles of convenience or ornament, as a tenant for years. The former go to the one entitled to the next estate in possession; the latter to the personal representative or legatee of the tenant for life.”

There is a question also as to whether the damages, if any there be, should not have been merely nominal.

This brings up to our next contention.

VI.

We further contend that the jury should have awarded nominal damages, if any.

This contention includes Point VI of Specification of Grounds of Appeal, and Grounds of Appeal Nos. 5, 16 and 17 (Case, p. 101).

These reasons are all based upon the theory that there is no proof that the buildings were affixed to the real estate.

40 *Cyc.*, 532, 5, *Waste.*

“It devolves on plaintiff to show that waste has been committed to his injury, and the amount of damage, if any, to the free-

hold. *This includes the burden of proving that the alleged act of the tenant was not rightfully done, for the presumption is in favor of the latter until the contrary appears from the evidence.*"

Am. & Eng. Ency. of Law, Vol. 30, 304.

"In cases of alleged waste, the presumption is in favor of the tenant until the contrary appears, and the plaintiff must show, not only that acts which may be waste have been committed, but also that they worked an injury to the inheritance."

The case is destitute of testimony that the buildings were affixed to the land.

VII.

We further contend that the question of possession, as well as of damages, should have been left to the jury.

This contention includes the points covered by Caption VII of the Specification of Grounds of Appeal, and of Grounds of Appeal Nos. 13, 19 and 20 of Case, pages 100-101.

By refusing to allow extrinsic evidence in aid of the construction of the deed, the Trial Court eliminated from the province of the jury the determination of its true construction. As hereinbefore shown, ambiguity undoubtedly exists in the instrument, and is of such a nature as to warrant extrinsic evidence. The Court should have allowed proper extrinsic evidence, and should have left the whole matter, under proper instructions, to the jury.

13 *Cyc.*, 610, *j*, *Deeds, Province of Court and Jury.*

"It is the duty of the court to construe deeds and determine their legal effect, where there is no such ambiguity as requires parol proof and submission to the jury. The interpretation may, however, depend upon the sense in which the words are used and upon facts *aliunde*, and so become a mixed question of law and fact, or there may be such a latent ambiguity, or such a necessity for the determination and application of extrinsic facts, or surrounding circumstances, or subsequent matter of legal admissibility, as that the question will become one for the consideration of the jury, subject to instructions by the court."

Sidell v. Evans, 21 *Am. Dec.*, 387, 390.

"That the construction of written evidence is for the court, and of parol evidence for the jury, and that an admixture of parol with written evidence draws the whole to the jury, are principles which appear everywhere in our books."

Easthampton v. Vail, 151 *N. Y.*, 463.

"While it is a general rule that the construction of a written instrument is a question of law for the court, yet, where its interpretation depends upon the sense in which the words were used, or depends upon facts *aliunde* in connection with the written language to ascertain the intent of the parties, the question becomes a mixed question of law and fact."

White v. Hoyt, 73 N. Y., 505, 512.

“As a rule, the interpretation of written instruments is with the court as a question of law, but when the interpretation depends upon the sense in which words are used, or the sense in which the promissor had reason to believe the promisee understood them, a fact to be determined from the relation of the parties and the surrounding circumstances, it would seem that it becomes a mixed question of law and fact. It is not, then, a matter of interpretation merely, but the ascertainment of the minds and intents of the parties.”

First National Bank v. Dana, 79 N. Y., 108.

“While it is the province of the court to construe contracts, yet where the meaning of a contract is obscure and depends upon facts *aliunde*, in connection with the written language, the question of construction may be one of fact for the jury.”

For the reasons above urged, we think that the judgment, both as to possession and damages, should be reversed.

Respectfully submitted,

HARRY KALISCH,
JOSEPH G. WOLBER,
Of Counsel with Defendant-Appellant.

