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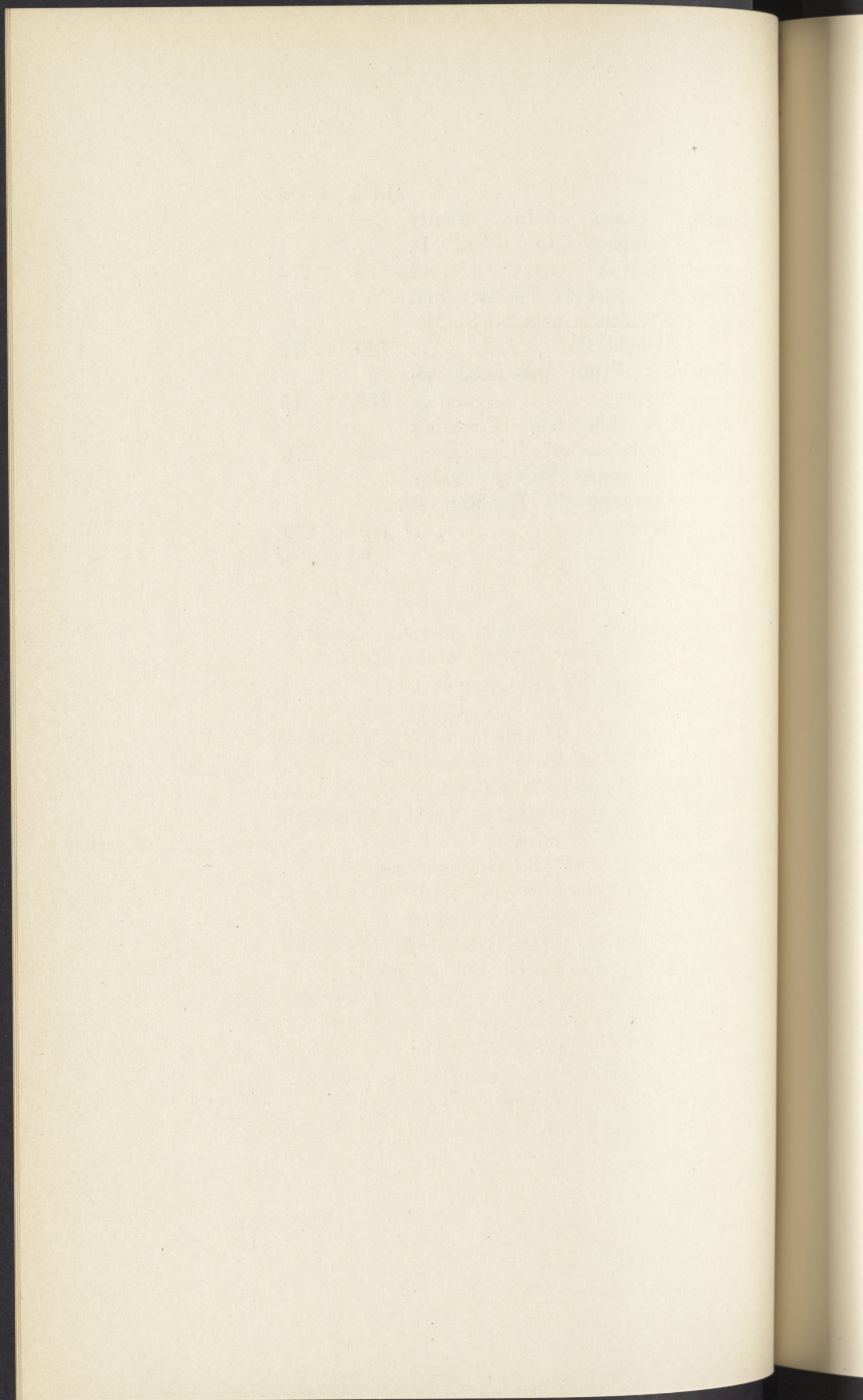

NOTICE OF APPEAL—Hugh F. Cook, et als.

Filed August 8, 1926.

In Chancery of New Jersey

Between The City of Newark, *Petitioner,* *and* Hugh F. Cook, *et als., Defendants.*	*On Petition, etc.* *Notice of Appeal.*

10

The defendants, Hugh F. Cook, Margaret Cook, Paul Burne and Frank Blanchet, individually and as executor under the last will and testament of Honoria Ann Blanchet, deceased, hereby appeal from so much of the order and decree adjudicating rights of parties in fund, and directing disposition thereof, made in this cause by the Chancellor, upon the advice of Vice-Chancellor Backes, on the 27th day of July, 1926, as directs payment out of the fund in court to Charles A. McEuen, or to his solicitor of record, of the sum of $46.85, and interest, and from so much of said order and decree as directs payment out of the fund in court to the Surety Realty Company, or to its solicitors of record, of the sum of $93,065.93, and interest, to the Court of Errors and Appeals, in the last resort in all causes.

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McCARTER & ENGLISH,
Solicitors of above-named Defendants.

Dated, August 5, 1926.

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I conceive there is good cause for appeal in the above-stated cause.

ARTHUR F. EGNER,
Of Counsel with Hugh F. Cook, Margaret Cook, Paul Burne and Frank Blanchet, individually and as executor, etc.,
Appellants.

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PETITION OF APPEAL—Hugh F. Cook, et als.

Filed August 25, 1926.

To the Honorable Court of Errors and Appeals in the last resort in all causes:

The petition of Hugh F. Cook, Margaret Cook, Paul Burne and Frank Blanchet, individually and as executor under the last will and testament of Honoria Ann Blanchet, deceased, respectfully shows that your petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor, upon the advice of Honorable John H. Backes, Vice-Chancellor, bearing date the 27th day of July, 1926, wherein the City of Newark was complainant and said Hugh F. Cook, *et als.,* were defendants, in this respect, to wit, that the said decree directs that payment be made out of the funds in the Court of Chancery in this cause to Charles A. McEuen, or his solicitor of record, of the sum of $46.85 and interest, and directs that payment be made out of the fund in the Court of Chancery in this cause to the Surety Realty Company, or its solicitors of record, of the sum of $93,065.93, and interest, as aforesaid, upon the ground that

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the same is erroneous in that the said Chancellor should have decreed that said sums and both of them be paid to these appellants, Hugh F. Cook, *et als.*

Petitioners, therefore, pray that the said decree of the Chancellor may be in the particulars aforesaid reserved, set aside and for nothing holden, and that your petitioners may have such other relief in the premises as may seem meet. 10

Dated, August 24, 1926.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Appellants.

Formal answers to petition of appeal filed.

NOTICE OF APPEAL—Louis K. Liggett Company. 20

The defendant, Louis K. Liggett Company, a corporation, hereby appeals to the Court of Errors and Appeals in the last resort in all causes from so much of the order and decree adjudicating the rights of the parties in the fund on deposit herein and directing the disposition thereof made in this cause by the Chancellor upon the advice of the Honorable John H. Backes, Vice-Chancellor, on the 27th day of July, 1926, as directs, after providing for the payment out of the fund in court to Charles A. McEuen or to his solicitors of record of the sum of $46.85 and interest, and also the payment out of the fund in court to the Surety Realty Company or to its solicitors of record of the sum of $93,065.93 and interest, the payment of the balance of the fund therein referred to by the clerk of said Court of Chancery, together 40

with all accumulations thereon, to Hugh F. Cook, Margaret Cook, his wife; Paul Burne and Frank Blanchet, or to their solicitors of record; and from so much of said order and decree as orders, adjudges and decrees "that except as herein otherwise provided, none of the parties
10 in interest herein have any further right, title, interest or claim in and to said fund"; and from so much of said order and decree as denies payment to the said Louis K. Liggett Company of its costs and counsel fees therein.

LINDABURY, DEPUE & FAULKS,
Solicitors of Louis K. Liggett Company.

I conceive there is good cause for appeal in the above-entitled cause.

20 BURTIS S. HORNER,
Of Counsel with Louis K. Liggett Company.

PETITION OF APPEAL—Louis K. Liggett Company.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

30 The petition of Louis K. Liggett Company, a corporation, one of the appellants in the above-entitled cause, respectfully shows that:

I. Petitioner finds itself aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of his Honor John H. Backes, bearing date the 27th day of July, 1926, in a certain cause in said
40 Court of Chancery, wherein the City of Newark

was petitioner and Hugh F. Cook, *et als.*, were defendants, in this respect, to wit:

1. That said decree denies said appellant's application for counsel fees and taxed costs and after providing for the payment to Charles A. McEuen of $46.85, besides interest, and to the Surety Realty Company payment of the sum of $93,065.93, together with interest, directs the clerk of said Court of Chancery to pay over the balance of the fund deposited in said cause described in said decree, together with all accumulations thereon, to Hugh F. Cook, Margaret Cook, his wife; Paul Burne and Frank Blanchet, or to their solicitors of record, and further decrees that except as therein otherwise provided, none of the parties in interest therein have any further right, title, interest or claim in and to said fund.

II. Petitioner appeals from said decree upon the following grounds:

1. That said decree is erroneous in that the said Court of Chancery should have granted your petitioner's application for counsel fees and costs aforesaid, and awarded your petitioner reasonable counsel fees and costs to be paid out of said fund.

2. That said decree is erroneous in that the Court of Chancery should not have directed the clerk of said Court of Chancery to pay over the balance of said fund described in said decree which was on deposit in said court, together with accumulations of interest, to the said Hugh F. Cook, Margaret Cook, his wife; Paul Burne and Frank Blanchet, or to their solicitors of record.

3. That said decree is erroneous in that the said Court of Chancery should not have de-

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creed that except as therein otherwise provided none of the parties in interest therein have any further right, title, interest or claim in and to the said fund, but should have adjudged and decreed that your petitioner was entitled to have paid to it out of said fund the sum of $56,049.57, together with accumulations of interest thereon.

4. That the said Court should have adjudged and decreed that there be paid to your said petitioner out of said fund, for the value of its leasehold as damages, the sum of $43,776.00, besides all accumulations of interest thereon.

5. That the said Court should have adjudged and decreed that there be paid as damages to your said petitioner out of said fund for the value of the improvements made to said premises the sum of $1,573.57, besides all accumulations of interest thereon.

6. That the said Court should have adjudged and decreed that there be paid to your petitioner out of said fund as damages for the depreciated value of its furniture and fixtures the sum of $6,500.00, together with all accumulations of interest thereon.

7. That the said Court should have adjudged and decreed that there be paid to your petitioner out of said fund as damages for loss upon the depreciation of fixtures removed from the leased premises the sum of $3,500.00, together with all accumulations of interest thereon.

8. That the said Court should have adjudged and decreed that there be paid to your petitioner out of said fund as damages for loss and damage by reason of its expenses incident to the closing of the leased premises the sum of $700.00, together with all accumulations of interest thereon.

9. That said decree deprives the said petitioner of said petitioner's property without due process of law and is in violation of the Constitution of the United States.

10. That said decree deprives the said petitioner of the equal protection of the law and is in violation of the Constitution of the United States. 10

11. That the failure to award the petitioner the sums set forth in this petition, in subdivisions 3; 4, 5, 6, 7 and 8 of paragraph II, is the taking of private property of your petitioner for public use without just compensation in violation of the Constitutions of the State of New Jersey and of the United States.

Petitioner, therefore, prays that the said decree of the said Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper. 20

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with
Defendant-Appellant, Louis K. Liggett Company.

BURTIS S. HORNER,
Of Counsel. 30

Formal answer to petition of appeal filed.

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NOTICE OF APPEAL—R. E. McDonald, Inc.

The defendant, R. E. McDonald, Inc., a corporation, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from so much of the order and decree adjudicating the rights of the parties in the fund on deposit herein and directing the disposition thereof, made in this cause by the Chancellor upon the advice of Honorable John H. Backes, Vice-Chancellor, on the 27th day of July, 1926, as directs the payment of the balance of the fund therein referred to by the clerk of said Court of Chancery, together with all accumulations thereon, to Hugh F. Cook, Margaret Cook, his wife; Paul Burne and Frank Blanchet, or to their solicitors of record; and from so much of said order and decree as orders, adjudges and decree "that except as herein otherwise provided none of the parties in interest herein have any further right, title, interest or claim in and to said fund"; and from so much of said order and decree as denies payment to said R. E. McDonald, Inc., of its costs and counsel fees herein.

BILDER & BILDER,
Solicitors of R. E. McDonald, Inc.

I conceive there is good cause for appeal in the above-stated cause.

DAVID H. BILDER,
Of Counsel with R. E. McDonald, Inc.

PETITION OF APPEAL—R. E. McDonald, Inc.

To the Honorable Court of Errors and Appeals in the last resort in all causes:

The petition of R. E. McDonald, Inc., a corporation, respectfully shows:

That your petitioner finds itself aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, upon the advice of his Honor John H. Backes, bearing date the 27th day of July, 1926, in a cause wherein the City of Newark was petitioner and Hugh F. Cook, *et als.*, were defendants, in this respect, to wit: 10

I. That said decree denies said appellant's application for counsel fees and taxed costs, and after providing for the payment to Charles E. McEuen of $46.85, besides interest, and to the Surety Realty Company payment of the sum of $93,065.93, together with interest, directs the clerk of said Court of Chancery to pay over the balance of the fund deposited in said cause described in said decree, together with all accumulations thereon, to Hugh F. Cook, Margaret Cook, his wife; Paul Burne and Frank Blanchet, or to their solicitors of record, and further decrees that except as therein otherwise provided, none of the parties in interest therein have any further right, title, interest or claim in and to said fund. 20 30

II. Your petitioner humbly appeals from said decree upon the following grounds:

(1) That said decree is erroneous in that the said Court of Chancery should have granted your petitioner's application for counsel fees and costs aforesaid and awarded your petitioner 40

reasonable counsel fees and costs to be paid out of said fund.

(2) That said decree is erroneous in that the Court of Chancery should not have directed the clerk of said Court of Chancery to pay over the balance of said fund described in said decree which was on deposit in said court, together with accumulations of interest, to the said Hugh F. Cook, Margaret Cook, his wife; Paul Burne and Frank Blanchet, or to their solicitors of record.

(3) That said decree is erroneous in that the said Court of Chancery should not have decreed that except as therein otherwise provided none of the parties in interest therein have any further right, title, interest or claim in and to said fund, but should have adjudged and decreed that your petitioner was entitled to have paid to it out of said fund the sum of $170,835.17, together with accumulations of interest thereon.

(4) That the said Court should have adjudged and decreed that there be paid to your said petitioner out of said fund for the value of its leasehold as damages, the sum of $76,633.92, besides all accumulations of interest thereon.

(5) That the said Court should have adjudged and decreed that there be paid to your petitioner out of said fund as damages for the value of its furniture and fixtures, the sum of $14,500.00, together with all accumulations of interest thereon.

(6) That the said Court should have adjudged and decreed that there be paid to your petitioner out of said fund as damages for the value of its good will the sum of $50,000.00, together with all accumulations of interest thereon.

(7) That the said Court should have adjudged and decreed that there be paid to your petitioner out of said fund as damages for loss upon the close-out of its stock of merchandise on October 1, 1925, the sum of $17,884.25, together with all accumulations of interest thereon.

(8) That the said Court should have adjudged and decreed that there be paid to your petitioner out of said fund as damages for its loss and damage by reason of expenses incident to its closing-out sales above the normal overhead expenses, the sum of $11,817.00. 10

(9) That said decree deprives the said petitioner of said petitioner's property without due process of law and is in violation of the Constitution of the United States.

(10) That said decree deprives the said petitioner of the equal protection of the laws and is in violation of the Constitution of the United States. 20

(11) That the failure to award to petitioner the sums set forth in this petition in subdivisions 5, 6, 7 and 8 of paragraph II, is the taking of private property of your petitioner for public use without just compensation, in violation of the Constitution of New Jersey.

Your petitioner, therefore, prays that the said decree of the Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holden, and that your petitioner may have such other and further relief in the premises as may seem meet. 30

BILDER & BILDER,
Solicitors for and of Counsel with Appellant,
R. E. McDonald, Inc., a corporation.

Formal answer to petition of appeal filed. 40

NOTICE OF APPEAL—Surety Realty Company.

Filed August 6, 1926.

The defendant, Surety Realty Company, hereby appeals from so much of the order and decree adjudicating the rights of the parties in
10 the funds on deposit herein, and directing disposition thereof, made in this cause by the Chancellor, upon the advice of Honorable John H. Backes, Vice-Chancellor, on the 27th day of July, 1926, as directs payment out of the fund in court to the Surety Realty Company, or its solicitors of record, of the sum of $93,065.93, and interest, and from so much of said order and decree as denies payment to Surety Realty Company of its costs and counsel fees herein, to
20 the Court of Errors and Appeals in the last resort in all causes.

Dated, August 5, 1926.

STEIN, STEIN & HANNOCH,
Solicitors of Surety Realty Co.

I conceive there is good cause for appeal in the above-stated cause.

HERBERT J. HANNOCH,
30 Of Counsel for Surety Realty Co.

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PETITION OF APPEAL—Surety Realty Company.

Filed August 11, 1926.

To the Honorable Court of Errors and Appeals in the last resort in all causes:

10

The petition of Surety Realty Company respectfully shows that your petitioner finds itself aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor, upon the advice of his Honor John H. Backes, Vice-Chancellor, bearing date the 27th day of July, 1926, wherein the City of Newark was complainant and the said Hugh F. Cook, *et als.*, were defendants, in this respect, to wit, that the said decree directs that payment be made out of the funds in the Court of Chancery in said cause to your petitioner, or its solicitor of record, in the sum of $93,065.93, and interest, and that said decree denies payment to your petitioner of its reasonable costs and counsel fees herein, upon the grounds that the same is erroneous, in that the said Chancellor should have decreed that the sum of $103,882.94 and a reasonable counsel fee, and costs to be paid to this appellant, Surety Realty Company.

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Your petitioner, therefore, prays that said decree of the Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holden and that your petitioner may have such other relief in the premises as may seem meet.

Dated, August 10, 1926.

STEIN, STEIN & HANNOCH,
Solicitors for and Counsel with Appellant,
Surety Realty Company.

Formal answer to petition of appeal filed.

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**NOTICE OF APPEAL—
Charles A. McEuen, et ux.**

Filed August 6, 1926.

The defendants, Charles A. McEuen and Madge J. W. McEuen, his wife, hereby appeal from so
10 much of the final decree made in this Court by the Chancellor, on the advice of Vice-Chancellor Backes, in the above-stated cause, as reads as follows:

> "2. That the Clerk of this Court do pay to Charles A. McEuen or to his solicitor of record the sum of $46.85, together with any interest that may have accrued thereon from the date of the deposit of said fund with the said Clerk, and which sum, when paid,
> 20 shall be in full satisfaction and discharge of any and all interest which the said Charles A. McEuen may have in the fund on deposit herein."

To the Court of Errors and Appeals in the last resort in all causes.

Dated, August 5, 1926.

CECIL H. MacMAHON,
Solicitor and of Counsel with Defendants,
30 Charles A. McEuen and Madge J. W. McEuen, his wife.

I conceive there is good cause for appeal in the above-stated cause.

CECIL H. MacMAHON,
Of Counsel with Appellants.

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PETITION OF APPEAL—
Charles A. McEuen, et ux.

Filed August 11, 1926.

To the Honorable Court of Errors and Appeals in the last resort in all actions:

The petition of Charles A. McEuen and Madge J. W. McEuen, his wife, respectfully shows that your petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor, upon the advice of his Honor John H. Backes, Vice-Chancellor, bearing date the 27th day of July, 1926, wherein the City of Newark was complainant and Hugh F. Cook, *et als.*, were defendants, in this respect, to wit: that the said decree directs that payment be made out of the fund in the Court of Chancery in said cause to your petitioner, Charles A. McEuen, or his solicitor of record, the sum of $46.85 and interest, which sum, when paid, shall be in full satisfaction and discharge of any and all interest which the said Charles A. McEuen may have in the fund on deposit in said Court of Chancery, upon the ground that the same is erroneous, in that the said Chancellor should have decreed that the said Charles A. McEuen was entitled to receive one-third of the funds paid into the Court of Chancery in said cause as the owner of a one-third interest in the real estate for the condemnation of which, by the City of Newark, said fund had been paid into said Court of Chancery.

Your petitioner therefore prays that said decree of the Chancellor made in the particulars aforesaid be reversed and set aside and for nothing holden, and that your petitioners may have

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such further relief in the premises as may seem meet.

Dated August 10, 1926.

CECIL H. MacMAHON,
Solicitor for and of Counsel with Appellants,
Charles A. McEuen and Madge J. W. McEuen.

10

Formal answers to petition of appeal filed.

PETITION OF HUGH F. COOK, et als.

Filed October 6, 1925.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

20

The petition of Hugh F. Cook, Margaret Cook, Paul Burne and Frank A. Blanchet, individually, and as executor of the last will and testament of Honoria Ann Blanchet, deceased, respectfully shows unto your Honor:

1. Petitioners are residents of the Village of South Orange and the City of Newark, in the County of Essex and State of New Jersey, and are the owners in fee of premises situated at the northwest corner of Market and Washington streets in the City of Newark, being premises taken by the City of Newark for the opening and widening of Washington street in said city.

30

2. Pursuant to proceedings had before the Board of Commissioners of Assessment for Local Improvements of the City of Newark and the Circuit Court of the County of Essex, an award for the premies so taken was made by the Board of Commissioners of Assessment for Local Improvements of the City of Newark in the sum of

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Four Hundred Seventy-nine Thousand Five Hundred Fifty Dollars ($479,550.00), and pursuant to an order of your Honor made in this cause on the 25th day of September, 1925, said sum of $479,550 has been paid into the Court of Chancery of New Jersey.

3. Petitioners further show that the following persons and corporations claimed to be entitled to some share of the sum so paid into the Court of Chancery, that is to say: 10

(a) Surety Realty Company, a corporation of the State of New Jersey, and in possession of said premises under and by virtue of a lease made by Martin Burne, petitioners' predecessor in title, to one Sebastian S. Kresge, dated February 1, 1910, and assigned, after mesne assignments, to said Surety Realty Company. 20

(b) Louis K. Liggett Company, a corporation, a tenant in possession of a portion of said premises as sub-tenant under said Surety Realty Company.

(c) Ace Radio Shop, a corporation, a tenant in possession of a portion of said premises as sub-tenant under said Surety Realty Company.

(d) R. E. McDonald, Inc., a corporation, a tenant in possession of a portion of said premises as sub-tenant under said Surety Realty Company. 30

(e) John Harrington, a tenant in possession of a portion of said premises as sub-tenant under said Surety Realty Company.

(f) Charles A. McEuen, who claims to be the owner of an undivided one-third interest in said lands and premises, but which claim is denied by petitioners, and wife of said Charles A. McEuen, of whose first name petitioners are unaware. 40

(g) Anna Burne, wife of petitioner, Paul Burne.

4. Petitioners show that as owners of said lands and premises they are entitled to the payment of said sum so deposited by the City of Newark in the Court of Chancery.

10 Petitioners therefore pray that an order may be made directing the clerk of the Court of Chancery to pay to petitioners, or their solicitors, said sum of $479,550, so paid into the Court of Chancery, on account of the taking of lands of petitioners in the City of Newark, for the opening and widening of Washington street.

And that your petitioners may have such other and further relief as may be equitable and just.

And petitioners will ever pray, etc.

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McCARTER & ENGLISH,
Solicitors for and of Counsel with Petitioners.

State of New Jersey, }
County of Essex. } *ss.*

Arthur F. Egner, being duly sworn according to law, on his oath deposes and says:

I am a member of the firm of McCarter & English, solicitors of the petitioners named in
30 the foregoing petition, and their duly authorized agent to make this affidavit. I have read the foregoing petition and the matters and things therein contained are true.

ARTHUR F. EGNER.

Sworn to and subscribed, this 3rd day of October, 1925, before me, a Notary Public of the State of New Jersey.

Louise T. Gruhnert,
40 Notary Public of New Jersey.

ORDER ON APPLICATION OF HUGH F. COOK, et als.

Filed October 6, 1925.

The City of Newark having presented a petition to this Court for leave to pay into the Court the sum of $479,550.00, the amount awarded to the owners and persons interested in land of Hugh F. Cook, Margaret Cook, Paul Burne and Frank A. Blanchet, individually, and as executor of the Last Will and Testament of Honoria Ann Blanchet, deceased, by the Board of Commissioners of Assessment for Local Improvements; and

This Court having, by order dated the 25th day of September, 1925, ordered the petitioner to pay such sum into this Court to be distributed according to law, upon the application of any person interested therein; and

Said sum having been duly deposited in this Court, and application having been made therefor by said Hugh F. Cook, *et als.*, claiming to be the owners of said premises, and it appearing from the said petition that the following named persons claim to have an interest in the land and premises referred to in said petition:

Hugh F. Cook, Margaret Cook, Paul Burne and Frank A. Blanchet, individually, and as executor of the Last Will and Testament of Honoria Ann Blanchet, deceased, as owners;

Surety Realty Company, as lessee;

Louis K. Liggett Company, Ace Radio Shop, R. E. McDonald, Inc., John Harrington, as sublessees;

Anna Burne, wife of said Paul Burne, aforesaid; Charles A. McEuen, as alleged owner; McEuen, as wife of said Charles A. McEuen;

Order on Application of Hugh F. Cook, et als.

It is, on this 6th day of October, 1925, on motion of McCarter & English, solicitors for and of counsel with Hugh F. Cook, *et als.*, ORDERED that the parties above named, and each of them, within thirty days from the date hereof, present application in writing to this Court in such form as to advise the Court what claim or interest such person or corporation may have in the said moneys now in Court, or within such time do show cause in writing why the prayer of the application and petition of the said Hugh F. Cook, Margaret Cook, Paul Burne and Frank A. Blanchet, individually, and as executor of the last Will and Testament of Honoria Ann Blanchet, should not be granted; and

It is FURTHER ORDERED that a copy of this order be served upon each of the parties above named within ten days from the date hereof, personally, and where such personal service cannot be made, that notice of this order be given by publication, by advertising a copy of this order once in each week for two weeks successively in the Newark Evening News and the Newark Ledger, two newspapers published and circulating in the County of Essex, the first of such two publications to be made within the said ten days; and

It is FURTHER ORDERED that where personal service is not made upon any of the persons above named that a copy of this order be mailed to such persons not so personally served at their post office address, if the same can be ascertained, such mailing to be made within the said ten days. Certification of the copies of the order served in accordance with this order will be sufficient if made by the solicitors of the petitioner.

E. R. WALKER,
C.

A true copy.

Thomas Barber,
Clerk.

PETITION OF LOUIS K. LIGGETT COMPANY.

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

The petition of Louis K. Liggett Company, a corporation of the State of Massachusetts, duly authorized and licensed to transact business in the State of New Jersey respectfully shows that:

1. On or about September 19, 1912, Century Realty Company, a corporation of the State of New Jersey, entered into a written lease with William B. Riker & Sons Company, a corporation of the State of New York, wherein and whereby the said Century Realty Company demised and leased to the said William B. Riker & Sons Company the first floor and basement of premises known and designed as No. 107 Market street, in the City of Newark, Essex County, New Jersey, for a period of ten years from the 1st day of October, 1912, at a stipulated rental of $12,500 per annum.

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2. Thereafter and on or about December 31, 1917 your petitioner purchased the unexpired term of said lease from Cooperative Realty Company, a Massachusetts corporation, which had theretofore acquired the same through mesne assignments.

3. Thereafter and on or about January 1, 1918, your petitioner entered into possession of

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the aforesaid premises as assignee of the said Cooperative Realty Company under said lease and continued in possession thereof as such assignee until the expiration of such lease on October 1, 1922.

4. On or about June 8, 1922, your petitioner
10 entered into a new lease with Surety Realty Company, a New Jersey corporation, for the rental of said premises, (from which said premises a part in the rear thereof had then however been detached and separately leased to someone other than your petitioner), for an additional term of seven and one-half years from October 1, 1922, or until March 31, 1930. Upon the expiration of the term of said lease between the said Century Realty Company and William
20 B. Riker & Sons Company, assigned to your petitioner by the said Cooperative Realty Company as aforesaid, your petitioner continued in possession of said premises as tenant under such new lease and remained in possession thereof as such tenant until October 1, 1925. By the terms of such new lease your petitioner agreed to pay the said Surety Realty Company a rental of $15,000 per annum during the term thereof; and in case its total sales at said premises should in
30 any year during the first seven year period of said lease exceed the sum of $150,000 or should such sales during the last six months period of said lease exceed the sum of $75,000 your petitioner agreed to pay an additional rental of ten per cent. (10%) of the amount of such excess.

5. Upon entering into possession of said premises on or about January 1, 1918, your petitioner installed therein furniture and trade fixtures necessary for the business to be con-
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ducted therein by your petitioner at a cost of $16,573.70. In addition thereto your petitioner expended a further sum of $1,573.57 in installing in said premises additional furniture and fixtures upon the execution of its new lease with the Surety Realty Company as aforesaid.

6. On or about May 20, 1924, the City of Newark instituted proceedings for the condemnation of the aforesaid lands and premises including the leasehold interest of your petitioner therein for the purpose of widening and improving Washington street in said City. At the conclusion of the hearings conducted in said proceedings and on or about September 15, 1925, the Board of Commissioners of Assessment for Local Improvements of the City of Newark, being the Board of said City charged with the assessments for benefits in said City, filed its report in the office of the Clerk of Essex County, wherein and whereby it made an award of $479,-550 as the full value of said premises including the value of your petitioner's interest therein under its said lease. No appeal was taken from said award, and on or about September 25, 1925, the said City of Newark filed a petition in the above-entitled cause wherein and whereby it prayed leave to pay into this Court the said sum of 479,550 so awarded by the Board of Commissioners of Assessment for Local Improvements as aforesaid. Upon the filing of such petition and on September 25, 1925, an order was made and entered in said proceeding, directing the said City of Newark to pay such sum into this Court to be distributed according to law upon the application of any person interested therein.

7. Pursuant to such order, the said City of Newark paid said sum of $479,550 into this Court

and thereupon became vested by operation of law with title to the aforesaid premises and every right and interest therein, including the right and interest of your petitioner under its said lease and became similarily vested with the right to the immediate possession of said premises.
10 Thereupon the said City demanded immediate possession of said premises from your petitioner. In compliance with such demand, your petitioner surrendered possession of said premises to the City of Newark and vacated the same on October 1, 1925.

8. As a result of the condemnation of said premises by the said City of Newark and the involuntary surrender and vacation thereof by your petitioner, your petitioner claims $67,000
20 of the said sum of $479,550 so as aforesaid paid into this Honorable Court, the items of its claim being as follows:

For loss on furniture and fixtures as aforesaid originally installed by your petitioner	$10,000.00
For loss on furniture and fixtures as aforesaid subsequently installed by petitioner	1,000.00
30 For loss of profits during the remainder of the term of said lease with Surety Realty Company	25,000.00
For loss of the market value of the unexpired term of said lease	30,000.00
For cost of removing furniture and stock in trade	1,000.00
Total loss	$67,000.00

9. Your petitioner is informed and believes
40 that the only other persons or corporations who

claim any interest in said sum of $479,550 are as follows:

Hugh F. Cook, Margaret Cook, Paul Burne and Frank A. Blanchet, individually, and as executor of the last will and testament of Honoria Ana Blanchet, deceased, as owners:

Surety Realty Company, as lessee; 10

Ace Radio Shop, R. E. McDonald, Inc., John Harrington, as sub-lessees;

Anna Burne, wife of said Paul Burne, aforesaid; Charles A. McEuen, as alleged owner; Madge J. W. McEuen, as wife of said Charles A. McEuen.

Your petitioner therefore prays that an order may be made authorizing and directing the Clerk of this Court to pay to your petitioner the aforesaid sum of $67,000.00 or such other sum 20 as it may be entitled to, and for such other relief in the premises as this Honorable Court may deem proper.

Dated November 4, 1925.

LINDABURY, DEPUE & FAULKS,
Solicitors for Petitioners,
Louis K. Liggett Company.

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APPLICATION OF R. E. McDONALD, Inc.

To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

R. E. McDonald, Inc., one of the defendants in the above-entitled cause, pursuant to the
10 order of this Court heretofore entered herein on October 6, 1925, herewith presents its application to this court, and advises this Court the claim and interest which it has in the moneys now on deposit herein, and also shows cause why the prayer of the application and petition of Hugh F. Cook, Margaret Cook, Paul Burne and Frank A. Blanchet, individually, and as executor under the last will and testament of Honoria Ann Blanchet should not be granted:

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1. On February 1, 1910, Martin Burne, the then owner of property, executed and delivered a lease covering the premises described in the petition filed herein by the City of Newark, and adjoining lands, to Sebastian S. Kresge, said lease was for a period of twenty years from April 1, 1910, and provided for payment of a rental of Eighteen Thousand Dollars for the first ten years of said period and Nineteen
30 Thousand Dollars for the second ten years of said period. Said lease contained other terms and provisions covering the use and occupation of said property.

2. Thereafter the said lease was duly assigned by the said Sebastian S. Kresge to S. S. Kresge Co., a corporation, by assignment dated April 30, 1912.

3. Thereafter the said S. S. Kresge Co., a corporation, duly assigned said lease to the Cen-
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tury Realty Company, by assignment dated August 27, 1912.

4. Thereafter the Century Realty Company assigned said lease to the Surety Realty Company.

5. Thereafter the Surety Realty Company entered into a lease with your petitioner, wherein and whereby the said Surety Realty Company leased to the R. E. McDonald, Inc., the store and basement underneath said store, commonly known as No. 105 Market street, in the City of Newark, the store and basement each having a frontage of about twenty-one (21) feet and a depth of about eighty-five feet, together also with the floor immediately above said store, said floor running to the full width of said building to Washington street, which lease was to continue for the term of seven and one-half (7-½) years from the first day of October, 1922, to the 31st day of March, 1930.

6. Upon entering into the possession of said premises your petitioner installed therein furniture and trade fixtures necessary for the business to be conducted therein by your petitioner.

7. On or about May 20, 1924, the City of Newark instituted proceedings for the condemnation of the aforesaid lands and premises including the leasehold interest of your petitioner therein for the purpose of widening and improving Washington street in said City. At the conclusion of the hearings conducted in said proceedings, and on or about September 15, 1925, the Board of Commissioners of Assessment for Local Improvements of the City of Newark, being the Board of said City charged with the

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assessments for benefits in said City, filed its report in the office of the Clerk of the County of Essex, wherein and whereby it made an award of $479,550 as the full value of said premises including the value of your petitioner's interest therein under its said lease. No appeal was taken from said award, and on or about September 25, 1925, the said City of Newark filed a petition in the above-entitled cause wherein and whereby it prayed leave to pay into this Court the said sum of $479,550 so awarded by the Board of Commissioners of Assessment for Local Improvements as aforesaid. Upon the filing of such petition, and on September 25, 1925, an order was made and entered in said proceeding, directing the said City of Newark to pay such sum into this Court to be distributed according to law upon the application of any person interested therein.

8. Pursuant to such order, the said City of Newark paid said sum of $479,550 into this Court and thereupon became vested by operation of law with title to the aforesaid premises and every right and interest therein, including the right and interest of your petitioner under its lease, and became similarly vested with the right to the immediate possession of said premises. Thereupon the said City demanded immediate possession of said premises from your petitioner. In compliance with such demand, your petitioner surrendered possession of said premises to the City of Newark, and vacated the same.

9. As a result of the condemnation of said premises by the City of Newark, and the involuntary surrender and vacation thereof by your petitioner, your petitioner lost the value of said

lease and has been subjected to damage, the items of its claim being for loss on furniture and fixtures as aforesaid originally installed by your petitioner, for loss of profits during the remainder of the term of said lease with the Surety Realty Company, for loss of the market value of the unexpired term of said lease, for costs of removing furniture and stock-in-trade. 10

10. Your petitioner is informed and believes that the only other persons or corporations who claim any interest in said sum of $479,550 are as follows:

Hugh F. Cook, Margaret Cook, Paul Burne and Frank A. Blanchet, individually, and as executor of the Last Will and Testament of Honoria Ann Blanchett, deceased, as owners:

Surety Realty Company, as lessee; 20

Ace Radio Shop, Louis K. Liggett Company, John Harrington, as sub-lessees;

Anna Burne, wife of said Paul Burne, aforesaid; Charles A. McEuen, as alleged owner, Madge J. McEuen, as wife of said Charles A. McEuen.

Wherefore, your petitioner prays that it may be paid out of the funds on deposit herein, the value of the estate and interest which your petitioner has in said premises, together with the damages which it has sustained, all of which values your petitioner prays may be ascertained, fixed and determined, by this Court, and for such other and further relief as may be equitable and just in the premises. 30

Dated November 5, 1925.

BILDER & BILDER,
Solicitors for and of Counsel
with Petitioner, R. E. McDonald, Inc. 40

PETITION OF CHARLES A. McEUEN AND MADGE J. W. McEUEN.

Charles A. McEuen and Madge J. W. McEuen, his wife, of the City of Washington, in the District of Columbia, do hereby, in pursuance of an order made in the above-entitled cause, on 10 the 6th day of October, 1925, respectfully apply to this Court, for the payment to them of one-third of the monies heretofore paid into this Court by said City of Newark, the said Charles A. McEuen being the owner of an undivided one-third interest in the lands condemned by the City of Newark, as set forth in the petition of said City.

Your petitioners show that the interest of the said Charles A. McEuen arose as follows:

20 On February 13, 1850, David Leavitt, being then the owner in fee of the premises on the northwest corner of Washington and Market streets, in the City of Newark, conveyed a two-thirds interest therein to Charles Sherman, and on the same day conveyed a one-third interest to your petitioner, Charles A. McEuen, and his brothers and sister, John S. McEuen, James P. McEuen, and Mary L. McEuen. The deed to 30 Sherman was recorded March 14, 1851, N-7 of Deeds for Essex County, page 50, but that the deed to the petitioner, and his brothers and sister, was not then received by them nor did they have knowledge thereof, all being minors, the oldest being fourteen years of age, and your petitioner four years of age. The deed from Leavitt to them did not come to their knowledge until 1869 when it was produced by Abraham H. Sherman the brother of Charles A. Sherman who refused to give up the deed to the children unless,

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and until your petitioner executed and delivered to the said Sherman, a mortgage upon petitioner's interest in said property for $1,000.00, although your petitioner was in no way indebted to the said Abraham Sherman. Said mortgage was registered January 18, 1870, Book L-5, page 168. The deed to the McEuen children was recorded January 14, 1870, Book R-14, page 587. 10

John S. McEuen was born in 1836, and died in 1859, unmarried and without issue and intestate. James P. McEuen was born in 1841, died in 1903, unmarried, without issue and intestate. Mary L. McEuen was born in 1843, and died July 22, *1833,* without leaving any issue and intestate, the said Mary Lois McEuen was first married to George J. Wheeler and after his death married Charles H. Miller, both of whom are now deceased. That your petitioner, Charles A. McEuen was born in 1846 and is married to Madge J. W. McEuen. 20

Your petitioners further show that Charles A. Sherman gave a mortgage to Le Massena, which mortgage was foreclosed, and his two-thirds interest was conveyed to Abraham H. Sherman at a sheriff's sale, deed recorded November 26, 1852, in Book E-8, page 544, and that the said Abraham H. Sherman mortgaged his two-thirds interest in said property to the Mutual Benefit Life Insurance Company (Registered July 25, 1856, N-3, 339). 30

On August 6, 1852, the Common Council of the City of Newark, authorized the construction of a sewer passing the property in question and appointed assessment commissioners to assess the expense "upon the owners of the property benefited thereby," and were directed to proceed in such assessment in the manner provided by the 40

Ninth Section of the act entitled "Further Supplement to the Act entitled 'An Act to incorporate the City of Newark,' approved February 28, 1849," and said commissioners were thereby authorized and directed * * * to cause reasonable notice to be given to the owners of the
10 property in their opinion benefited by said sewer before any assessment should be by said commissioners concluded against them; said notice to inform said owners of the property when and where they might have an opportunity of being heard, etc. Notice to be given by advertising and by notice either served personally on or left at the residence in the City of Newark of the several owners of property, so in the opinion of the commissioners benefited so far as the said owners or their residence could be ascertained
20 and found, at least ten days prior to such hearing. The assessment commissioners on December 5, 1856 reported an assessment of part of the whole expense of said sewer upon the reputed owners of the property benefited thereby and did accompany their report with a map designating the property referred to in the said report. This map and report are on file in the City Hall, in the City of Newark, showing the property in
30 question with the name "A. Sherman." There being no other name or designation to indicate any other owners of the property. The sum of $171.29 was assessed upon "A. Sherman," as the owner of the lot of land in question, said lot being #259 on said map. "A. Sherman" was Abraham H. Sherman, hereinbefore mentioned.

The Common Council on June 5, 1857 directed that the said land be advertised and sold for the purpose of raising the amount so assessed
40 upon the "reputed" owners of the property

aforesaid ,and the interest thereon, etc., and on August 24, 1857 said land was sold to John R. Weeks for a term of two hundred years for $178.86, "being the amount assessed as aforesaid on said lot, etc." A sale certificate dated November 5, 1857 was issued to John R. Weeks for the whole property (Book B, record of sales under the old charter, page 39). The said John R. Weeks bought the property in at the sale for the said "A. Sherman," who on August 25, 1857, gave his check to John R. Weeks for $178.86 in cash to hold said certificate for the benefit of Sherman and the said Sherman continued in possession of the property. 10

This sale certificate was not recorded until December 28, 1882 (Q-21, page 421), twelve years after recording the deed to the McEuen children. 20

John R. Weeks, at the request of A. Sherman assigned the sale certificate to Nehemiah Perry, a creditor of Sherman, by assignment dated June 5, 1861, but not recorded until December 28, 1882 (Q-21, page 425), the said Perry holding the certificate at the request and for the benefit of said Sherman. The said Sherman on May 29, 1860, at a sheriff's sale held by virtue of five writs issued out of the Essex County Circuit Court, two writs issued out of the Essex County Court of Common Pleas, and one writ issued out of the New Jersey Supreme Court, aggregating judgment for more than $3,000.00—bought the two-thirds interest of Abraham H. Sherman in premises in question for $140.00, an amount about sufficient to pay the sheriff's fees. 30

On April 23rd, 1861, the mortgage given by Sherman to the Mutual Benefit Life Insurance

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Company, was foreclosed, and the sheriff conveyed Sherman's two-thirds interest in the premises to Perry for $10,650, and Perry took title in his name for the benefit of Sherman. On May 10th, 1866, at the request of Sherman, Perry executed a deed purporting to convey the premises in question to Martin Burne, the consideration set out in said deed being $17,600, and the said Perry assigned the sales certificate to Martin Burne by assignment dated May 9th, 1866, recorded December 28th, 1882 (Q-21, 425). This assignment was made by direction of said Sherman, who was indebted to Burne in about the sum of $19,500. Burne cancelled said indebtedness, paying Sherman a sum of money in addition thereto. The said Martin Burne died in 1912, leaving a will probated March 2nd, 1922, devising his property to his five children, Honoria Blanchet, Martin Burne, Jr., Lucien Burne, Margaret Cook and Paul Burne (S-4 of Wills, Essex County, page 373).

In 1870, the McEuen children all then living and all of age, but not being residents of the State of New Jersey, instituted an ejectment suit in the New Jersey Supreme Court against Martin Burne, who served a bill of particulars claiming title by virtue of the sale certificate (and other deeds) to John R. Weeks, and the assignments from Weeks to Perry and Perry to Burne. The sale certificate and the two assignments not being recorded at the time of the ejectment suit.

The case was tried at the September term of the Essex Circuit, before Justice Depue and a jury. Justice Depue charged the jury that the entire interest had become vested in John R. Weeks by virtue of the sale certificate, and that

the legal title to the whole property was in Weeks, and must prevail, that it could not be over thrown because of the act of the legislature of the State of New Jersey, entitled "Supplement to an act entitled 'An act for the better security of titles to land sold by sheriff's or other officers' approved March 26, 1864," which in the second section provides that declarations of sale theretofore or hereafter made by, or by authority of any public or municipal authority, authorized or empowered under or by virtue of law of the state to make or execute a deed * * * and the proceedings upon which such deeds, declarations of sale and conveyances are founded shall not be subject to be questioned collaterally, but may be at any time reviewed by certiorari or other proper proceedings in the Supreme or Circuit Courts.

Your petitioners show that no notice of the proposed assessment above mentioned or of the sale above set forth was ever given to Davit Leavitt or to the McEuen children.

Your petitioners further show that on the 25th day of September, 1925, notice in behalf of Charles A. McEuen was served upon the City of Newark and the Burne devisees, of an application to be made by the said Charles A. McEuen for a writ of certiorari, before Hon. William S. Gummere, Chief Justice, on the 10th day of October, then next and that on the 10th day of October application was made, by consent of all parties to adjourn the matter to October 17, 1925. On October 17, 1925, the Chief Justice denied the application on the ground that the applicant was guilty of gross laches in making his application.

Your petitioners further show that the said Charles A. McEuen, did immediately thereafter give notice to the City of Newark and Burne devisees, that he would renew his application before the New Jersey Supreme Court *in banc,* at the opening of the then next term, and that
10 written notice of said application has been served upon the City of Newark and the Burne devisees, of an application for a writ of certiorari to review the sale certificate and the proceedings for the assessment, for the non-payment of which the premises in question were sold.

The City of Newark has instituted condemnation proceedings to take one-half of the premises in question for the widening of Washington street. That a sum of money has been awarded
20 as the amount of damages, which sum, as your petitioners are informed, has been paid into this Court in this proceeding.

And your petitioners further show that Charles A. McEuen is now the sole owner of the McEuen one-third interest in the property and has signified his assent to all the proceedings, including the amount of the award of damages so far taken to condemn that part of the property to be taken by the City of Newark, and hereby
30 for himself, his heirs and assigns, tenders himself ready to execute any and all appearances and consents to be bound by the proceedings so far taken in such condemnation proceedings reserving however his claim to the one-third interest in the damages awarded, in lieu of his claim, to the undivided one-third part of the fee in that portion of said premises which have been condemned.

Your petitioners charge that a fraud was com-
40 mitted upon them and the other McEuen chil-

dren, by Abraham H. Sherman, who procured possession of the deed from Leavitt to the said McEuen children and suppressed the same until the year 1869; that the said Sherman with intent to defraud the McEuen children procured the sale of the premises in question by the City of Newark, by refraining from paying the assessment which had been made against him as the reputed owner of the property, although the said Sherman well knew of the rights of the McEuen children and procured the said John R. Weeks to buy the property at said sale and repaid the money paid by Weeks at said sale on the day following. 10

Your petitioners say that at the time Charles A. Sherman recorded his deed above-mentioned, there was also recorded a quit claim deed from John McEuen now deceased, father of this petitioner, Charles A. McEuen, who however, had no interest whatever in the property. 20

Your petitioners charge that the said Abraham H. Sherman deliberately deprived the McEuen children of their rights in the property by suppressing the deed from Leavitt to the said children, by obtaining from their father, a quit claim deed to Charles Sherman, thus indicating his knowledge of the rights of the children by procuring the sale of the property, by refraining from paying the assessment which had been made in his name, as reputed owner of the property, and by procuring a deed to be executed by Nehemiah Perry to Martin Burne for the whole of the premises in question on May 10, 1866. 30

The consideration of the lease for two hundred years made for non-payment of Sherman's assessment to John R. Weeks, was $178.86, less than one dollar a year rent for the premises lo- 40

cated on one of the two principal streets of the city, but two blocks away from the centre of the city, was grossly inadequate, the property then being worth about $50,000, and that Abraham H. Sherman paid to John R. Weeks, $178.86 the day after the sale, and caused the certificate of sale
10 or lease to be withheld from record in furtherance of his scheme to defraud the McEuen children.

Your petitioners further show that by setting up the aforesaid sale certificate in bar of the plaintiff's claim, and the provisions of the Act of 1869, providing that collateral attack cannot be made on such sale certificates but that the same might be reviewed by a writ of certiorari out of the Supreme Court at any time, Martin Burne and his devisees are now estopped from denying
20 that their possession is other than under such lease and are now in the same position as any tenant would be, whose lease contained a provision that the lease might be terminated by the landlord at any time during the continuation of the term, upon the happening of some event, in this case the review of the assessment proceedings by certiorari which became a vested right in the McEuen children upon the passage
30 of the Act of 1869 depriving them of the right to attack such certificate in an ejectment suit, which right had existed up to the passage of said act, and substituted therefor the proceedings by certiorari which might be had at any time.

Daniel Leavitt was a prominent merchant and banker of New York at the time he made his deeds to Charles Sherman and the McEuen children and his residence was set forth in said
40 deeds as being in the City of Brooklyn, State of

New York; the McEuen children were infants when the assessment was made and resided with Abraham H. Sherman in Essex County, New Jersey.

That evidence of the procuring of the sale for non-payment of said assessment by Abraham H. Sherman to John R. Weeks, and the payment of the consideration of said sale by Sherman to Weeks, not to redeem the property but in furtherance of the fraud practiced upon the McEuen children was offered at the trial of the ejectment suit in 1870 aforesaid and excluded as not being then cognizable in a court of law. That Martin Burne in his lifetime and his executors and devisees since his death have at all times had notice of said fraud by the public records of the City of Newark and the County of Essex and that Abraham H. Sherman was the owner of no more than a two-thirds interest in said property.

That the deed from Nehemiah Perry to Martin Burne purporting to convey the fee in said premises is based upon a sheriff's deed made June 1, 1860 to Nehemiah Perry at a sheriff's sale held by virtue of a number of executions issued on judgments against Abraham H. Sherman and a sheriff's deed to Nehemiah Perry made April 23, 1861, upon foreclosure of the mortgage given by Abraham H. Sherman of his two-thirds interest to the Mutual Benefit Life Insurance Company.

That after 60 years from the date of the deed from Perry to Burne, Burne may claim title to the entire fee in said premises to the total exclusion of your petitioners.

And your petitioners pray that this court will by virtue of the statute of New Jersey under

which these proceedings are had and the general jurisdiction of the Court, examine the title conveyed by the deeds made by Perry to Burne above set out and the interest conferred by the assessment sale certificate or lease aforesaid and decree that they affected only the two-thirds interest owned by Abraham H. Sherman and that your petitioner, Charles A. McEuen, is the owner of an undivided one-third interest in said property or in the funds paid into this Court by the City of Newark in this proceeding and that your petitioner is entitled to her dower in that one-third interest, because to deprive your petitioners of their rights in an undivided interest in said property would be contrary to the intent of the statute of 1869 aforesaid and would be depriving your petitioners of their property without due process of law, contrary to the law of this State and contrary to the 19th Amendment of the Constitution of the United States and for the reason that the Supreme Court of this State may not deny its writ of certiorari to review the sale certificate without encroaching upon the exclusive functions of the legislature, the legislature having granted your petitioners the right to such a writ during the term of years for which John R. Weeks bought the property aforesaid, or that this Court will hold one-third of said fund until the final determination of the rights of your petitioners or either of them in the courts of law of this State and of the United States upon the grounds above-mentioned and any other grounds your petitioners may be advised they have a right to urge in support of their claims herein set forth.

And your petitioners pray that this Court further decree that the executors and devisees of

Martin Burne account to your petitioner Charles A. McEuen for one-third of the net rents and profits from said property received by Martin Burne in his lifetime and by them since his death, or for such time as shall be equitable and just. And that your petitioners may have such other remedy as may be equitable and just. 10

CECIL H. MacMAHON,
Solicitor of Petitioners.

APPLICATION OF SURETY REALTY COMPANY.

To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey: 20

Surety Realty Company, one of the defendants in the above-entitled cause, pursuant to the order of this Court heretofore entered herein on October 6, 1925, herewith presents its application to this Court, and advises this Court the claim and interest which it has in the moneys now on deposit herein, and also shows cause why the prayer of the application and petition of Hugh F. Cook, Margaret Cook, Paul Burne, and Frank A. Blanchet, individually and as executors under the last will and testament of Honoria Ann Blanchet should not be granted: 30

1. On February 1, 1910, Martin Burne, the then owner of property, and the predecessor in title of said petitioners, executed and delivered a lease covering the premises described in the petition filed herein by the City of Newark, and adjoining lands, to Sebastian S. Kresge. Said lease was for a period of twenty years from 40

April 1, 1910 and provided for payment of a rental of Eighteen Thousand Dollars, for the first ten years of said period and Nineteen Thousand Dollars for the second ten years of said period. Said lease contained other terms and provisions covering the use and occupation of
10 said property, and will be submitted to the Court upon the hearing hereof.

2. Thereafter the said lease was duly assigned by the said Sebastian S. Kresge to S. S. Kresge Co., a corporation, by assignment dated April 30, 1912.

3. Thereafter the said S. S. Kresge Co., a corporation, duly assigned said lease to the Century Realty Company, by assignment dated August
20 27, 1912.

4. Thereafter, the said Century Realty Co. duly assigned said lease to your applicant by assignment dated

5. Applicant was in possession of said premises, through its sub-tenant, at the time of the taking of the property referred to in the petition filed herein by the said City of Newark.

30 6. The estate granted to your applicant under the terms of the lease held by it, was of considerable value, and by reason of the acts of said City, not only has the value thereof been lost to your applicant, but in addition thereto, your applicant has been subjected to substantial claims for damages alleged to have been sustained as a result of said taking by sub-tenants of your applicant.

Wherefore, your applicant prays that it may
40 be paid out of the funds on deposit herein, the

value of the estate and interest which your applicant has in said premises, in which shall be included the value of the estate of the various sub-tenants of your applicant, all of which values applicant prays may be ascertained, fixed and determined by this Court, and until the said values have been so ascertained, fixed and determined, and the amount so ascertained, paid to your applicant, said fund be not distributed, and that your applicant may have such other and further relief in the premises as the nature of the case may require. 10

SURETY REALTY COMPANY,
By Louis Kamm,
President.

STEIN, STEIN & HANNOCH,
Attorneys. 20

State of New Jersey, }
County of Essex. } *ss.*

Louis Kamm, being duly sworn on his oath according to law, deposes and says: that he is the president of Surety Realty Company, the petitioner named in and who subscribed the foregoing petition, that he has read the said petition and knows the contents thereof and that the same is true, except as to the matters herein stated to be alleged on information and belief, and as to those matters, he believes it to be true. 30

LOUIS KAMM.

Subscribed and sworn to before me,
this 2nd day of November, 1925.

Herbert R. Hains,
(seal) N. P. of N. J., &c. 40

IN CHANCERY OF NEW JERSEY.

April 14, 1926.

Between

10 THE CITY OF NEWARK,
Petitioner,

and

HUGH F. COOK, *et als.*,
Defendant.

Transcript of shorthand notes of testimony taken in the above-entitled matter before his Honor, John H. Backes, Vice-Chancellor, at the 20 Chancery Chambers, in the City of Newark, New Jersey, in the presence of McCarter & English (Mr. Egner) for petitioner; Lindabury, Depue & Faulks (Mr. Faulks, Mr. Bishop and Mr. Horner) for Louis K. Liggett Company; Cecil H. MacMahon, for Charles A. and Madge McEuen; Stein, Stein & Hannoch, Merritt Lane and Spaulding Frazier, for Surety Retalty Company; Bilder & Bilder and Mr. Kaufman, for R. E. McDonald, Inc., and Max N. Schwartz, for John Harring- 30 ton and John H. Hocter and William R. Heyer, trading as Ace Radio Company.

Mr. Egner: I offer in evidence a blue print showing the property in question and the parts taken by the City of Newark.

(Map marked Exhibit P. 1.)

Mr. Egner: Mr. Blanchet, one of the owners of our interest has recently been married and I move to amend by adding as a party de- 40 fendant, Lillian Hart Blanchet.

I offer two photographs showing the condition of the property prior to the condemnation and taken at or about that time.

(Photographs marked Exhibits P. 2 and 3.)

Mr. Egner: I offer in evidence bargain and sale deed from Nehemiah Perry and wife to Martin Burne dated May 10, 1866, and recorded in Book Z-12 of Deeds for Essex County, pages 272, &c.

10

(Deed marked Exhibit P. 4.)

Mr. Egner: I offer in evidence as one exhibit certified copy of certificate of tax sale from the Mayor and Common Council of the City of Newark to John R. Weeks, dated November 5, 1857, and recorded in Book Q-21 of Deeds for Essex County on pages 121, &c., and assignment of the latter certificate from John R. Weeks to Nehemiah Perry dated June 5, 1861, and recorded in Book Q-21 of Deeds, page 425, and assignment of the same certificate from Nehemiah Perry to Martin Burne dated May 9, 1866, and recorded in Book Q-21 of Deeds for Essex County, page 426.

20

(Papers marked Exhibit P. 5.)

Mr. Egner: The deed from Perry to Burne, Exhibit P. 4, was recorded on May 19, 1866. The certificate of tax sale, together with the two assignments thereof were recorded on the same day, namely, December 28, 1882, some ten years after the ejectment proceedings.

30

For the purpose of showing the present state of the record as between my clients, I offer the following papers, with the understanding that, if agreeable to counsel, the abstracts of the deeds which I now offer may be used in lieu of the original certified copy:

40

Last will and testament of Martin Burne, approved March 22, 1912, before the Surrogate of Essex County. I might say for the record that under that will Mr. Burne divides his real estate between his five children as follows: Honoria Ann, wife of Frank Blanchet, Martin Burne, Junior, Lucien Burne, Margaret, wife of Dr. Hugh F. Cook, and Paul Burne.

10

(Paper marked Exhibit P—5—A.)

Mr. Egner: I next offer bargain and sale deed from Lucien Burne and Ida B. Burne, his wife, to Hugh F. Cook, dated May 17, 1916, recorded May 19, 1916, in Book H-57, pages 481, &c., conveying an undivided one-fifth right title and interest in and to the premises in question.

(Paper marked Exhibit P. 6.)

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Mr. Egner: I offer the last will and testament of Honoria Ann Blachet, dated October 20, 1917, approved October 1, 1921, in the Essex County Surrogate's office. Under this will she gave all her property, real and personal, to her husband, Frank A. Blanchet.

(Paper marked Exhibit P. 7.)

Mr. Egner: I also offer in evidence warranty deed from Martin Burne, Junior, and Anna G. Burne, his wife, to Margaret Cook and Hugh F. Cook, her husband, Paul Burne and Honoria Ann Blanchet, dated November 5, 1920, recorded June 27, 1921, in Book S-64, pages 292, &c. This conveyed an undivided one-fifth interest in the premises in question. The result of the deed which I have offered in evidence, indicate that the record title as far as the representatives and successors of Martin Burne are concerned, was vested one-quarter in Margaret Cook, one-quarter in Hugh F. Cook, her husband, one-

30

40

quarter in Paul Burne, and one-quarter in Honoria Ann Blanchet, passing by her will to her husband, Frank.

(Paper marked Exhibit P. 8.)

Mr. Egner: It is admitted that the City of Newark passed the ordinance covering the widening of Washington street and involving the taking of this property on May 20, 1924. I offer a certified copy of that ordinance. A map was filed and the other proceedings contemplated by the statute were taken.

10

(Paper marked Exhibit P. 9.)

Mr. Egner: The map that has been offered in evidence is part of the general map that accompanied the ordinance. The assessment commissioners' report of damages was confirmed on September 15, 1925, by the Circuit Court of this County. Their award for the property in question was the sum of $398,750, for the land and $80,800 for the buildings, and included in the land award is the damages to the remaining portion of the land; making a total award of $479,550. The $398,750 was one award for the value of the land taken and the incidental damages to the strip of land that remained. The $479,550 was paid into Court.

20

Mr. Bilder: Has Mr. Egner a copy of that award so that we can check up the fact that the incidental damages are contained in the $398,-750?

30

Mr. Egner: Of course that can be verified, but that is the fact.

Mr. Bilder: We wouldn't want to concede that until we are satisfied by the record.

Mr. Egner: Under an order made in this cause on November 23, 1925, a mortgage on the

40

premises in the principal sum of $100,000 held by the Howard Savings Institution was paid and there was disbursed from the fund in Court, the sum of $102,750, so that the total I have mentioned of the award has been reduced by that amount. That was an order entered on consent of all the parties. It is also conceded that on the date of the ordinance, May 20, 1924, and on the date of the confirmation of the report by the Assessment Commissioners, Hugh F. Cook and Margaret Cook, Paul Burne and Frank A. Blanchet were in possession of the premises through their tenant the Surety Realty Company. They were the holders of the title. That the City of Newark entered into possession of the lands on the 1st day of October, 1925, and demolished the entire building. The Surety Realty Company paid rent up to the 1st of October and received rent from its sub-tenants up to that date.

Mr. Faulks: Has the award been offered in evidence?

The Court: We will get a copy of the award. He hasn't got it now.

Mr. Egner: We rest.

PETITIONER RESTS.

Mr. Hannoch: I desire to offer in evidence the lease made by Martin Burne to Sebastian S. Kresge, covering the entire property, dated February 1, 1910, and being for a period of twenty years from April 1, 1910, at a rental of $18,000 per year for the first ten years and $19,000 per year for the last ten years, the lease having been recorded February 23, 1910, in Book S-46 for Deeds for Essex County, page

181, and I desire leave to substitute a copy of the lease for the original.

(Paper marked Exhibit D—Surety—1.)

Mr. Egner: I object to the admission of the lease on the ground that it was terminated as of the 1st of October by the destruction of the building, and inasmuch as the tenant was in possession until the 1st of October, the lease has no further materiality in this case. 10

The Court: It runs beyond that time in terms.

Mr. Egner: Yes, sir.

The Court: Objection overruled.

Mr. Hannoch: It is admitted that by various mesne assignments, which I do not intend offering in evidence, this lease was assigned so that it was held at the time of the taking by the Surety Realty Company. 20

Mr. Egner: That is consented to subject to the same objection.

Mr. Hannoch: I now offer in evidence lease made by the Surety Realty Company with Louis K. Liggett, dated June 8, 1922, covering the store and basement commonly known as 107 Market street, Newark, store and basement being located on the northwest corner of Market and Washington streets in said city, having a frontage of 22 feet inside measurement on Market street, and a depth to the full width of said frontage of 74 feet on Washington street, inside measurement, the lease beginning from October 1, 1922, and terminating on March 31, 1930, at a rental of $15,000 plus certain increases which appear in the lease. In general they provide that in the event that the sales from the business exceed $150,000 per year, 10 per cent. of the increase shall also be paid as an additional rental. It 30 40

also provides that the Liggetts pay the water rent for the property. I offer the original lease, which is recorded in Book Y-66 of Deeds for Essex County, page 420, and ask leave to substitute a copy.

(Paper marked Exhibit D—Surety—2.)

10 Mr. Hannoch: I now desire to offer in evidence lease from the Surety Realty Company to R. E. McDonald, Inc., dated April 18, 1922, covering the store and basement underneath the same, commonly known as 105 Market street, Newark, New Jersey, being the store immediately adjoining on the west the store now occupied by William B. Riker & Sons, which was the predecessor of the Liggetts, store and basement each having a frontage of 21 feet and depth of 85 feet, together with the floor immediately
20 above the store, said floor running the full width of said building to Washington street and extending to the north to a point about twelve feet from the most northerly wall of said building, said twelve feet being specially reserved by the party of the first part for the use of a hallway from the bottom to the top of the said building, covering the whole of the second floor. The rental provided for in the lease is $17,000 per
30 year for the period beginning October 1, 1922, and ending March 31, 1925, and $19,000 for the balance of the term. As an additional rental this tenant was to pay three per cent. on all sales in excess of $300,000 a year; also to pay water rent. I offer that in evidence and ask leave to substitute a copy.

(Paper marked D—Surety—3.)

Mr. Hannoch: I offer in evidence lease dated August 30, 1923, by the Surety Realty Company to John H. Hocter and William R. Heyer cover-
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ing the store on the ground floor and basement underneath the same in premises known as 241 Washington street, which store is located in the rear of the drug store heretofore leased to William B. Riker & Sons Company, said store being approximately 10 feet front by 18 feet deep, for a period beginning September 15, 1923, and running for three years, and providing for the payment of rent at $1,200 a year for the first year, $1,800 a year for the second year, and $2,100 a year for the third year, beginning September 15, 1923, for three years.

I meant to call the Court's attention in the McDonald lease to a provision whereby that lease could be cancelled upon the payment of $25,000. That may become important. The lease is in evidence, but I call that specifically to your Honor's attention.

Referring to the Hocter lease, that lease provides for a termination of the lease upon the payment of $250 upon 60 days notice.

(Paper marked Exhibit D—Surety—4.)

Mr. Hannoch: The remaining tenants who were in possession were in under monthly tenancy, and after the rest of the documentary proof is in I am ready to prove the nature of their tenancy from our books.

Mr. MacMahon: I have a clerk here from the City Hall and I would like to put some records in myself. As I understand it, it is stipulated on behalf of Charles A. McEuen and his wife that the Mayor and Common Council of the City of Newark did authorize the construction of a sewer in Washington and Market streets in the City of Newark in front of the property on the northwest corner of these streets. That on December 1, 1854, the Mayor and Common Council

of the City of Newark appointed Assessment Commissioners to assess the expense of the sewer upon the owners of the property benefited thereby, and that the Commissioners made an assessment dated July 6, 1855, which was set aside by the Supreme Court of New Jersey.
10 That the Mayor and Common Council of the City of Newark on April 4, 1856, appointed other Commissioners to make an assessment upon the owners of the property benefited by the construction of said sewer, either in whole or in part, and if a part only of such amount should be assessed upon such owners of the property, then these Commissioners were directed to assess the balance of the amount of such expense upon the City of Newark and to proceed in said assessment in the manner provided by the ninth
20 section of the act entitled "Further Supplement to the Act entitled 'An Act to Incorporate the City of Newark, approved February 28, 1849,'" and the said Commissioners were authorized and directed to cause notice to be given to the owners of the property benefited thereby "before any assessments be by said Commissioners concluded against them." That said Commissioners proceeded to make an assessment upon
30 the owners of property to be benefited by the construction of said sewer and did file a report, which was adopted by the Mayor and Common Council of the City of Newark December 5, 1856, and notice of said report was directed to be published. That said report reads as follows: "We, the Commissioners appointed on the fourth day of April, A. D. 1856, by the Mayor and Common Council of the City of Newark, to make an assessment of the amount of expenses of constructing a sewer beginning at Academy street
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and Washington street, etc. (description of the line of the sewer), do hereby certify this map, consisting of fifteen leaves or sections, bound together, to be the map referred to in our report, dated the fifth day of December, A. D. 1856, and that the lots mentioned in the said report are designated by the numbers marked herein, dated December 5, 1856." Signed by five commissioners. That the property in question in this matter being the lot on the northwest corner of Washington and Market street, in the City of Newark, as shown on said map appears as a block with Washington street on one side, Market street on one end, Number 250 within the lot, and the name Abraham H. Sherman within the lot. That on the 6th day of March, 1857, the treasurer of the City of Newark was directed to collect the assessment. That on May 1, 1857, contest notices were directed to be given. That notice was published in the "Newark Daily Advertiser" on June 22, 29, July 6, 13, 20, 27, August 3, 10, 17 and 22, 1857, of the making of the assessment for said sewer and giving notice that unless the assessment was paid on or before the 25th day of August, 1857, the treasurer of the City of Newark would sell such lots of lands and premises at public auction to such person or persons as would bid off the same for the longest term of years, and pay such assessment thereon, together with the interest thereon and the expense of such sale, and that said notice contained the following: "The following are numbered according to the Commissioner's map (and not the street number), which is open for inspection by all persons interested or concerned, and will so remain until said sale at the City Treasurer's office." Map #259; reputed owner, Abraham H. Sherman; street where located, Market and

Washington; amount, $171.29. That on August 24, 1857, the property in question was sold by J. Hartshorne, City Treasurer, to John R. Weeks for the sum of $178.86, for the term of two hundred years, and that the lease was delivered May 29, 1960." That is the stipulation.

10 Mr. Egner: Will you change that to certificate of sale?

Mr. MacMahon: Certificate of sale. By the way, it is called a lease in the city records.

I offer in evidence copy of a deed from David Leavitt and wife to John S. McEuen, James P. McEuen, Mary L. McEuen and Charles A. McEuen, recorded on January 14, 1870, in R-14 of Deeds, pages 587 and 588. The deed is dated February 13, 1850.

20 The Court: Is the question of the delivery of that deed to come up in this litigation?

Mr. Egner: I think not. The deed finally got to McEuen, who brought suit on it. I have no proof how he got it. He is here.

(Paper marked Exhibit McEuen—1.)

Mr. MacMahon: I also offer in evidence certified copy of the record of the New Jersey Supreme Court in a suit wherein Martin Burne was 30 defendant and James P. McEuen, Charles A. McEuen, George H. Wheeler and Mary L. Wheeler, his wife, were plaintiffs, in which a judgment in favor of Burne was entered.

(Record marked Exhibit McEuen—2.)

Mr. MacMahon: I also offer in evidence the bill of particulars served by Martin Burne upon the plaintiffs in ejectment in that suit.

The Court: What have you here, the original 40 files?

Mr. MacMahon: No, sir; the record is a copy of the files. This is the original paper given by the defendant's attorney to the plaintiff's attorney.

The Court: Where did you get it?

Mr. MacMahon: From my client, who was one of the plaintiffs. 10

(Paper marked Exhibit McEuen—3.)

Mr. MacMahon: That then leads me to offer the charge of Judge Depue to the jury in that case.

(Paper marked Exhibit McEuen—4.)

Mr. MacMahon: Also copy of the testimony in that case.

(Paper marked Exhibit McEuen—5.)

Mr. MacMahon: I offer the order of the New Jersey Supreme Court in the matter of the application of Charles A. McEuen for a writ of certiorari, order dated March 16, 1926, ; that the writ of certiorari be denied on the ground of laches on the motion of McCarter & English, attorneys of the respondent. 20

(Paper marked Exhibit McEuen—6.)

Mr. Bishop: I offer in evidence on behalf of of the Liggett Company a lease made by the Century Realty Company on September 19, 1912, to William B. Riker & Sons Company, a corporation, and attached to it, assignment to the Liggett Company. It is important, showing they were tenants in the building at the time they installed certain fixtures by reason of the deprivation of which they claim in this case. They made a new lease and the fixtures stayed in. 30

Mr. Frazier: We have no objection except it is immaterial.

(Paper marked Exhibit Liggett—1.) 40

Mr. Schwartz: I appear for John H. Hocter and William R. Heyer, partners, trading under the name of the Ace Radio Shop, who occupy a store in the rear of the Liggett Drug Store, under a lease from the Surety Realty Company which expires by its term on the 15th of Sep-
10 tember, 1926, and they also occupy a store immediately adjacent on the north — the lunch room—to which they transferred their radio business, of which they were really only month-to-month tenants. I also appear on behalf of Mr. John Harrington, who occupied the entire third and fourth floor of the property over McDonald, 44 by 100, and it appears that Mr. Harrington had been in possession for seven or eight years before the eviction; that he had a lease that had long since expired, and his tenancy
20 under the Surety Company was merely that of only a month-to-month tenant. All of which, I think, will be stipulated. I have no documentary evidence.

CHARLES A. McEUEN, sworn.

Direct examination by Mr. MacMahon.

Q Where do you live, Mr. McEuen? A
30 Washington, D. C.

Q Are you married? A Yes, sir.

Q What is your wife's name? A Madge J. W. McEuen.

Q How often have you been married? A Three times.

Q What was the name of your first wife? A Jane Walker.

Q What was the date of your first marriage?
40 A About 1850.

Q Were there any children by that marriage? A Yes, sir; there were three children by that marriage.

Q Are they living? A They are not.

Mr. Egner: I do not see what this has to do with the case.

Mr. MacMahon: He is claiming as a surviving grantee under a deed to four people, eliminating the others.

Mr. Egner: I do not see how his own children come in.

Q Are they living? A No, sir.

Q How old were they when they died? A They died in infancy.

Q What was the date of the second marriage?

The Court: What has that got to do with this case?

Mr. MacMahon: I want to show the right that this man has to be in this court.

The Court: He inherited from his brothers and sisters. What has his descendants got to do with it? The present wife may have.

Q You were married to your present wife when? A I was married to my present wife in 1907, April 10.

Q How old are you? A I am eighty years old in September, born in 1846—in my eightieth year.

Q How long have you lived in Washington? A Between fifty and sixty years.

Q That is your permanent home? A Yes, sir.

Q What was your father's name? A John McEuen.

Q Is he living? A He is not.

Q When did he die? A He died in the seventies.

Q Where? A At Sailors' Snug Harbor.

10 Q Staten Island? A Staten Island.

Q What was your mother's name? A My mother's name was Mary Antoinette Judson McEuen.

Q Was that her maiden name? A Her maiden name was Mary Antoinette Judson.

Q Is she living? A No, indeed.

Q When did she die? A She died in Irvington, New Jersey.

Q When? A July 4, 1848.

20 Q Did you have any brothers and sisters? A Yes, sir; I had several brothers and sisters.

Q Who were they? A Several died in infancy, my brother John S. McEuen, James P. McEuen, the only ones—(interrupted).

Q Any sisters?

The Court: They grew up?

The Witness: They grew up, yes, sir.

30 Q Sisters? A Yes, sir.

Q What is the name of the sister? A Mary Lois.

Q She grew up? A She grew up.

Q Are those the persons named in the deed from Leavitt to you and others? A They are.

Q Is John S. McEuen living, your brother? A He is not.

Q When did he die? A He died December 30, 1859.

40 Q Where? A At Joliet, Illinois.

Q Was he married? A Unmarried.

Q Did he leave any will? A Not to my knowledge.

Q Did—is James P. McEuen living? A He is dead.

Q When did he die? A He died in 1903.

Q Where? A At the Soldiers' Home at Dayton, Ohio. 10

Q Was he married? A No, indeed.

Q Either one of your brothers leave any children?

The Court: Did he leave a will?

The Witness: He left no will.

Q Were these brothers ever married? A No, sir.

Q Did either of them leave any children? A No, sir. 20

Q Is Mary L. McEuen living? A She is not.

Q When did she die? A She died, I think, in the seventies.

Q Was she married? A She was married.

Q Was she married more than once? A She was married twice.

Q What was the name of her first husband? A George H. Wheeler.

Q Is he living? A He is not. 30

Q Were there any children by that marriage? A No, no children by that marriage.

Q What was the name of the second husband? A Charles Henry Miller.

Q Is he living? A He is not.

Q When did he die? A He died about four years ago.

Q Were there any children by that marriage? A No, no children by that marriage.

40

Q Did your sister Mary leave a will? A She did not.

Q Where did you live in 1850? A I don't know where I lived. I lived with my parents. I was a child four years old. I lived in Newark, or Irvington.

10 Q When did you come to Irvington or Newask? A I don't remember.

Q Do you remember living with your parents? A I lived with my parents.

Q Do you remember living with them? A No. My father was a seafaring man and my mother died when I was twenty months old.

Q Who is Albert Sherman? A He was the father of Abraham H. Sherman.

Q Was he any relation to you? A He was a 20 half uncle.

Q How did that relationship come about? A My grandfather married a Sherman.

Q What was your grandfather's name? A Judson—Sylvester J. Judson.

Q Married a Sherman? A Married a Sherman, widow, who had these children.

Q His wife was who—his wife was a Sherman—your grandfather's wife was a Sherman? 30 A Yes, sir; second wife.

Q What relation to Alvah? A Why, he was stepfather. I may be mixed up on that. Judson married a widow Sherman who had these two children, Alvah Sherman and Elkaman Sherman.

Q Who is Charles A. Sherman? A He was the son of Alvah Sherman, brother of Abraham H. Sherman.

Q Did you ever live with Alvah Sherman? A 40 I did.

Q How long? A I lived until I went into business, until I was about eighteen years old—sixteen or seventeen—came to Newark.

Q About what year was that? A I lived with him until I went into business—until I came here to Newark and took a clerkship in a grocery business—lived out here at Irvington on a farm. 10

Q And what year was that, Mr. McEuen? A What year?

Q When you left Alvah's house. A I was a boy. I don't remember.

Q In what year was it, what date? A I think it was along about 1864.

Q About 1864? A Yes, sir; towards the close of the war.

Q About eighteen years old? A Not so old—yes, neighborhood of eighteen years old. 20

Q How long did you stay in Newark?

> The Court: How long had you been with him, with Sherman?
>
> The Witness: Oh, many years; I went to school out in the country and worked on the farm.

Q Out at Irvington? A At Irvington. Come here and took a clerkship corner of Academy and Halsey street and went to the Naval Academy and from there to Washington. 30

Q Did your other brothers and sister live with Sherman? A Yes, sir; they did.

Q The whole crowd of you? A Yes, sir; except my brother, John; he had gone west. Jim went—wasn't here very long, because he went in the Navy before the Civil War and served all through the war.

40

Q I understood you to say you went from Newark to the Naval Academy, is that correct? A That is correct.

Q At Annapolis? A Yes, sir.

Q And from there you went to live in Washington? A Yes, sir.

10 Q And have you resided in Washington ever since? A I have.

Q Who was Abraham H. Sherman? A Son of Alvah Sherman.

Q What was his business? A He was a lawyer.

Q Where? A Lawyer and secretary of the present Mutual—(interrupted).

Q Lawyer in Newark? A Lawyer in Newark here.

20 Q What was Charles? A Charles was a real estate man in Newark, carried on business in New York.

Q Where did you get the deed from David A. Leavitt to you and your brothers and sisters? A I got it from Abraham H. Sherman.

Q Under what circumstances? A Sherman came to Washington and took a place in the Census Office in 1870 and he came to me and told me that he would deliver that deed to me—

30 (interrupted).

Mr. Egner: I object to any conversations.

The Witness: (Continuing.) He came to Washington and he came to me and told me that he had this deed, that he would deliver it, place it upon record, if I would pay him a thousand dollars. I agreed to do it and went with him to the National Hotel before Judge Culver, Associate Justice of the United

40

States Supreme Court, and executed this mortgage for a thousand dollars, and he brought it on to Newark here and turned it over to P. & Sons—he brought the mortgage that I gave him and turned it over to & Sons, harness manufacturers.

10

Q That is the mortgage? A The mortgage.

Q What did he do with the deed? A He recorded the deed.

Q Didn't hand it to you at that time? A No; didn't hand it to me. He placed it on record himself. It was understood between us that he should do that.

Q Was that the first you ever heard about the deed? A I had never heard of it until that time.

Q How old were you then? A In 1870?

20

The Court: That was just before the deed was recorded?

The Witness: Just before the deed was recorded.

The Court: That is the time you made the mortgage.

The Witness: That was the time I made the mortgage.

30

Q When were you born? A I was born in 1846.

Q When was your brother John born? A John was born—I think John was born in 1836.

Q When was James born? A James was born in 1841, as I—if I remember correctly.

Q And your sister Mary? A My sister was born about 1838 or 1840—two years difference I think between my brother—(interrupted).

40

Q After you learned about the deed what did you next do about the property? A Why, I instituted this suit.

Q You mean the ejectment suit which was mentioned in this case? A Yes, sir.

Q You were one of the plaintiffs in that suit
10 with the other parties mentioned, were you? A Yes, sir.

The Court: Have you offered the files of that suit?

Mr. MacMahon: Yes, sir.

The Court: I was going to suggest you offer the record in that case. You do?

Mr. MacMahon: I offer the record, in-
20 cluding the exhibits.

The Court: Those are already in. You waive further proof as to the bill of particulars and the judge's charge?

Mr. Egner: Yes, sir.

The Court: Who is David Leavitt?

The Witness: He was a large property owner and merchant in New York.

The Court: Any relation to you?

30 The Witness: No relation at all.

The Court: Relation of Sherman?

The Witness: No. My grandfather was a wealthy merchant running vessels to different parts of the world.

The Court: What?

The Witness: My grandfather was a merchant—had several merchant vessels running to different parts of the world and carried
40 on business there.

The Court: Leavitt was not related to you and not related to the Shermans?

The Witness: No relation to the Shermans. Mr. Judson placed a great deal of property in Mr. Leavitt's hands and among the property recovered from him was the property transferred in this way, two-thirds to Sherman and one-third to McEuens. 10

The Court: You say he got a lot of property as well from the Shermans that caused him to reconvey to the Shermans?

The Witness: No; he conveyed—at Mr. Judson's request he conveyed this property in this manner.

The Court: Do you know why he conveyed two-thirds to Sherman and one-third to McEuen? 20

The Witness: I don't know how the Shermans—how he came to do that I am sure. I know he had considerable property of Mr. Judson's.

The Court: What?

The Witness: He had a very considerable amount of property of Mr. Judson's. They were never able to get it away from him. 30

The Court: That is, Leavitt had?

The Witness: Leavitt; but they got this property.

The Court: Judson was your grandfather?

The Witness: Yes, sir; Judson was my grandfather. My mother was a Judson.

Q What was your father's name? A John McEuen. 40

Q John McEuen. Is he the grantor in a quit-claim deed made in 1850 to Charles Sherman? A Yes, sir; Charles A. Sherman.

Q He never had any interest in this—(interrupted).

10 Mr. Egner: I object.

The Witness: No interest.

Q Were you present at the trial of the suit in ejectment? A I was.

Q Do you remember whether the counsel for Martin Burne made any statement as to what he relied upon in his defense in that suit? A He said expressly that he relied upon this act—(interrupted).

20 Mr. Egner: Wait a minute. I object to this witness testifying to what counsel said. We have the record here and we have what purports to be a transcript of the proceedings.

The Court: Stenographic notes of the entire proceeding?

Mr. Egner: Yes, sir. I object to any statement made off the record.

30 Mr. MacMahon: I am willing to stand on the record.

The Court: I do not think you are obliged to stand on it. You can show what happened if there were declarations against what you now think are interests. Put in both the record and what this witness says. Are you going into things that are not disclosed in the record?

Mr. MacMahon: No; I cannot say that. I

40 will simply confirm it.

The Court: No use going into it then. Counsel admits it.

Cross examination by Mr. Egner.

Q Mr. McEuen, since you became aware of that deed, in 1870, have you had any of the income from this property? A Not a dollar. 10

Q Have you paid any taxes on it? A I have not.

Re-direct examination by Mr. MacMahon.

Q Did you ever have any notice of the making of an assessment for the building of the sewer in front of this property? A I never had.

Q I am referring to the sewer assessment for which the property was sold to John R. Weeks. 20

Mr. Egner: I suppose that involves a question of law, as to whether he had legal notice.

The Court: Go on.

Q Did you ever receive any notice? A Never received any notice.

Q As a matter of fact, were you of age at that time? A No, I was not. 30

Q Or your brothers and sisters? A Well—I think they were not.

Q Where were you living at that time? A Well, my sister and myself were living at Irvington, and my brother, I think, went in the Navy.

Q Who were you living with? A Living with Alvah Sherman, Abraham H. Sherman's father.

40

Re-cross examination by Mr. Egner.

Q You testified that you have not had any of the rents of this—income of this property during this period. Did you ever ask either Mr. Burne or any of his representatives or successors for any of the income from the property? A No; I never did.

Q You never did? A But I want to say right in this connection—I would like to say—(interrupted).

The Court: Anything more?

By the Court.

Q You never had possession of the property? A Never had possession of the property.

Q You sued for possession of the property in 1870 and did not get it? A Did not get it.

Q You have been out of possession ever since? A Yes, sir.

Q Burne has been in possession since you lost that suit? A As I understand it.

Q Or those who held under them? A Yes, sir.

Q You wanted to say something. I will hear it. A He asked me if I received any income. I want to say I had a sailor brother, gallant fellow, went through the war, he came back and found that I had paid money for this deed and wanted to help me and gave me $500. He went to Mr. Burne time after time and wanted Mr. Burne to give him something for our interest in this property and Mr. Burne wouldn't do it.

Mr. Egner: What did he say?

The Witness: He said he would hold the property and would not pay anything and my brother could not get a dollar out of him for this property.

Mr. Egner: Is that your brother that died in 1903?

The Witness: He died in Dayton, Ohio, in the Soldiers' Home there. 10

The Court: Are you through with your case?

Mr. MacMahon: Yes, sir.

The Court: Now the Surety Company.

LOUIS KAMM, sworn.

Direct examination by Mr. Hannoch. 20

Q You are the president of the Surety Realty Company? A Yes, sir.

Q And are familiar with its business affairs? A Yes, sir.

Q And the leases which we have offered in evidence this morning are leases that have been executed by the Surety Realty Company? A Yes, sir. 30

Q Does your concern keep a set of books in which are recorded the receipts and disbursements of the business? A Yes, sir.

Q Does the Surety Realty Company have any other business other than this particular lease in discussion here? A No.

Q By whom are your books audited? A Puder & Puder.

Q They are here to testify as to what those records show? A Yes, sir. 40

Q In addition to the leases which have been offered in evidence, Mr. Kamm, there were other portions of the building in question which were occupied by tenants. Will you tell us who occupied the third floor of the building? A Harrington. The billiard parlor.

10 Q Who occupied the fourth floor? A Harrington, billard parlor.

Q What rent were they paying? A $1,500 a year for the third floor and $1,100 a year for the fourth floor.

Q They were in under a lease or as monthly tenants? A Monthly tenants.

Q The restaurant store, or store next adjoining Liggett's store on Washington street. A Formerly a restaurant store.

20 The Court: Do not do any answering or talking until counsel gets through.

Q The store next door to Liggett's on Washington street was occupied by whom? A Will you repeat the question, please?

Q The store on Washington street nearest the corner and next after the Liggett store was occupied by whom? A Occupied by the radio store.

30 Q And they had a lease expiring in 1926? A Yes, sir.

Q Who occupied the store next door to the radio store? The extreme end of the property. A The radio store on monthly lease, from month to month tenancy.

The Court: We have been calling it the lunch room.

The Witness: The reason for that was it was formerly occupied as a lunch room and

40

then the store front was changed and two stores put in with two separate entrances, the thought being to get a larger income from two stores.

Q The radio store occupied how much of the store which had formerly been occupied by the lunch room? A About one-half.

10

Q And they were paying for that one-half how much? A I can't tell you unless I refer to this memorandum—twenty-one hundred dollars.

Q No, for the one-half? A For the one-half $75.

Q And the balance of the store was vacant at the time of the taking?

20

Mr. Egner: Seventy-five dollars a month.

Mr. Hannoch: Yes, for the half of the restaurant.

The Witness: That was by month to month lease.

Q And the rest of the store was vacant at the time of the taking, was it not? A I do not quite get you.

30

Q Was the balance of that store at the time the City took the place in October, 1925—the balance of that store was vacant. A The balance of the store was vacant.

Q Now, for how long a period had you been renting the second and third floors—or third and fourth floors of the building on a monthly basis—approximately how long? A From the time that I heard that the condemning was going to take effect, or there were rumors about it.

40

Q Why did you not make leases for the third and fourth floors?

Mr. Egner: We object.

The Court: Overruled.

10 A Because I didn't want to be placed in the position that—(interrupted).

The Court: Didn't want to be bound by the covenant.

The Witness: With all this rumor and talk going on before the proceedings.

Q Were you in position to rent the floors on a leasing basis?

20 Mr. Egner: I object.

Q For a term of years?

Mr. Egner: I object.

The Court: Objection overruled.

A Yes, sir.

Q Were you able to rent that portion of the building which had formerly been occupied as a
30 lunch room on a term basis?

The Court: You mean the vacant store?

Mr. Hannoch: The vacant store.

A Yes, sir.

Q For a term of years? A For a term of years.

The Court: The answer is yes?

40 The Witness: Yes, sir.

Q What were you getting for the roof at the time the city was taking it—at the time the city went into possession in October? A A hundred dollars a month.

Q On a monthly rental? A Yes, sir.

Q That hundred dollars that you were getting, did that include any services to yourself for your own sign that was on there? A Well, I will have to refer to the books on that. I couldn't answer that, the detail. 10

Q Are these the books of the Surety Realty Company? A Yes, sir; these are the books of the Surety Realty Company.

Cross examination by Mr. Egner.

Q Originally you say there was one store on Washington street in the rear of Liggett's store? 20

The Court: Two.

Mr. Egner: Originally, before the division?

The Witness: When you say originally, what do you mean? How far, originally, back?

Q You testified on your direct examination that some time or other you made two stores out of what had theretofore been one store; is that right? A Yes, sir. 30

Q So that before that division there was one store on Washington street in the rear of the Liggett store; is that correct? A Yes, sir; but when Riker and Liggett—let me explain to you—renewed their lease, that is the lease under which they were operating on, their store was cut down from 85 feet or 88 feet, to 74 feet, and 40

that left the balance of the space back of the Riker store—annexed that space with the restaurant store, which we divided into two small stores, putting in two fronts.

Q Did you lease—did the Surety Realty Company lease to Riker? A Yes, sir; the Surety
10 Realty Company leased to Riker. The Surety Realty Company made the improvements on the entire property.

Q Do I understand, Mr. Kamm, that when you renewed with the Liggett Company and made the lease which has been offered in evidence here, you acquired additional space on Washington street which you added to the space theretofore occupied by the lunch room and made two stores out of that space? A Yes, sir.

20 Q Now at the time of the condemnation proceedings one of those stores was occupied by the Ace Radio Company? A At the time of the—when the condemnation took effect it was.

Q Now how much was the radio company paying for that store at that time? A Well, I believe the accountant can certify to that better than I can.

The Court: There is a lease.

30 The Witness: Yes; lease in evidence.

Q At that time the restaurant store was empty. A There was no restaurant store. The restaurant store had been divided, the radio store occupying one-half of the space.

Q Now the other half, was that empty at the time? A Yes, sir.

Q So I understand that the entire building was occupied with the exception of the one
40 store, half of the lunch room—half of the original

lunch room? A Yes, sir; some of it, temporary leases.

Q Yes; everything was occupied except that one store? A Yes, sir.

Re-direct examination by Mr. Hannoch.

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Q You said in response to Mr. Egner's question that the Riker lease was made by the Century Realty Company, I think, the lease that is in evidence. (They refer to Riker and Liggett, both being the same thing.) There was a lease actually made to Riker by the Surety Realty Company that had expired at the time the Surety made its lease with them? A The Riker and Liggett was considered one company, and when you referred to that—Riker had sold out to Liggett—and I refer to it as one company.

20

The Court: The Century and the Surety the same company?

The Witness: No. The Century Realty Company was a company that was owned by Mr. —

Mr. Egner: I think we can stipulate this on the record, the original lease—the original term lease was made to S. S. Kresge, was assigned by him to S. S. Kresge Company, assigned by the S. S. Kresge Company to the Century Realty and assigned by the Century Realty to the Surety Realty Company. Correct, Mr. Kamm?

30

The Witness: Yes, sir.

Q You were also interested in the Century Realty Company? A To the extent of one-half ownership.

40

Mr. Schwartz: Concerning the Harrington, third and fourth floor. How long had he been in possession before this condemnation?

The Witness: He had been in there a number of years. I couldn't tell you.

10 The Court: Month to month tenant?

The Witness: After his lease had expired—he had a lease which had been there for a term of years, but when there was talk of condemnation or making some changes on the property, rather than to be tied or bound up with a number of these tenants, I took practically nothing and went into Harrington and told him the distinct understanding was that he should have a month to

20 month lease if he was ready to get out when the lease was up.

Mr. Egner: I ask that the statement that he took practically nothing be stricken from the record.

Mr. Hannoch: He said he took practically nothing in rent.

The Witness: I say I took a great deal less money in rent not to be bound up—left everything there expecting the condemnation

30 to come to a head any day or something to come to a head.

Mr. Hannoch: We made a lease each month with this man.

The Court: Written lease?

Mr. Hannoch: Continuation, actually—having him in possession from month to month.

40

Further cross examination by Mr. Egner.

Q For how many years have you heard rumors that—of the widening of Washington street at that particular place? A I couldn't say. I know there were rumors—there was talk for at least several months, or a year or so—I don't know exactly—before the property ever was condemned. 10

Q Isn't it a fact that for the past ten years there has been some talk about the widening of Washington street at that place and the taking of this property? A Not to my knowledge.

Q You mean to say you never heard of this as a possibility until some two or three months before the ordinance was passed? A I wouldn't put it three or four months. It might have been a little—period a little longer than that, but 20 never as far back as the time of the original Riker and Harrington leases were made.

Q Isn't it a fact that for the last five or ten years there has been talk in the City of Newark about the probability of this being taken for the improvement of Washington street? A None that I had heard, Mr. Egner.

Q Did you know that the City Plan Commission back in 1910-1913 recommended that as one 30 of the improvements to be made in the City of Newark? A I didn't know it.

Mr. Schwartz: How long has Mr. Harrington been a month-to-month tenant?

The Witness: Our books would show that. If you give me time to look that up I can answer the question if it is important.

RECESS.

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JOHN J. BERRY, sworn.

Direct examination by Mr. Hannoch.

Q Mr. Berry, you reside in the City of Newark and have so resided for many, many years? A I am about forty years of age and I have been here forty years.

10

Q What business have you been engaged in? A Real estate.

Q For how long? A Twenty years.

Q Familiar with the property in the center of Newark? A Yes, sir.

Q Familiar with the property at the corner of Washington and Market street? A Yes, sir.

Q Do you have any official position with the City of Newark? A I am president of the Newark Tax Board.

20

Q And what are your duties in connection with that position? A To assess properties; to listen to appeals.

Q And as a result of the information that you have in your official capacity and in your general business are you familiar with the rental values of the property that we have been talking about this morning? A I believe I am.

Q Did you prior or at about October, 1925, examine the property at the corner of Market and Washington streets? A Yes, sir; I did.

30

Q You are familiar with the Liggett property? A Yes, sir.

Q Portion of the property occupied by Liggett? A Yes, sir.

Q What is your opinion, Mr. Berry, as to the fair yearly rental value of that property on October, 1925? A The fair yearly rental?

Q Yes. A I would figure Liggett's portion, which is 22 by 74—(interrupted).

40

Q What did you take into consideration in reaching your conclusion? A I took in consideration the location—location of the building.

Q I mean about the premises. A The size of the plot that Liggett was occupying together with the basement underneath.

Q Where is this property located with respect to the business center of the City of Newark? A Corner of Washington and Market streets, directly opposite L. Bamberger's department store; within two blocks of the corner of Broad and Market streets, which is the business center. 10

Q Is it a retail or wholesale or manufacturing section? A Retail section.

Q Specializing in what sort of business? A Women's wear and furniture—furniture beyond, west of Washington street.

Q Where is it located with respect to the general industry and traffic of the City of Newark? A It is located on the north side of Market street, which is considered by most real estate men and myself as the second best corner in the City of Newark for pedestrian traffic. 20

Q Is it better—which side of the street is the better, north or south side of Market street? A The north side is the better section.

Q Is there any particular reason for that? A Well, being all of the business of Newark, especially the women's wear, which brings the greatest rental, are all north of Market street, starting from Market and Broad street, going north on Broad, and staying on the north side of Market street, the southern side—south of Market and Broad street is not considered as valuable on account of the pedestrian traffic as the north side. 30

Q Where is it with respect of the traffic resulting from the use of trolleys, jitneys? A 40

Well, the jitneys used to stop at that corner and the trolleys stopped at that corner—some trolleys turned at Market street and went over Washington.

Q Is it a transfer point? A It is a transfer point.

10 Q Now, to go back again to the Liggett store, will you tell us now what, in your opinion—(interrupted).

The Court: What did they occupy?

The Witness: They occupied the first floor on the corner—first floor of the corner, 22 by 74, with the basement.

Mr. Egner: Basement under the store or the whole thing?

20 The Witness: Basement under the store.

Q What is your opinion of its fair yearly rental value October, 1925? A $15,400.

Q How do you arrive at that? A On the basis of $700 a front foot.

Q Are you familiar with the McDonald property? A Yes, sir.

Q And they occupy—(interrupted).

30 A That was directly west of the Liggett store, they occupied.

Q Do you think that that value is greater or less than what it would be for the four and a half years next succeeding October, 1925?

Mr. Bilder: Testifying now about McDonald?

Mr. Hannoch: No; Liggett.

The Witness: I don't quite get your question.

40

Q Is the $700 a year which you referred to as being a fair rental value for just 1925, or for how long a time would that continue? A I believe that is a fair rental value for the entire term of the lease.

Q For how many more years? A Four and a half more years—be up to October, 1930.

10

Q In 1925 the lease had four years to run?

The Court: Until October, 1930.

The Witness: Yes, sir.

The Court: The witness knew that.

The Witness: Yes, sir.

The Court: During that period you think the annual rental—(interrupted).

The Witness: Would be $700 a foot.

20

Q Referring to the McDonald store, what was it that they occupied? A They occupied the store directly west of the Liggett store. They occupied the store and the basement and the entire second floor.

Q And what was the size of the store? A The store was 21 by 85.

Q Second floor? A Second floor was about 44 by 100; had about 4,400 square feet.

30

Q And they had the basement underneath that? A They had the basement underneath.

Q What, in your opinion, was the fair rental value of the portion of the premises occupied by McDonald in October, 1925?

Mr. Bilder: The objection is this: As I understand it, Mr. Hannoch is here appearing for the Surety Realty Company which was the owner of the paramount lease. They have sub-let for the balance of the term that

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portion occupied by McDonald. We are the owners of whatever value is in that leasehold, as I understand it. Have we any issue with the Surety Realty Company which enables them to offer testimony with regard to our leasehold, the value of which, as I see it, does not inure to them?

10

The Court: Objection overruled.

Q In answering that question, Mr. Berry, will you first start with the value as of the first floor and then take the second floor, and then take both? A I would value the McDonald shoe store, that is the first floor, considering the basement—that it had a basement—at $10,500, which is $500 per front foot.

Q And the second floor? A I would value the second floor, the 4,400 square feet, at $2.00 a square foot, taking into consideration that there was an elevator running from the first to the second floor.

20

The Court: There is an elevator?

The Witness: There was an elevator.

Q Making the total for McDonold—(interrupted). A Making the total for the McDonald lease of $19,300.

30

Q What have you to say as to the balance of the term—how would the fair rental value for the balance of the term compare with the figures you have just given us? A I think that would be a fair price.

Q Now, refer to the third floor of the building. How many square feet were there in the third floor? A 4,400; the same as the second floor.

40

Q What do you consider the rental value as of October, 1925? A $3,300.

Q How do you arrive at that? A $.75 a square foot.

Q In arriving at that value, how would you say the value for the balance of the term compared? A I believe that would be the same value for the remaining four and a half years. 10

Q In arriving at the value of the third floor, is that the rental you think could be obtained on a monthly rental or on a term rental? A On a term rental.

Q For how long? A Well, a term rental of at least three to five years.

Q Referring to the fourth floor, what is your opinion of the fair rental value in October, 1925? A $2,200.

Q How is that arrived at? A $.50 a square foot. 20

Q How does that compare with the balance of the term? A I believe the balance would be the same for the remaining term of the lease.

The Court: No elevator service?

The Witness: No elevator service above the second floor.

Q And the store we have referred to as the Radio Shop—will you tell us the fair value of that as of October, 1925? A That was a small store on Washington street just north of the Liggett's, 10 by 18. I figured that store is worth $3,000 a year or $300 per front foot. 30

Q What about the balance of the term? A I don't see any reason for any change in the value.

Q Refer now to the store that we have referred to as the lunch room. What was the size 40

of that store? A That was on the extreme end of the building; that was 15 by 44. I figured that worth $5,250, based on $350 a front foot.

Q Why do you put a greater value on that store than you do on the radio store? A Because it is a larger store. The other is only
10 10 by 18—deeper store. It is larger. The other is 10 by 18.

Mr. Egner: What is the rental value?

The Witness: $350 per front foot.

Mr. Egner: What is the total?

The Witness: $5,250.

Q What is the fair rental value of the roof? A For sign purposes? $100 a month.

20 Q That is as of October, 1925? A Yes, sir.

Q And that would continue for the balance of the term? A I believe it would continue for the balance of the term.

The Court: Regardless of our future condition as to prosperity?

The Witness: Well, the roof wouldn't—(interrupted).

30 The Court: I mean these others—present-day prosperity and hope for the future.

The Witness: There are no more people passing the corner of Broad and Market street today than there were last year or the year before.

The Court: You base your estimate on present-day prosperity?

The Witness: Yes, sir, on present day prosperity. There may be a change.

40

The Court: And expectation?

The Witness: Of its continuing.

Q You also take into account the general building conditions in the center of the city in arriving at those values? A I don't quite understand what you mean, the general building condition. 10

Q The number of other—number of structures which are now being erected in the center of the city which will result in bringing people into the city. A They would bring people into the city, but not necessarily bring them up to that corner of Bamberger's department store.

Q What traffic passes this corner as the result of outlying suburban towns? A Well, the L. Bamberger & Company department store, through its extensive advertising operations, brings people from all over the northern part of New Jersey to this particular center. 20

The Court: And from the south, too?

The Witness: I presume they do.

Q I mean what trolleys going out into the suburban territory surrounding Newark pass this particular corner? A The Orange trolley and the Springfield avenue trolley. 30

Q Run out Market street? A Out Market street and—(interrupted).

Q South Orange? A Yes; South Orange avenue.

Q The trolley service that comes in from Morristown, where does that pass? A I don't know whether it comes in from Morristown—I think they change in Maplewood and come through the Springfield avenue trolley. 40

Q Come down on the Springfield avenue trolley? A Yes, sir.

Q Are you familiar with the triangular piece of land that was not taken by the city? A Yes, sir.

Q What would you say its value is as of the present time?

10

Mr. Egner: I object.

The Court: Let me make a suggestion. Reframe your question.

Q What is your opinion of the market value of that property as of October 25th, with the buildings down, as it now stands?

Mr. Egner: I object. Assuming that the value of the remainder has anything to do with it, it would necessarily have to be the value of the remainder as of the time of the making of the assessment.

20

The Court: It is framed that way.

Mr. Egner: No. This is October 1, 1925, which is after the award had been made and after this triangle had a frontage on the street. I say the value of that is immaterial at any time.

30

The Court: What date do you want to fix? You are speaking of some day.

Mr. Egner: I say if it is material at all it must be the value as of the time that the Assessment Commissioners fixed the values of the part taken. In other words, what they did was to make this an interior piece of property.

The Court: Has the value of that property changed within the year of October, 1925?

40

Mr. Egner: It has changed since the improvement has been made.

The Court: I mean aside from the improvement.

The Witness: Well, that would be a question, your Honor; that would be rather hard to answer. It is the improvement that made the value. 10

Mr. Egner: After the improvement was made this interior piece of property became again a property with a street frontage, and for that, which enters into the present value of the property, they will have to undoubtedly pay an assessment for benefits.

The Court: I do not understand the point of your objection. It may be all of it is a matter of record which you may argue. The testimony is proper. 20

Mr. Egner: I object to having any statement in evidence as to the present value, or the value of that property after the making of the improvement.

The Court: Objection overruled.

The Witness: I believe the value of that property after the making of the improvement was $265,000. 30

Q The triangular piece? A The triangular piece that is left.

Q Worth that when? A Just as soon as the improvements were made and it became a corner. It became a corner just as soon as the buildings were removed and the improvements made—street widened.

The Court: As of what date? 40

The Witness: About October 1st, 1925.

The Court: The Commissioners made their report of the total value of the property as of September 15th, any difference in value between the two dates?

The Witness: Assuming the building—
10 (interrupted).

The Court: Assuming the improvements were made.

The Witness: Yes, sir; as soon as the improvements were made there was a difference in value—it became a street frontage.

The Court: Suppose it became a street frontage on September 15th, not October 1st?

The Witness: The value would be the same.

20

Q Now, at any time—I will fix the time later —long prior to the commencement of the condemnation proceedings, did you have any transactions with the Cook family whereby they expressed a willingness to sell their equity in this property subject to the Surety Realty Company's lease? Answer that yes or no. A Yes, sir.

Q As of what time did you have that conference? A Oh, around 1923—about the spring
30 of 1923.

Q And how long was that before the commencement of the discussion relating to the proposed widening of Washington street? A Well, there had been a considerable discussion about widening Washington street for four or five years, but it never crystalized until about a year after this discussion.

Q And what value did they place—don't answer this question—what price did they offer you
40 to sell their equity in this property for?

Mr. Egner: I object.

The Court: When you speak of equity, what do you mean?

Mr. Hannoch: I mean their interest in the property subject to the Surety Realty Company's lease and the mortgage of a hundred thousand dollars. 10

Mr. Egner: I object.

The Court: I think if you will present all the conditions that entered the mind, you may then get the answer.

Q Suppose you tell us the conversation that you had—first, with whom the conversation was. A I had conversation with Dr. Cook.

Q And can you fix the time—what part of 1923? A In the spring of 1923.

Q Where was it? A Up at his office in the Aldine Building, I think Lombardy or Fulton street. 20

Q Tell us what the conversation was.

Mr. Egner: I object. In the first place, conversation with one of four owners, Dr. Cook; it occurred over a year before the City passed the ordinance, and certainly in an inquiry of this kind where the Court must determine what the actual value was, even assuming that Dr. Cook made an improvident offer at that time, your Honor would not hold him to it. There is no estoppel. Nobody acted on his statement of what he thought the property was worth. He is not an expert. He was one of the owners. Let us assume he put on a ridiculous price. I think it has nothing to do with the present inquiry which is what the property was really worth. I feel we must object to that. 30 40

The Court: I think you are quite right. I will sustain the objection.

Mr. Hannoch: May I make my point as to why I think it is important? I think it becomes important for this reason, it indicates what value the owners of the property thought this particular lease that we had on the property had, because the price at which they were willing to sell subject to our lease is an indication as to what they thought themselves our lease was worth at that time.

The Court: Too far removed.

Cross examination by Mr. Egner.

Q Mr. Berry, in giving us these rental values that you have testified about, have you based them upon the fact that the improvements—the effect of the improvements on conditions around Market and Washington street? A The present improvements?

Q Yes. A No; I have not.

Q So in giving us the values that you have, you acted upon your knowledge of the conditions without regard to the improvement? A Without regard to the improvement.

Q Now you have placed a value on the Liggett's lease—that is the Liggett store—rental value, at $700 a front foot. Can you tell us any other leases that you know of in that neighborhood in Market street bearing a similar rental? A I had offered Mr. Miller—(interrupted).

Q I am not asking an offer; I ask you any lease? A I would just like to explain it. I was collecting the rent and sold the property at 101 Market street, or 103, which is directly next to this property. I had sold that to the

Kirch Company and prior to that time I was collecting the lease, and I had offered Mr. Miller —(interrupted).

Mr. Egner: I ask that that be stricken out.

Q I asked you whether you know of any other lease in that general neighborhood in which the rent is fixed at $700 a front foot. A Well, there are various leases in that neighborhood that have been made, but this is a particular piece of property that is different—(interrupted).

Q I am not asking you to argue with me. I am asking you to tell me whether you can mention one lease where the rental reserve was as much as $700 a front foot? A Not at $700 a foot.

Q No. And what is the highest rental that you can tell me about reserved in any lease in existence on October 1st, 1925? A Well, there are a number of rentals up there. The corner, #75 Market street is leased on a basis of $12,000. a year net, plus the taxes, which amount to about —I guess they amount to about $3,500. or $3,400. a year, which would make—(interrupted).

Q How many feet front is that? A I think that is about 25 feet front.

The Court: That is west.

The Witness: Yes, sir; it is further up, it is in furniture row.

Q What do you figure that as per front foot? A I figure that that—(interrupted).

Q I don't ask you what it is worth. I ask you what that reserve rental amounts to per front foot? A I didn't make the lease so I don't

know what they reserved per front foot. In my opinion it would run about $500 a foot.

Q That is a corner, too. A No, it isn't a corner; it is further up.

Q How deep is that store? A That store is about 190 feet deep.

10 Q Runs through to the next street? A Yes, sir.

Q And has frontage on the back? A Which doesn't amount to anything.

Mr. Egner: I ask that that be struck out. Does it have a frontage on the back street?

The Witness: On the alley.

Q What is that alley? A That alley is Campbell Place; it is about 12 feet wide.

20 Q Is it a public alley? A It is a public alley.

Q Considered as a street in Newark, isn't it? A Not exactly.

Q Well, is it or isn't it? A I don't think it is. It is considered a public highway.

Q It is a public highway? A Yes, sir.

Q Now name other leases that you know about. A Well, there are a number of other leases that I know about on Market street—#59.

30 Q Name the next lease you know of that has a rental—next highest rental you know of reserved in any existing lease in October, first, 1925. A 59 and 61 Market street.

Q What was the rent there? A The rent for that is $25,000. a year net.

Q How many feet is that? A That is 30 feet 6 inches by 100 feet 9 inches deep.

Q What do you figure that to be per front foot? A It is rather hard to figure the front foot on that, because you have got to figure the

40 taxes.

Q Making reasonable allowance for the taxes —you are familiar with the taxes in Newark. A Making reasonable allowance for taxes that will be about $30,000. allowing $5,000. for taxes, and of course, you have got to consider insurance and other carrying charges. That building would be about $700 a front foot. That is a five-story building and basement. 10

Q That is for the whole building, is it? A That is for the whole building, but your big value on all central real estate is the first floor. That has to carry—(interrupted).

The Court: Won't you please answer?

The Witness: I am trying to explain it to him.

The Court: He doesn't want your explanation. 20

Q Do you say that figures $700 a front foot for the entire building, which is a five-story building? A No; you misunderstood me. I would figure that at a thousand dollars a front foot.

Q I am not asking you what you would figure. I am asking you what the actual rental is. You said the rental was $30,000. for the whole building. A No; I did not. 30

Q What did you say? A I said it was $25,000. a year net.

Q For the whole building? A You told me to figure the taxes.

Q $5,000. more. A And not having the tax book before me I can't tell you exactly what the taxes are. I am only hazarding a guess as to what the taxes would be.

Q You are President of the Tax Board? A I do not carry every assessment in my head, sir. 40

Q You know the rates? A Yes, sir.

Q You know the approximate valuations on Market street? A I know the approximate valuation.

Q You said the reasonable amount to figure for taxes was $5,000 a year? A That is what I believe is reasonable.

10

Q That would make $30,000 for the whole building, wouldn't it? A For the whole building.

Q How much does that figure per front foot? A On that basis it would figure a thousand dollars a front foot.

The Court: What number?

The Witness: Number 59 and 61, in furniture row, up near Plane street.

20

The Court: Near the Court House?

The Witness: No; near Plane street.

Q That is a five-story building? A That is a five-story building.

Q Modern building? A It is not modern. It is a building that has been up about twenty years.

Q Do you know how long the Burne Building has been up? A Well, to my knowledge it has been up thirty years.

30

Q It was up there when you first began to pay attention, wasn't it? A Yes, sir.

Q What other lease can you refer to in existence on October 1, 1925? A Well, there is the lease at number 93 Market street.

Q What is that? A That lease is—that building is 26.8 inches by 192 feet.

Q That goes through to that public highway in there? A I believe it does. That lease is $19,500.

40

Q What kind of a building is there on that? A I think there is a four-story building on that.

Q That is for the entire building? A That is for the entire building.

Q Can you name any other? A Then there is a lease—(interrupted).

Q Was that net or with the payment of taxes? A I think the owner made a poor lease on that. He is paying the taxes.

Q So he gets $19,000 and pays the taxes? A I believe he does.

Q What else can you mention—what other leases? A There is a lease at number 96 Market street.

Q What is that? A That is a building—plot of ground 20 feet 7 inches by 100. That is leased for—(interrupted).

Q What kind of a building? A I think that is only a two-story building.

Q What is the term of that lease? A That is leased for $8,000 a year net for the first five years and $8,500 a year net for the last five years.

Q When do the last five begin? A I think the last five began about three years ago.

Q Do you know? A I beg pardon?

Q Do you know when—or is that the case? A Well, I understood from the broker at the time he made the lease that it started about three years ago—went into existence about three years ago.

Q You are not positive about it at all? A I have never seen the lease.

Q Any others that you had in mind? A That is all I have in mind.

Q Now you testified as to the rental values of the third and fourth floors. Your estimate as to those rental values is considerably more than

John J. Berry, cross.

Mr. Kamm was getting in rent, was it not? A That is possible.

Q Well, you know it is so, don't you? A Well, I heard testimony to that effect.

Q Did you know what Mr. Kamm was getting—what the Surety Realty Company was getting? A Why, I heard him testify this morning.

Q Did you know what they were getting when you figured your estimate as to the rental values? A Did I know?

Q Yes. A No.

Q Didn't you think it was important to find out what they were actually getting in preparing yourself to testify here as to the rental value? A No, because I leased the building next door and I know what I was getting for the building next door.

Q You didn't think it was important? A I didn't have to go into—(interrupted).

Q You did not think it was important, did you? A No, I did not.

Q And you arrived at your figure as to the rental value of those two floors without having any actual knowledge of what the Surety Realty Company was actually getting for those floors, is that right or isn't it? A I arrived at it by the knowledge of what I was getting for the building directly next door.

Q Please answer my question? A Yes, sir; that is right.

Q In estimating the rental value of the so-called radio store and restaurant did you know what the Surety Realty Company were actually getting in rent for those premises? A I knew what they were getting for the stores—the radio and the restaurant.

Q When did you find that out? A I found that out—I think one of the radio men came down before the Tax Board on a question of reduction of taxes and I asked him what his rent was.

Q Did you know about the restaurant? A Yes, sir; I knew about the restaurant. 10

Q And did you consider those rentals in arriving at your opinion as to the rental value? A I did not consider those rentals because they were month to month tenancies.

Q Now is it your opinion that the third and fourth floors would have produced those rentals without any physical change in them? A Might have to be cleaned up and painted.

Q Any other improvements put in? A Well, they may have to have to put toilets up there. 20

Q Did those two floors have any toilet facilities? A I believe they do.

Q Do you know? A Well, my mind is rather hazy. I went through that building at the time I made an offer to Dr. Cook for it, but my mind is rather hazy now as to whether they did or didn't. I believe they did.

Q In estimating the rental of thirty-three hundred dollars for the third floor did you expect for that rental to have toilet facilities? A On the basis of fifty cents, no, sir, I would not. 30

Q At the basis of seventy-five cents? A Even at seventy-five, no sir. That is industrial real estate rental, for factory property.

Q So it is your opinion without any physical change in those premises whatever they could have been rented for $3,300 a year? A With possible painting and cleaning it up.

Q And notwithstanding the fact that the landlord could not have given a lease for more than 40

four and a half years? A I didn't take that into consideration? I took into consideration that the landlord could give a lease for four and a half years.

Q That is what I say. That is, you say that if they leased for four and a half years it would
10 have brought that amount? A In my opinion, yes, sir.

The Court: You have to have those.

The Witness: Sometimes the tenants put them in themselves.

The Court: They would be required.

The Witness: Yes, sir.

Q Now, you have appraised the property that
20 is left at the sum of $265,000 after the making of the improvements. Do you know what that property is assessed for by your Board? A Yes, sir; I know what it is assessed at, but I do not think that is a fair question.

The Court: Strike out the latter part.

The Witness: If your Honor please—

The Court: Wait. Answer these questions.
30
The Witness: Yes, sir; I know what it is assessed at.

Q What is it assessed at?

The Witness: If your Honor please, I am testifying as a real estate man, not as a tax expert.

The Court: Answer the question.

The Witness: It is assessed at $158,000.
40

Q Where did you get that information? A On the City tax book.

Q I show you a tax bill for this year. A Let me see. Maybe I can figure it. Well, $152,600. I was just going to figure it out.

Q You are one of the appraisers, one of the assessors? A I am one of the tax commissioners. We do not go out and interview and inspect every property. It is humanly impossible. I am on the Board. 10

Q So I understood. I also understood one of your duties was to go out and make these assessments? A It is humanly impossible.

Q Every assessment in the City of Newark is made by your Board? A Made by our Board. Over—supervisors over thirty-five or forty clerks. It is impossible—(interrupted). 20

The Court: Stop.

Q Your Board fixes the rate of assessment per front foot in the City of Newark, doesn't it? A Yes, sir.

Q When you made up your valuation of the triangle that was left, you knew, did you not, at what this property had been assessed by your Board? A Yes, sir. 30

Cross examination by Mr. Bilder.

Q What was the rate per square foot that you fixed for the third floor of that building? A Seventy-five cents.

Q And the fourth floor? A Fifty cents.

Q Are you familiar with the McDonald premises, the basement the first floor and second floor? A Yes, sir.

40

Q When were you last there? A I think that was in 1924. Around through January or February, 1924.

Q Did you observe whether or not there was an elevator running from the basement? A I did. I testified to it.

Q To the second floor? A I did, I testified
10 to that.

Q Does the fact that there was an elevator there add any particular value—or rental value to those premises—did that affect the rental value? A That made an increase in the second floor. Otherwise my opinion of the second floor would have been a dollar and a half a square foot. I allowed fifty cents a square foot by reason that you had access by elevator other than the stairway.

20 Q Now, did it not increase the value also of the store floor because of the fact that it added area easily accessible to the unit or entity that existed there? A I don't think so, public elevator, or store elevator—store elevator. I don't think so. It was in the rear of the store.

Q If you were valuing—you put this value at $19,500, as I understand it? A $19,300; $10,-500 and $8,800.

30 The Court: How do they get access to the third and fourth floors?

The Witness: Washington street by stairs. Have to climb up.

The Court: No elevator there?

The Witness: No elevator, your Honor.

Q Now, the store floor, I understood you to say, was where the big value was on Market street? A The first floor is always the big
40 value on Market street or any other.

Q And you only reached $500 on that? A $500 a front foot.

Q How did you arrive at that? A That is my opinion of what it was worth.

Q What mathematical computation did you make to arrive at $500 per front foot for the 21 feet? A I used the knowledge I had of other leases that were in existence and the price that I had offered for the adjoining store which Miller occupied.

10

Q Did you in figuring the value of the second floor take into consideration that the second floor had windows which faced the Bamberger store for a distance of approximately 90 feet? A They have windows all the way up. The entire building has windows on Washington street.

Q But did you take those windows into consideration—these particular windows on the second floor—did they enter into your computations? A I took those into consideration when I was arriving at the two dollars a square foot.

20

Q Was there an elevator running to the third and fourth floors? A There were no elevators running to the third and fourth floors.

Q In your opinion wasn't the fact that there was that exposure of approximately 98 feet of space coupled with the ground floor entrance on Market street and the basement—didn't that increase that value beyond the sum that you mentioned? A If it hadn't been for the elevator from the first to the second floor, my opinion of that floor would have been at a dollar and a half a square foot. I allowed fifty cents a square foot taking into consideration that the patrons of the store could enter the store and get to the second floor without any physical effort.

30

40

Q You only added fifty cents on account of the elevator? A Yes, sir, to the second floor.

Q Now, was there any difference in value a year before—a year prior to September 15, 1925? A No difference in my opinion.

Q Wasn't there an increase in population
10 generally within that period—within a year? A There is no way of determining that. We believe there is, but we do not know.

Q As tax assessor didn't you increase valuations at the end of 1925 as compared with 1924? A Yes, sir; we increase them every year.

Q Why? A Well, because property has become more valuable. There is a general speculation in all big cities now, and as tax assessors we are supposed to follow up the increase in
20 valuation with increased ratables.

Q You want us to understand that you increase valuations not because the property was more valuable, but because the City needed the money? A I did not say it.

The Court: You are incorporating my question into the record and it is not there.

Mr. Bilder: I thought he acquiesced in
30 your Honor's question.

The Court: The reporter did not put that in. He is instructed not to put in side remarks.

Q Did you ever examine the lease the rental value of which you have testified to? I am talking now with regard to the McDonald lease? A I knew of it, the McDonald lease?

Q Yes. A No, I did not. I thought you
40 meant the original lease on the property.

Q Do you know whether if the second floor had been devoted to ladies wearing apparal, cloaks and suits, that the premises might have been worth more than $2 a square foot as you put it? A I don't think it would.

Q What were the premises worth for office space? A Why, it wasn't worth more than $1.50 a square foot for office space. You would have to divide it up into offices which would entail an expense and I don't believe you could get over $1.50 for it. 10

Q Did its increase in assessed valuation have any tendency to increase the rental value of the property? A Not necessarily.

Cross examination by Mr. Horner.

Q In your opinion what was the value of the radio store lease for the four and a half years from October 1, 1925? A I have given that. I have testified to that. 20

Q Would you mind stating?

Mr. Egner: $3,000.

Q Do you think there was any increase in the value of Liggett's property from 1922 to 1924? A In the property? 30

Q Increase in the rental value? A Not in the rental value.

Q Wasn't it your opinion when you increased the assessed valuation of the property that you also thought there was an actual increase in the valuation of the property? A Value of property and rental value is two different things.

Q As a general rule doesn't the rental value follow increase in valuation? A Not necessarily. 40

The Court: Follows increase in taxes?

The Witness: At times it does. You assess a vacant piece of property, there is no rental from that and yet it gets its increase.

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10 HENRY S. PUDER, sworn.

Direct examination by Mr. Hannoch.

Q You are a certified accountant and a member of the firm of Puder & Puder? A Yes, sir.

Q Your firm acts as auditors for the Surety Realty Company? A Yes, sir.

Q And keep and make regular audits of their books? A Yes, sir.

20 Q Have you, at my request, prepared a schedule in which you set forth the actual rents which the Surety Realty Company were getting from the property at the corner of Market and Washington street in October, 1925? A Yes, sir.

Q And have set them forth in that schedule? A Yes, sir.

Q Have you also prepared in that schedule the total amount of rent which would be collected

30 by the Surety Realty Company from October 25, 1925, for the balance of their lease, assuming that they received the same amount of rent throughout the entire term? A That is right.

Q You got that on that schedule? A Yes, sir.

Q Have you also prepared a statement setting forth the cost to the Surety Realty Company for carrying this property? A Yes, sir.

Q For how many years? A For four years preceding January 1st, 1925.

40

Q 1921, '22, '23 and '24? A That is right.

Q And those carrying charges consisting of what? A Repairs, but not including improvements, insurance, janitor salaries, miscellaneous general expense, light and coal.

Q And you have also averaged that for the four years? A Yes, sir; have taken those expenses for four years and divided it by four. 10

Q What do they average a year? A $2,063-.82.

Q In addition to that they pay the rent to the Burne Estate $19,000 a year? A That is right.

Q Have you on your last schedule recapitulated all those figures for the balance of the term? A We have.

Mr. Hannoch: I offer the schedule in evidence. 20

(Paper marked Exhibit Surety—4.)

The Court: That schedule was made up from entries in the books that have been offered in evidence?

The Witness: That is right.

Cross examination by Mr. Egner.

Q Are these figures of disbursements given on Exhibit Surety-4 the same figures contained in the corporation income tax return? A Only so far as the items of expense and maintenance of the property are concerned, yes, sir. 30

Q What other deductions were made in the income tax return other than shown here? A Interest on borrowed money, which is administrating expense, nothing to do with the property.

The Court: Speak out louder.

The Witness: Interest on borrowed money. 40

Q Anything else? A There was administrative office salary charged to the corporation for handling the corporate matters which had nothing to do with the maintenance of the property.

Q How much did you charge each year for
10 that, Mr. Puder?

The Court: The corporation was confined in its operations to this one building?

Mr. Egner: It had nothing else.

The Witness: In 1921, $2,080 were charged as officers' salaries to Mr. Louis Lamm.

Q $2,080? A $2,080; 1922 the same amount; 1923 the same amount; 1924, $1,000; 1925 there
20 was no salary charged except to another officer, $500.

Q $500 to another officer in 1925? A Yes, sir.

Q Now, what other deductions, if any were made in addition to this item of interest on borrowed money and the administrative expenses you have just referred to? A Income tax provision for reserve on depreciation on leaseholds.

30

The Court: Why was there a deduction from two thousand to one thousand made in 1924?

The Witness: Based upon resolution of the Board of Directors, over which I have no control whatsoever.

Q At any rate, that was for administrative expense. Upon what figure was the deduction, we will say, for depreciation in value of lease-
40 holds? A Yes, sir.

Q Upon what basic figure was that carried on the books? A That was valuation given for— the cash consideration for the transfer, I believe, from one corporation to this corporation for which we could secure, under the income tax regulation, that portion as a deduction on the income tax return. In other words it is not a—it is the valuation insofar as we could secure—(interrupted).

10

The Court: What?

The Witness:: It is a valuation only insofar as we could secure, under the regulation from the Treasury Department rulings, on write-offs on leaseholds.

Q That is the write-off being designed to write off the value of the lease during the term of years coincident with the duration of the lease. A Based on the life of the lease.

20

Q Now I ask you what valuation the lease was carried at in your books?

Mr. Hannoch: I object.

The Court: Objection overruled.

A Represented the same valuation apparently—(interrupted).

30

Q I ask you for the figures, Mr. Puder. A Pardon me. $30,000.

The Court: What is that?

The Witness: $30,000. That is the valuation on the books.

Q And what percentage was taken off each year to cover a year's depreciation? A The amount—(interrupted).

40

Q Can you give it to us in terms of percentage? A I don't think so. It is based upon the life of the lease.

Q Will you give each year beginning 1921, how much was taken off in the income tax return for that item? A $1,764.71 each year.

10 Q Same amount each year? A Yes, sir.

Q Now I notice in Exhibit B that you have given an item entitled "Repairs not including improvements." Were any sums actually expended in each of those years for improvements? A There was in 1923.

Q Anything in 1921, Mr. Puder? I would like, if you can, to have you give, during each year the amount spent in improvements distinguished from repairs. A I found nothing in 1921, nothing in 1922; in 1923 there was $962
20 spent for some improvements, a wall built by a contractor; nothing in 1924 or 1925.

Q So that during the five years in question the only amount spent for improvements was $962 in 1923? A Apparently.

Q Now, are there any other disbursements shown on the books attributable to these premises other than those that you have already mentioned? A No, there are not.

30 *Re-direct examination* by Mr. Hannoch.

Q Who is the stockholder of this Surety Realty Company? A Louis Kamm.

Q The only party in interest. What is the title of your account in which the $30,000 has been referred to? A Leaseholds.

Q What is the $30,000 the result of, do you know? A Represents the valuation as of March 1st, 1913, of the leasehold at that point.

40 Q In 1913, $30,000. A Yes, sir.

Q That same figure has been carried along since March 1st, 1913? A Absolutely.

Q And the March 1st, 1913, what significance has that?

The Court: It was reduced year after year from 1913?

10

The Witness: It was reduced from the time the income tax regulation was started in 1917 and it is put in a separate reserve account.

Q What is the significance of the date, March 1, 1913? A That is the date the Revenue Department allowed as the bases of securing the valuation of intangible assets.

Q Profits and losses are determined under the income tax of the property owned prior to 1913 by its value as of March 1st, 1913, and the profit and loss resulting from the sale subsequent to that date? A Yes, sir.

20

Re-cross examination.

Q That figure, $30,000, reduced each year by the rent, in the income tax return? A It was put in the reserve accounts, which automatically work the same way.

30

Q I understand, Mr. Puder, that as of March 1st, 1913, the value of this lease was entered on the books as $30,000. A That is right.

Q And in every year it has been so permitted under the regulations of the Income Tax Department, that you have deducted a certain amount because of the decreased value of that lease? A That is right.

Q And that amount has been entered into a reserve account? A Right.

40

Q And balancing the reserve account against the leasehold account the effect has been to decrease on the books of the company each year the value of the lease? A That is right.

Q Now looking at the reserve account as of the last entry therein will you tell us how much has been put in that account for this purpose? A The reserve was first started in 1919 and there has been accumulated reserve to January 1st, 1926, in the amount of $14,117.68.

Q So that if you were asked to tell us at how much the lease was now carried on the books of the company, your answer would be $15,883, would it not? A Difference between $30,000 and this reserve.

Q Which is $15,883? A $882.32.

Q What was it carried at as of October 1st, 1925? A The reserve is only set up once a year.

Q What was the condition as of that date? A The reserve at that time was set up for January 1st, 1925, and showed a credit balance of $12,352.97.

Q From what did you make the figure $30,000—from what information? A Valuation.

Q Who put the valuation on it? A By Mr. Kamm as of March 1st, 1913.

Q That was his value of that lease to him? A As of that date.

Q And the balance of value shown on the book as of October, 1925, was $17,647.03, is that right? A Representing the book balance—leasehold balance.

The Court: Tell me, at that rate, what would be the value of this lease on the first day of March, 1930? I want to get your method.

The Witness: Well, it would be—(interrupted).

The Court: Just a fractional value?

The Witness: It would almost automatically wipe itself out.

Mr. Hannoch: We rest, with the exception of reserving the right to call Mr. Berry for the purpose of proving what Dr. Cook considered the property worth subject to our lease. 10

SURETY REALTY COMPANY RESTS.

EDWARD J. MAIER, sworn.

Direct examination by Mr. Horner. 20

Q Mr. Maier, you are a real estate man in the City of Newark? A Yes, sir.

Q And how long have you been in the real estate business? A Nineteen years.

Q And in the course of your dealing in real estate have you had occasion to rent personally properties in the center section of Newark? A I have. That has been my entire business during that time. 30

Q Are you acquainted or familiar with the property known as Liggett's store that was at the corner of Washington and Market street? A Yes, sir.

Q Do you know the size of that building that they occupied there? A Yes, sir; I do.

Q Do you know that they occupied the first floor and basement of that building? A I do.

Q From your knowledge of values—rental values, what would you say would be the value of 40

the lease on that property for four and a half years beginning October 1st, 1925? A I didn't figure the value that way. I was asked simply to put it on a yearly basis. I put it on the yearly basis of $26,400.

10 *Cross examination* by Mr. Egner.

Q How did you arrive at that figure? A I arrived at that figure by taking rentals that had been made in the vicinity and arriving at a basic front foot value—rental value.

Q What basic front foot value did you arrive at? A $1,200 a foot. Basic value of $800 a foot, but the corner—adding 50 per cent. for the corner.

Q In other words, you based your figure of 20 $26,400 on a front foot valuation of $1,200? A Of $800 on Market street, adding 50 per cent. for the corner of Washington.

Q $1,200 for this particular store? A Twelve for that particular store, yes, sir.

Q And you say you base that on your knowledge of rent reserves in other leases in the neighborhood? A Yes, sir.

Q What was that lease you had in mind? A I had in mind lease at 75 Market street, building 30 consisting of store, basement, second, third and fourth floors.

Q Who is the owner of that property? A That is the Kirch-Harrison to the Robinson Company.

Q What was the date of that lease? A The date of that lease is October 1, 1924.

Q Is that for the entire building? A That is for the entire building.

Q What are the dimensions of the building? 40 A Why, the building—the plot is 21 by 193.

Q Is the building on the entire plot? A Covers a good part of the plot, yes, sir.

Q Doesn't it cover the whole plot? A Yes, sir; it does cover the whole plot.

Q And has frontage on Campbell Place? A Yes, sir.

Q How many stories is the building? A Four stories. 10

Q Modern construction? A No, I wouldn't call it modern construction.

Q How old is the building? A I suppose that building is fifteen or twenty years old.

Q Fifteen to twenty, eh? Now, what rent is reserved in that lease? A $12,000 a year net.

Q $12,000 a year net. Now, what does that figure per front foot for the whole building? A The taxes on the building would be about $4,400.

Q That would make a gross rental of about 20 $16,000? A Plus taxes, plus insurance.

The Court: $17,000?

The Witness: Plus insurance and maintenance and heat.

Q Are those sums paid by the tenants? A Those sums are paid by the tenants; yes, sir. I figure that brings the tenants' rental up to over $20,000 a year. 30

The Court: You do not count heat in the rental, do you?

The Witness: We do, because the other lease provides for heating.

Q That is, Liggett's provides for the heat? A Yes, sir.

Q Now, just give me the items in your estimate of $18,000 a year. $12,000 for rent? A $12,000 for rent. 40

Q How much for taxes? A $4,400 was the last year we had a record of. Of course that will probably increase as we go along.

Q What else did you put in? A We put in heat.

Q How much for heat? A Well, I just estimated the heat and maintenance and insurance roughly as about $4,000.

Q Well, now give us the net estimate here now of how much of that $4,000 was for heat. A Well, we will say $2,000—about $1,800.

Q $1,800 for coal? A Yes, sir. This is a four-story building.

Q For coal? A Yes, sir.

Q And how much for insurance? A $500–$600.

Q All right. And what is the other item? A Maintenance.

Q What do you mean by "maintenance"? A Repairs to the building, and so forth, keeping the place in order.

Q How much? A $1,500.

The Court: A year?

The Witness: Yes, sir.

Q And anything else? A No, that is all.

The Court: How did you come to put $1,500 for maintenance—what items?

The Witness: You have a large building here.

The Court: To do what with the $1,500?

The Witness: Why, to keep the building in repair, any part of the building.

The Court: What, painting, carpentering?

The Witness: Anything, yes sir. Here is a lease that has ten years to run. It may need new flooring. There is a lot of things.

The Court: You put in $1,500 a year; ten years; that is $15,000. What is that used for, as you view it, in making up the estimate?

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The Witness: It may be needed for changing a show window, almost anything. In the course of ten years, to keep a building up to date in a shopping district, you may have to rebuild your show windows, you may have to change your doors—may have to do a number of things.

The Court: They are not normal repairs?

The Witness: They are not normal, but they are necessary in the maintenance of a building of that type.

20

Q And for all these things you figure a base rate of a thousand dollars, approximately, a foot, don't you? A Yes, sir.

Q And that is for a four-story building? A Yes, sir.

Q 193 feet deep? A Yes, sir.

Q Now, how much do you figure as a real estate expert it would take to heat the Liggett store and basement per annum?

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The Court: $2,000.

The Witness: No; this is another property entirely. I do not want to give a wrong impression. I am giving an estimate here of a four-story building. I would say probably three to four hundred dollars a year—four hundred dollars a year, possibly.

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Q Four hundred dollars a year. And what would you say the average cost of maintenance of the same store would be per year? A I don't know. Figures of that kind are speculative entirely. I would not build up my rental value of this property by any figure such as you are calling for now. This maintenance charge, for instance, is one which has to do with the entire building. It could be divided up, but it can't be done by me here in this way because figures of that kind wouldn't be—that would be misleading.

Q In the Liggett store the entire Washington street front was a show window, wasn't it? A Yes, indeed. It would be a whole lot to change those show windows every year for ten years.

Q You say the lease was dated October 1, 1925, 75 Market street? A October 1, 1924.

Q How many years did it have to run? A Ten years.

Q The same rental? A Yes, sir.

Q That lease was made, was it not, after it had become public knowledge that the city was going through with the improvement of Washington street? A I guess it was, but I didn't believe the property would be affected by that.

Q Why not? A To any great extent.

Q Why not? A Because west of Washington street—it might be slightly affected, but not so very materially. This property is quite a little bit west of Washington street, and is not so much affected by Washington street.

Q The widening of Washington street is going to bring a great many more people in that neighborhood; isn't that so? A I don't believe so.

The Court: Make room for more.

The Witness: Yes, sir; it will make room for those there now possibly, but nothing about that particular improvement right there that would bring any more people there.

Q Have you read in the paper that the Public Service is going to run more trolley lines along Washington street now and more lines along Market street? A Yes, sir; I hear a lot of these things. 10

Q That is going to bring more people there? A Why, I am not considering that in my estimates of these properties.

The Court: That is not the question. Nobody asked you what you were considering. Answer the question. 20

Q I am asking you whether that will bring more people there? A It probably will.

Q And the more people in the neighborhood the higher the rental values are, aren't they? A Exactly.

Q Now, what other lease did you have in mind in arriving at your base rental of $1,200 a front foot for the Liggett store? A Had a lease at 63 Market street. 30

Q Give us the particulars of that lease. What is the date? A Lease from Union Building Company to the F. & M. Grant stores.

Q What is the date of the lease? A Date of the lease is August 13, 1924.

Q And runs until when? A It expires August 30, 1944.

Q August, 1944? A Yes, sir.

Q What is the rental? A The rental is $15,000 a year net for ten years and $16,500 for 40

ten, with ten per cent. additional added for the cost of the additional building that was to be erected on the rear end of the premises.

Q What kind of a building is that, the size of it? A Why, the building is 28 by 123.

Q How many stories? A That is three stories.

10

Q This lease includes the entire building? A Yes, sir.

Q Did you have any others in mind? A Building at 140 Market street.

Q Give us the particulars of that. A Store and basement leased from February 29, 1924.

Q For how long? A For ten years. That is, the lease was dated February 29, 1924, beginning May 25, 1924.

Q Ten years? A Ten years.

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Q What rental? A Rental of $11,000 for six years and $12,000 for three additional years.

Q What are the dimensions of the store and basement? A 18—17 by 85.

Q That store is very much nearer Broad and Market street, isn't it? A Yes, sir.

Q It is opposite the Bamberger store. It is on the first block, namely, block between Broad and Halsey street; is that right? A No, it is on the block between—yes, Broad and Halsey—

30

no, Halsey and—let's see. Wait a minute. This is west of Halsey street.

Q What number? A 140. Between Halsey and Market.

Q It is on the first block, between Broad and Halsey? A Yes, sir, between Broad and Halsey.

Q Now, in fixing that rental value of the Liggett store, you fixed it for a lease of how many years? A I figured—fixed it for a term of the

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Liggett lease.

Q Four and a half years? A Four and a half years.

Q And in fixing that valuation did you take into account the provisions of the Liggett lease, or did you assume an unqualified tenancy? A I assumed an unqualified tenancy in that.

Q So that you are not prepared now to tell us how much you would reduce from that figure because of the special conditions and covenants of the Liggett lease? A No; I am not. 10

JULIUS H. C. FOGG, sworn.

Direct examination by Mr. Horner.

Q You are associated with the Liggett Company, Mr. Fogg? A I am. 20

Q In what capacity? A In the Real Estate Department.

Q How long have you been with the Liggett Company? A More than ten years.

Q In the course of your duties with the Liggett Company did you have occasion to look around for a place to replace this store on Washington street? A I did.

Q What investigation did you make and with what result? 30

Mr. Egner: I object.

The Court: Objection overruled.

A You do not give me the exact time you talk about. I made three or four investigations.

Q Confining your efforts to 1924 and 1925, when this condemnation proceeding was going on. A Well, at that time it was a checking up 40

of all previous investigations, which included, as far as I was able, everything in the vicinity; I will say over—within two or three blocks.

Q When was that? A No definite time. It is going on all the time. After once a store is in danger or approaching an expiration we are busy on it all the time.

Q Confine your testimony, please, to this particular store? A All right.

Q Did you make that investigation in 1924 and 1925 when you found this store was to be taken from you? A Yes, sir.

Q And were you able to replace the store? A No.

Q Were you able to find anything in that vicinity which would take its place? A No.

Q Did you have any offers made? A Yes, sir.

Q What were those? A There were a great many—no, there were quite a number of offers—make them verbally—I have a few on record here in my correspondence. They do not comprise the whole.

Q Just let us have some that is in the vicinity of this store.

Mr. Egner: I object.

The Court: Objection overruled. It may have some bearing. I do not think it has very much. It may have some.

The Witness: Well, I was offered one in 1924. In the correspondence I have I find only two letters. Most of our work isn't done by letters.

Q What were the offers which were made to you for stores in this locality? What places and

at what prices? A The only two I have are the two—(interrupted).

The Court: Contained in letters?

The Witness: The only two I have on record are here.

The Court: You may refer to those. 10

The Witness: One of them was number 82 Market street—no, excuse me—that is in 1925. 102 Market street, July 8, 1924.

Q And what is the size of that building? A Frontage of 16½ feet.

Q Of what depth? A By 100.

Q And at what offer? A $11,250 to $11,750, graded over a period of nine years.

Q Was that net? A No, that is gross, but carries with it a bonus of $7,500 for the lease. 20

Q You mean you had to buy the lease from someone else? A Yes, sir.

Q That is on the opposite side of the street from the present store? A Yes, sir.

Q What other? A And $800 a front foot, as I figured it.

Q Now what other offer did you have?

The Court: 102 is a corner? 30

The Witness: I should say not, Judge; I do not remember. No; it isn't a corner. 116 was offered in June, 1924, 21 by 100.

Q 116? A Yes, sir.

The Court: Corner?

The Witness: I should say not, sir. These are across the street.

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Q What size? A 21 by 100, offer of $16,800 a front foot.

Q $16,000? A Yes, sir.

Q For how long? A There is no stated time.

Q Do you recall how long? A Those are always matters of negotiation and I wasn't interested so I didn't find that out.

Q For a term of years; Liggetts don't rent for one year. A No; stores are offered for three years or thirty years, and we have to negotiate them the way we want. I didn't want this store so I didn't—(interrupted).

Q You didn't carry the negotiations any further? A No.

Q Now, did you have any others? A That is all I have got a record of. There were many others. At least there was conversation all the time.

The Court: Do you recall?

The Witness: No, sir.

Q Do you recall whether you had any in 1925? A I have some letters, yes, sir.

Q Well, were those offers for stores? A The same, yes, sir.

Q What were those? A Here is one, 97-9. Unless an offer is good for something we forget it.

Q After you moved in October had you located in the immediate locality? A We have become located—we have another one near Broad street.

The Court : What became of this store, the operation of this store at Washington street—out of existence?

The Witness: I assume so, unless you assume this one down here takes the place of it.

The Court: Where is the one, on Broad street?

The Witness: In the low Prudential Building. 10

The Court: When did you go there?

The Witness: We are not there.

The Court: You are going to take the Petty Store?

The Witness: No, around the corner. We have two in the same building.

The Court: You did not remove your stock from this store to any other store for operation? 20

The Witness: No, sir.

Q What else have you in 1925? A This 97-9 was offered in April, 28th, 1925. That involves a large building, comes out on Washington street by an "L."

The Court: Located on Market?

The Witness: Market, but going around back of this property in question and coming out. 30

Q What number? A 97-9.

Q What was the value there? A It is difficult to answer. I can tell the figures he asked, but it means certain price net with taxes.

Q What did he ask? A He asked $26,000 a year net, taxes, alterations.

The Court: You are not helping me unless you can show the stores are pretty much 40

alike. He has got an "L" here running on another street. I don't know as your present investigation is going to help me anyhow.

Q What kind of a building was that? A It is an old building; building that had to be remodeled a good deal; I figured it—

Q How many feet frontage on Market street?

The Court: Do you know what the building was?

The Witness: Oh, sure. He calls it 25 by 106, is the front building.

Q And what was the other building fronting on Washington street? A He says that is 25.9 by 94.

Mr. Egner: I object to this offer.

The Court: He hasn't finished yet. How many stories?

The Witness: Four stories.

Mr. Egner: I object as having absolutely no basis of comparison.

The Witness: This offer is more or less ambiguous although it comes from a nice office. If he means two buildings—if he is offering us two buildings at this price instead of one, the store floor value of the store and basement as I figure it was $1,500 a front foot. It would cost us if we took it.

Q $1,500? A Yes, sir. For my own benefit that is what I figured it would cost.

The Court: That is because you had no use for the upper floors?

The Witness: No. That means the upper floors let to somebody else, but we would have to do it.

Q You mean if he meant one store. Suppose he meant both stores. Are you speaking now— did that mean both stores or one store? A I am assuming that he offered both stores for that price. 10

Q And for both stores it would cost you $1,500 a foot, is that right? A No; it would cost $1,500 a front foot for the first floor and basement on Market street that we would use. If we went through the whole operation, which we would have to do, by the time we pay the tax money, the alteration, let the upper part, heat it, pay the insurance, and everything, get back whatever income we can, and the result is what we would pay for the store floor. 20

Q What would be the net under those circumstances per front foot? A The net to us for front foot, $1,500, that is my basis of comparison all the way along.

Q After counting in your rent? A Yes, sir. That is the only way I can judge any of these prices.

Q After renting the rest of the property? A Yes, sir, the rest of the building. 30

Q Did you have any other? A Yes, sir; here is 93 and 5.

Q And when was that and how large was it? A That was offered in June, 1925. That is store and basement, 26 feet deep by 140.

Q How much? A $19,000 for ten years, $20,000 for eleven years net, bonus of $35,000.

Q Have you figured that in front foot? How much? A $1,200. 40

Q What is the size of it? A It is 26 feet overall. That means about 24 feet of store.

Q How deep? A 140.

Q Is there any other? A Yes, sir; number 82.

Q That is on the other side of the street?
10 A Yes, sir.

Q When was that? A That was in September, 1925.

Adjourned until tomorrow morning at 10:00 A. M.

SECOND DAY.

20

April 15, 1926.

Continuation of hearing pursuant to adjournment, at the place and in the presence of the parties as before.

JULIUS H. C. FOGG, resumes the stand, for further,

30 *Direct examination* by Mr. Horner.

Q Mr. Fogg, when we adjourned last evening we were speaking about 82 Market, which you said was an offer made in September, 1925. What was the size of that building and what was the price? A 26 by 98, two-stories and a basement.

Mr. Egner: You mean by price, the offer?

Mr. Horner: Offer, yes.

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Q What was that offer? A $25,000 net, fifteen years, and $30,000 net fifteen years.

Q What does that figure a front foot for the store? A Well, I figured it about $1,000 a front foot, actual cost of the Liggett's store.

Q And 82 is on which side of the street? A It is on the south side.

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Q And do you consider that as desirable for your purposes as the north side? A No.

Cross examination by Mr. Enger.

Q Mr. Fogg, did you accept any of these offers? A No.

Q Why not? A Didn't like any of them.

Q And you thought the rents were too high, too, didn't you? A Yes, sir.

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ELMON MESERVE, sworn.

Direct examination by Mr. Horner.

Q Mr. Meserve, you are associated with the Liggett Company? A Yes, sir.

Q In what capacity? A Superintendent of Development.

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Q How long have you been with them? A Almost twenty years.

Q Now in your duties as supervisor of development—what are your duties? A Opening and closing stores whereever they may be.

Q How many stores have you opened, Mr. Meserve, in your experience? A Well, more than a hundred.

Q How many did you close? A I would say I have closed more than a hundred.

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Q And in the opening of stores did you have the purchasing of the fixtures that went into those stores? A Yes, sir.

Q In your control? A Yes, sir.

Q And in the closing of them did you also dispose of the fixtures? A Yes, sir.

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The Court: Did you do that with reference to this Market street store?

The Witness: Yes, sir.

Q What was the value of the fixtures in the Market street store, Mr. Meserve, in the summer of 1924? A $16,500 about.

Q And was there any change in that value on October 1, 1925? A No, sir.

Q Now what happened to those fixtures? A Well, there was a certain portion destroyed—we couldn't use—and I should say about $3,500 worth; and then the other portion that I could use was $6,500—about $6,500.

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Mr. Hannoch: Pardon me. I did not quite get that last answer. What was that?

(Testimony read.)

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Q You mean by that last figure, that is the value of those last fixtures which you can use over again in some way by either remodeling or replacement some place? A Yes, sir.

The Court: And then they were of the value of about $6.500?

The Witness: The part we used had a value of about $6,500.

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Q You mean after placing? A Well, they would have to be remodeled.

Q After placement they were worth that, is that what you mean? A What I am trying to say is that the fixtures as I took them out of the store were valued at $6,500. In order to take those fixtures and use them over again I would have to add about $6,500 more in remodeling and refinishing. 10

Q That difference of $6,500 represents the loss in remodeling and the placing in another store? A Yes, sir.

Mr. Egner: I object to the word "loss."

The Court: We are not before a jury.

Q So that your total loss on those fixtures would amount to about how much? A About $10,000. 20

The Court: The same thing would have happened in 1930, wouldn't it, when you got through with your lease?

The Witness: Yes, sir.

Q Was there an entrance to this store on Washington street? A Yes, sir.

Cross examination by Mr. Egner. 30

Q You stated that the value of those fixtures in the summer of 1924 was $16,500. A Yes, sir.

Q How do you arrive at that valuation? A Why, by the amount of fixtures there were in there and the cost of them.

Q Well, was the item of $16,500 the cost of the fixtures? A No, sir.

Q What had these fixtures cost? A Why, I would say in 1912 they cost about $10,000. 40

Q In place? A In place and from then on we, of course, had to improve them.

Q You say in 1912 there was ten thousand dollars worth of fixtures put in? A Yes, sir.

Q And that represented the cost of the fixtures plus the expense of installing them? A
10 No.

The Court: He said "in place."

The Witness: In place.

Q Those fixtures were put in under your first lease, were they not? A Yes, sir.

Q How many fixtures were put in under your second lease? A Well, that is pretty hard to say. What I mean is, continuation and then there was a remodeling of the store. I can't
20 tell you exactly.

Q How much insurance did you carry on these fixtures in the summer of 1924? A I cannot answer that. It is out of my department, sir.

Q Can you find out and let us have that information? A I think we could.

Q You say that in all, $3,500 worth of fixtures were destroyed and that the value of the fixtures you saved was about $6,500. A Yes, sir.

30 Q The item of $6,500 which you referred to for remodeling the fixtures, that consisted of what—doing what? A The $6,500 worth is the fixtures that could be used in another store and remodeling them and refinishing them to fit another location, as it may be.

Re-direct examination by Mr. Horner.

Q What was the cost of removing those fixtures? A About $700.
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Q And would those fixtures decrease in value? A Not for our purpose.

PAULINE PIRONE, sworn.

Direct examination by Mr. Horner. 10

Q Miss Pirone, you are associated with the Liggett Company? A Yes, sir.

Q In what capacity? A Statistician.

Q And in your duties as statistician do you have to do—have charge of the accounts of the different stores of the Liggett Company? A Yes, sir.

Q Did you have charge of the accounts of the Market and Washington street store of this city? A Yes, sir. 20

Q Now, have you with you a tabulation of the income, expense, and so forth of that store? A Yes, sir.

Q Do you know the fact of whether or not the gross income from that store ever reached $150,000, that is, since 1922? A It has never reached that.

Q What does your tabulation show as to the profits on that store for 1924 and 1925? 30

Mr. Egner: I object.

The Court: What do you want to do, show loss or profit?

Mr. Horner: Not as such. I want to show the loss of profit as an item in the value of this lease, which I think we are entitled to show.

The Court: How do you expect to show it?

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Mr. Horner: I think it would be proper to show what we lost and show the actual value of what we had there, the valuation of the leasehold interest, not as a subject of damage but—

The Court: I will let it in. I do not think it will play any part at all, but I will let you get your whole case in.

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Q Will you just give me that information, what the profits were for 1924 and 1925? A 1924, for the year, $5,306.

Q And up to October 1, 1925, when we were dispossessed? A $3,209.

(No cross examination.)

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Mr. Horner: I am expecting two other witnesses and I would like to reserve the right to put them on when they come.

The Court: Now, the McDonald.

EDWARD J. MAIER, recalled.

Direct examination by Mr. Bilder.

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Q You are the same Mr. Maier who was on the stand here testifying in the Liggett case? A Yes, sir.

Q You have become acquainted with the property at the northwest corner of Market and Washington streets, have you? A I have.

Q I refer you to the part of the premises occupied by the McDonald Company. You are familiar with that part of the premises? A Yes, sir.

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Q By R. E. McDonald, Inc.? A Yes, sir.

Q And you know that that consisted of store floor 21 by 85? A Yes, sir.

Q And the basement of 21 by 85? A Yes, sir.

Q And the second floor covering the entire— A 44 by 98.

Q The size of the entire plot. Now, have you formed an opinion as to the rental value of those premises as of the 20th day of May, 1924? A I have. 10

Mr. Bilder: That, if your Honor please, is the date when the Commissioners filed their map and under the authorities the date of valuation. I will give both dates.

The Court: Has there been any variation in the valuation between the date of the filing of the ordinance and the filing of the Commissioner's report? Is there any claim by anybody? 20

Mr. Bilder: I have found that there is a difference and that is the reason I am obliged to present it.

The Court: All right. Any other claimant claim the same thing? It might entail the bringing back of the witnesses. 30

Mr. Hannoch: We have taken a position as of October 1, 1925, in our proof. I understood that was the date at which it was to be taken, because, irrespective of whether values were given in the condemnation suit as of 1924, nevertheless the tenants had been in actual enjoyment of the property up until October, 1925, and that is the reason I proved mine to October, 1925. If there was any change theoretically we had enjoyed 40

it up to that time and could not get it over again.

The Court: It is the value of the property at the time you were deprived of it.

Mr. Egner: My information is from our experts that there has been no change in the
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value of the property between these respective dates, or the value of the leasehold.

Q What, in your opinion, is the rental value of those premises as of May 20, 1924? Total. A Total rental value without subdividing it?

Q Yes. A $34,176.50.

Q Per annum? A Yes, sir.

Q Now referring to the store floor, what is your separate valuation for that? I mean, how did you arrive at those figures? A I based
20
it upon a valuation in 1920 of $700 per front foot; 21 feet at $700 per foot, $14,700.

The Court: In 1920?

The Witness: On May 20, 1924.

Q Now, with regard to the basement? A With regard to the basement, 21 by 85, containing 1,785 square feet, at two and a half per
30
square foot, $4,462.50.

The Court: The basement used for what purpose?

The Witness: For merchandising, in conjunction with the main floor store.

The Court: Can the basement be used separate from the store?

The Witness: No; it has no street entrance, only a store entrance—forms part of
40
the store.

Q With regard to the second floor, or the floor above the store, what is your valuation as to that? A The dimensions of that are approximately 44 by 98, having 3,312 square feet at $3.25 a foot.

Q Makes a total of how much? A $15,014, covering the entire premises over the Liggett store. They had the entire second floor. 10

Q Now did you form an opinion with regard to the valuation of the same premises—the rental value of the premises now as of September 1st or October 1, 1925? A The store, 21 by 85, at $800 per front foot, $16,800; the basement, 21 by 85, 1,785 square feet at $2.75, $4,908.75; the second floor, 4,312 square feet at $4.00, $17,-248, making a total of $38,956.75.

Q Now, you are familiar with the terms of the lease? A I am. 20

Q You know that. In making those valuations did you take into consideration that there was a clause in the lease against assignment or subletting except to a boot and shoe store and for cloaks, suits—ladies' wear—you took that into consideration? A Yes, sir.

Q Did you also take into consideration that there was a provision in the lease that the landlord might upon nine months' notice cancel the lease upon paying $25,000, the lease to run without cancellation until October 1, 1926? Did you take that into consideration? A I took that into consideration. 30

Q Now, then, will you tell us what you took into consideration in forming that opinion? A With relation to the covenants of the lease?

Q No; I mean with regard to the valuation? A With regard to the valuation I took into consideration with relation to the store floor—I 40

made my valuation there $700 a foot, and testified yesterday how I arrived at my conclusion on that. Now I am speaking of May 20—and $800 on the other.

Q Yes. A And the figures were arrived at on the same basis. With relation to the basement

10 are—I figured that there being an elevator connecting the premises, the second floor, the basement and the store floor, brought the three parcels in contact so as to become a single unit, the basement thereby offering the advantage of a display store entrance and being used for merchandising purposes.

The Court: Did they sell in the cellar?

The Witness: Yes, sir.

20 The Court: Did they sell goods in the cellar?

The Witness: They did, as far as I know.

Mr. Egner: Do you know?

The Witness: I was told that they did.

Mr. Bilder: That is the assumption.

The Court: I do not want any false assumptions.

The Witness: I took that into considera-

30 tion, that they did use it for merchandising.

The Court: You understood that?

The Witness: I understood that. I was told that was so.

The Court. You do not know?

The Witness: I was not there, no. I took into consideration that the second floor had a rather unique position, inasmuch as it was directly opposite the Bamberger store having a display of show windows on the second

40 floor of 44 feet on Market street and ap-

proximately 98 feet, or over 90 feet on Washington street, making it in full view from both sides of Market street in a heavy shopping district, so that in that respect the property was—stood in a class by itself and not comparable with other property on that particular block on Market street, on account of the display which it had on this great broad side, which could be used for advertising.

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Now, with relation to the McDonald use of it, it is very apparent from the photographs that we have here that that second floor not only gave McDonald a display there, but it brought his store floor which was on Market street and not on Washington street—it brought them out to the view of the people who were doing shopping at Bamberger's corner and made it practically the same as the Bamberger corner, with relation to its exposure and so on, so that that second floor had a specific and unique value that was not comparable with other properties in the immediate neighborhood, with relation to its use.

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Q Now, with regard to the permanence of this corner, its location and visibility. Have you anything to say with regard to that? A Well, it is very evident—you can see that the corner is in full view from—coming through either Washington street or Market street—that the Bamberger store on Market street is really the center of activity there. There are really only two corners, and one other corner that is comparable with that. If you go to the other side of the street the traffic isn't as heavy by any means,

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and on this side of the street the only other corner would be the corner of Halsey—northeast corner of Halsey and Market.

Q Did you take into consideration that Bamberger sells shoes? A Yes, sir. That is a great feature. The idea is to have a location opposite
10 a department store and become able to sell the same kind of merchandise that the department store sells. That adds to the value of the location.

Q Do you think that the display windows would affect Bamberger's customers? A Exactly. Not necessarily—yes, the customers that would come into Bamberger's store.

Q Was the McDonald premises located in a district which was specially devoted to any par-
20 ticular kind of business? A Women's wear, generally.

Q And how did it compare with Broad street, where similar districts are established, in value and desirability? A Well, it is rather difficult—of course some of the Broad street locations and even some of the Market street locations would be more valuable, that is, locations between Broad street and the Bamberger store would be more valuable than one the other side of it.
30

The Court: What part of Broad street are you comparing now?

The Witness: I am not making a comparison. I was asked the question.

The Court: You said some parts of Broad street.

The Witness: Yes, sir.

The Court: We know some parts of Broad street would be very unfavorable.
40

The Witness: I would say within the same distance.

The Court: From the four corners?

The Witness: Within the same distance from the four corners; and if you go north, of course, the comparison could not be made there, because that would be regarded as— between Market and Hahne's—would be better than this location, although it might not be the same distance from Market street. 10

The Court: You said that was a dry goods neighborhood?

The Witness: Yes, sir.

The Court: Are there dry goods stores in the neighborhood .except Bamberger's?

The Witness: Well, I said ladies' wear and dry goods, yes, sir. 20

The Court: I do not know the difference.

The Witness: Well, yes, sir—no, Bamberger's is sufficient. There is a whole broad side block there.

The Court: I asked you whether there were any others in the neighborhood.

The Witness: Shoe stores on the other side of the street. Of course when we go west—(interrupted). 30

The Court: That is a furniture neighborhood?

The Witness: I regard you are getting entirely out of this district when you go to the west of this.

The Court: The very next store and from then on is—(interrupted).

The Witness: Is the furniture district, yes, sir.

40

Q Can you tell us whether the same considerations influence your opinion with regard to the value September 1st or October 1st, 1925? A Yes, sir; same consideration.

Cross examination by Mr. Egner.

10

Q How long have you been in the real estate business? A Nineteen years.

Q And how many of them have you spent in Newark? A Nineteen years.

Q All the nineteen years? A Yes, sir.

Q Under what name do you trade? A I am trading now under the name of E. J. Maier Corporation. I was for eight years vice-president and secretary of the Louis Schlessinger Corporation, and general manager of the business.

20

The Court: That is a big concern?

The Witness: Yes, sir.

Q How many years has the Bamberger building been in its present location? A Oh, I should say seven or eight years—eight years.

Q Is that as near as you can place it? A I think so.

Q Well, you have known that building during

30 the past twelve years—you have known about the Bamberger store for the past twelve years? A Yes, sir; not in that location though.

Q You say it has been there at least the last seven or eight or nine years. A Yes, sir.

Q All these considerations that you have mentioned arising from the location of the Bamberger store have obtained during the past seven or eight or nine years. A Yes, sir.

Q In giving you the information on which you

40 base your opinion, did the McDonald people tell

you that they got a reduction of rent some three or four years ago on the ground that they were not making any money? A No; they did not.

Q So you did not take that, if it be a fact, into consideration in arriving at your opinion? A No; I based it entirely on the leases, the information concerning this particular lot of leases. 10

Q And I assume that the concrete leases that you had in mind in reaching your opinion on the McDonald property were the same leases you told us about in speaking about the Liggett property? A Yes, sir.

Q In your opinion of the rental value of the McDonald property, and I understand that in the forming of that value you had in mind all the conditions and covenants of the McDonald lease? A Yes, sir. 20

Q You say that that had a greater value on October 1st, 1925, than it had on May 20th, 1924? A Yes, sir.

Q And you say that notwithstanding the fact that it would have been possible under the terms of the McDonald lease to terminate that lease one year after the first day of October, 1925? A By the payment of $25,000., yes, sir; I considered it.

Q Did you think that a business concern would have been willing to take that McDonald property on the 1st of October, 1925, and to pay $38,900 rental for it with the knowledge that they might be required to leave the premises in one year? A My appraisal took into consideration —(interrupted). 30

Q Answer my question. A I took into consideration that they were being indemnified to the extent of $25,000. in the event of their doing that.

40

Q And you think that under those circumstances any corporation or individual who would have taken that property and fitted it up for his business would have been compensated by the payment of $25,000.? A I did not regard it quite that way.

10 Q How did you regard it? A I regarded it as the value of the premises as occupied by McDonald and the conditions of their lease which indemnified them to the extent of $25,000. in the event of a removal being demanded by the owner.

Q So that in your opinion the payment of $25,000. would have amply indemnified a party for being compelled to vacate the premises at the conclusion of one year? A I didn't say that. I wouldn't—I didn't consider it that way. I con-

20 sidered that the rental at which I appraised it had taken into consideration the fact that there was a cancellation clause of $25,000. The question of whether or not that would properly compensate a person—if it didn't, it must be taken into consideration as part of the rental.

Q I want to ask you this question as a real estate expert of nineteen years' experience. Do you want us to believe that it is your opinion that on the 1st of October, 1925, you could have

30 leased these premises to any concern that had to fit it up new for a term of one year on the payment of $38,956.75, with the understanding that at the conclusion of the year the tenant would have been put out on only the sum of $25,000? A No; I do not want to give you that impression.

Q You could not have done it, could you? A I don't believe I could, no.

Q You do not want us to think so, do you? A No.

40

Q When did you see this building last? A Well, before it was torn down. I do not recall when that was.

Q How much of the building did you examine? A Why, I did not examine the building before making this appraisal—that is for the purpose of this appraisal. I have known the building for a long time. 10

Q When were you inside? A I have been inside—the building was gone when I made this appraisal.

Q Your opinion is not based on the actual examination of the inside of the building? A No; it is based upon my knowledge of the building and from photographs which recalled—(interrupted).

Q The pictures that have been offered in evidence here? A Yes, sir; I made this appraisal, I say, after this building was removed. 20

Re-direct examination by Mr. Bilder.

Q Did you take into consideration in the testimony and in the opinion you have given, that the tenant was entitled to nine months' notice prior to the first of October, 1926, of an intention of the owner or landlord to cancel the lease? A I did. 30

Q That if you had rented that for one year—for one year ending October 1st, 1926, that at the expiration of three months the tenant would know whether or not—the first three months—he was going to get a nine months' notice; did you take that into consideration? A Yes, sir; I took that into consideration.

Q The tenant had nine months in which to make his arrangements? A Yes, sir.

40

Q Now, during the nineteen years you have been in business in and around Newark have you observed the increase in the population of the city? A Yes, indeed.

Q Does that increase in population affect the rental value of property? A It certainly does.

10 Q And has that increase in population been such as to increase the rental value of this particular property from year to year? A Of course the population, I suppose, has an affect upon it but locations are affected by local conditions more than they are by increase in population that is more distributed, and, of course from year to year we all know the traffic increases but business changes and shifts from one place to another and the particular location might be affected by the local conditions rather

20 than by the general condition like increased population.

Q Have you noticed whether pedestrian traffic has increased from year to year at this location? A Yes, sir.

Q And does that affect the rental value of the property? A It certainly does, very much.

Q Does that intend to increase its rental value? A Increased traffic.

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ADOLPH A. ROSENBUSH, sworn.

Direct examination by Mr. Bilder.

Q Mr. Rosenbush, are you an officer of the R. E. McDonald, Inc.? A I am.

Q What officer are you? A President.

Q And how long have you been in the wholesale and retail shoe business? A Since 1891.

40

Q Now, have you operated stores similar to the McDonald store in other parts of the United States? A I have.

Q And can you tell me about how many stores you have operated similar to that? A About fifty.

Q At different times? A No, we have them now. 10

Q Chain stores? A Chain stores, yes, sir.

Q Who in 1924 and 1925 owned the capital stock of R. E. McDonald Company? A The Al. A. Rosenbush Company.

Q Now, are you familiar with the McDonald store? A I am.

Q When did you first observe that store—when for the first time did you know of that as a shoe stand? A That dates back to the time that Frazin & Oppenheim owned it. 20

The Court: When?

The Witness: Trace that back to about 1913.

Q Frazin & Oppenheim had established a business there, is that right? A Yes, sir.

Q Then did you buy that Frazin & Oppenheim business at that location? A Frazin & Oppenheim failed in business and we bought the stock and fixtures. 30

Q At that place? A Yes, sir. Newark and also in New York.

Q Do you know what those fixtures in that store cost to install or what the replacement value of the fixtures that you found there in 1914—what they must have cost to install?

Mr. Egner: I object. 40

Mr. Bilder: We are not going to ask what they cost. I am going to show the reasonableness of the value which we are fixing on it.

Mr. Egner: The question did ask what the cost was.

10

Q Can you answer that question, please? What, in your opinion, was the cost of the installation of those fixtures? A $17,000.

The Court: By Frazin & Oppenheim?

The Witness: Yes, sir.

Q At what price did you carry them on your books? A Ten per cent. of that value, $1,700.

20 Q And you carried them on your books on that basis ever since? A Yes, sir.

Mr. Egner: $1,700?

The Witness: $1,700.

Q Now, are you familiar with the fixtures and furnishings in those premises? A I am.

Q Will you look at this memorandum and tell me whether that is a list of what you re-
30 member were the fixtures in that store in May, 1924? A The majority of these were.

Q Now, will you, with that list before you, give us the items of those fixtures? A Matter of shelves?

Q Yes. What were those shelves worth at the premises? A Well, do you desire me to say replacement value on those shelves?

Q Yes. What were they worth if you had to
40 put others in their place?

Mr. Egner: I object to the replacement value.

The Court: Overruled.

A $3,000.

Q What were they worth when taken out?

10

The Court: Assuming this witness is qualified.

Q Have you had anything to do during the years that you have been connected in the operation of these stores with the purchase and installation of the fixtures?

The Court: Fixing up stores.

The Witness: Yes, sir; I have.

20

The Court: In all of them?

The Witness: Not all of them.

The Court: Mostly all?

The Witness: I would say that I supervised about all of them. Carpets.

Q What are they worth taken out? A These carpets—(interrupted).

Q I am talking about the shelving. What were they worth when taken out? A Only as far as the lumber is concerned. In the matter of replacement it would be then a question of replacing these shelves in a different unit, as to the labor and as to the different cuttings that you would have to utilize them.

30

Q As shelving would it have any value? A Only as far as the lumber is concerned.

Q What would you say that it is worth, about?

40

The Court: Have you any experience with lumber? Go on with the examination.

Q Installation of shelving—have you had occasion to supervise the purchase of materials that enter into installation of shelving? A Yes, sir, I have.

10

Q You have acquired knowledge as to value? A Yes, sir.

The Court: He is qualified. Go ahead.

Q What would you say that as lumber it was worth? A All the way from twelve cents to twenty-five cents a foot we pay.

Q There are quite a number of items on this list and I do not want to take the time to go over all of them—what, in your opinion, was the loss which the McDonald Company sustained by the removal of those items?

20

Mr. Egner: I object.

The Court: Objection overruled.

A The replacement value—taking into consideration the items that we could use and the amount of space that they covered in area, taking it upstairs on the first floor, second floor and basement, we figured close to ten thousand dollars.

30

Mr. Bilder: I would like to offer this memorandum in evidence for the purpose of furnishing a list—it is a list of furniture, fixtures and so forth, furnished by the witness.

The Court: And an appraisement as well?

Mr. Bilder: There are figures, but I am not relying upon the figures.

40

The Court: List of what?

The Witness: Fixtures.

Mr. Bilder: It furnishes a list of the fixtures and furniture that the witnesss has referred to in his testimony.

(Paper marked Exhibit McDonald—1.)

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Q Now, after you learned that condemnation proceedings were instituted affecting this property, what efforts did you make to get another location? A We made quite a number of efforts to locate ourselves, and my contract man spent considerable time here with the different agents in Newark, but we hadn't been able to successfully locate ourselves up to the present time.

Q Can you describe some of the efforts which you personally made or participated in in another location? A Well, we endeavored to get a location at number 97 and 99, the Ludlow & Squire Building. We endeavored to get the Ludlow & Squire store and building.

20

Q Where? A Right here on Market street. They were just within three doors of our own premises, but we couldn't negotiate on it, because it was out of line—the price was too prohibitive in order for us to make the proper connection.

30

Q Now, did you have any other negotiations with anyone else for the purpose of getting a location? A Yes, we did.

Q Who? A We had a party by the name of Berla.

Q What was that negotiation? A We negotiated for his lease—store room.

Q Located where? A Located at 101 Market street. We weren't able to negotiate on that. The price was too high.

40

Q What was asked? A The price asked was $21,000 with a $10,000 bonus, and the $21,000 represented a net figure. That would be plus the taxes and other matters.

Q What was asked in connection with the Ludlow & Squire property? A The Ludlow & Squire property, they asked us $20,000 and a $35,000 bonus.

10

Mr. Egner: How much was that, the rent?

The Witness: $20,000 net. There was furthermore—the negotiations on that also was for another building in the Washington street side, and that meant to purchase the building, for which they asked $200,000; and I didn't care about purchasing any property in Newark, particularly being that the real estate had taken such a boom here within the last couple of years that it was just prohibitive for any mercantile business with a single item of merchandise to make the grade, so we had to drop the negotiations as to those terms.

20

Q Did you conduct—did the McDonald Company conduct that business from 1914 down to the time of the condemnation at that location? A I think so.

30

Q Do you know whether or not during the period of twelve years ending with October 1, 1925, the McDonalds made a profit—whether a profit was derived from the operation of that store? A Yes, sir; we made a profit all but the last year.

Q All but when? A Two years—all but this last year or two.

40

Q But during the twelve-year period what was the average profit?

Mr. Egner: I object.

The Court: What was what?

Mr. Bilder: Average profit per annum.

The Court: During when? 10

Mr. Bilder: During the twelve years of operation.

The Witness: About eight per cent.

Q I mean in dollars per annum? I mean the profit derived from the McDonald store. A Showed a total of about eight per cent. on the operation.

Q Well, is that all that was derived from the operation? A That was derived from the sales. 20 That is the profit from the sales plus the profits from Boston.

Q What do you mean by the profits from Boston? A Well, we charge a unit a certain per cent. for our overhead and that is figured with the profit of the respective stores.

Q And can you tell, figuring that profit in, what the profit derived from that store was per annum—an average? A I haven't got the figures here, but I think—(interrupted). 30

Q You rely on your accountant for it? A Yes, sir.

The Court: The Boston and Newark stores together showed a profit of eight per cent. per annum?

The Witness: About eight.

Q Now, were you informed by your accountant as to what the average profit for that store 40

—profit from that store by Al. Rosenbush & Company, the partnership, and R. E. McDonald together, taking into consideration that the Al. A. Rosenbush Company owned all the capital stock of the R. E. McDonald—(interrupted).

10 The Court: You are asking whether he was informed by someone else?

Mr. Bilder: Yes. I want to lay a basis for the opinion as to the value of the good will.

The Witness: The figures are given to me by my comptroller for each respective unit.

Q And what were the figures that were given to you with regard to R. E. McDonald, the aver-
20 age annual profit? A The average—about eight per cent.

Q You cannot mention it in dollars and cents? A No, but we got the figures.

The Court: You cannot tell which of the stores made the profit of the unit.

The Witness: Yes, sir; I am speaking of the R. E. McDonald.

30 The Court: You said Boston and Newark.

The Witness: Boston and Newark—that is the individual store.

The Court: You cannot tell from which store the profit came that made up the eight per cent?

The Witness: Yes, sir.

The Court: Now, do you?

The Witness: Well, I go on record and say definitely it totaled about eight per cent.
40 from that unit.

The Court: From the two stores?

The Witness: From one store, that is R. E. McDonald store, taking in—(interrupted).

The Court: Newark and Boston.

The Witness: But only as far as the shipment is concerned, your Honor. I want to make that clear. We have stores in Frisco—(interrupted). 10

The Court: We do not care about the other stores. We are talking about this unit.

The Witness: That is what I am endeavoring to explain, your Honor.

Q When you mention eight per cent. you limit yourself entirely to the profits which the McDonald books show; is that right? A Yes, sir. 20

Q You do not take into consideration the profits which your firm as the owner of the capital stock made on the operation; is that right? A True; yes, sir.

Q And that the profit which your firm as the owner of the capital stock of that corporation upon the merchandise it furnished to McDonald made an additional profit of how much in percentage, if you know? A Will you read that question? 30

The Court: How much the Holding Company made out of the profits of the McDonald Company?

Mr. Bilder: No. Upon the sale—upon the delivery of merchandise which it furnished to the McDonald Company there was a profit separate and apart from the eight per cent. 40

The Court: That is another thing. That don't belong here at all.

The Witness: I am only talking on the figures of the R. E. McDonald Company as to its capitalization as to what it showed to us in its earnings that reflected an eight per
10 cent. profit.

Q Have you formed any opinion as to the value of the good will of R. E. McDonald on May 20, 1924, and on October 1, 1925?

Mr. Egner: I object.

The Court: Objection overruled. Answer yes or no.

The Witness: Yes.

20

Q Will you state that opinion?

Mr. Egner: I object.

The Court: Objection sustained.

Q Assuming that the testimony of the accountant will show that there was an average profit of $10,000 per annum from the R. E. McDonald store in Newark, what, in your opinion
30 would be the value of the good will of that store on the date that I have mentioned?

Mr. Egner: I object.

The Court: Objection sustained, but I will permit, in view of the statement of counsel that he may desire to take the question to the Court of Appeals, which he says has not passed upon the question that loss of good will is an element of damage, I will
40 permit the witness to answer.

The Witness: In view of the number of years that we are in business—(interrupted).

The Court: Answer the question.

Q What is your opinion as to the value? A Fifty thousand dollars.

Cross examination by Mr. Egner.

Q Mr. Rosenbush, you first took up this location through the purchase of the stock and fixtures of Frazin & Oppenheim who had carried on the shoe business in the same place? A Yes, sir.

Q And they had failed? A Yes, sir.

Q How much of the shelving and other personal property that you included on this list, Exhibit McDonald 1, was in the property when you acquired the assets of Frazin & Oppenheim? A I would say over seventy-five per cent.

Q And you paid for those assets the sum of $1,700, did you not? A Yes, sir.

Q In giving us your estimate that your damage from the removal of those fixtures was about $10,000, you have in mind all of the items of personal property shown on your Exhibit McDonald 1? A Yes, sir.

Q You said on your examination that for the past year or two you had made no profit in this store in Newark? A I did.

Q You had a special sale, did you not, for practically a year before you vacated that building? A Yes, sir.

Q And you advertised extensively the fact that the building was coming down and you were caused to liquidate your stock in that store? A Yes, sir.

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Q Your original leases in this building were short term leases, were they not? A No; they were three and five year leases.

Q Three and five year leases, and do you remember that in the years 1917 and 1918, at your request, the Surety Realty Company reduced
10 your rent some $1,500 in each of those years? A I do not really recall it.

Q Now you do recall—(interrupted). A No; on my word of honor—I am here on honor, so I wouldn't tell you—I should tell facts.

Q Maybe I can refresh your recollection.

The Court: He says he does not remember. Can you establish it?

Mr. Egner: I think he will remember it
20 and save the trouble of calling another witness.

The Court: All right. It was simply a reduction for those years?

Mr. Egner: Yes.

Mr. Bilder: Objected to as incompetent, immaterial and irrelevant.

The Court: Cross examination.

Mr. Bilder: Not cross examination on
30 anything that I brought out.

Q That—does this refresh your recollection on the subject matter of my question (showing witness paper)? A No, not until I read it.

Q Well, read it.

The Court: He doesn't remember. You got another witness who can tell about it in a minute or two.

40 Mr. Egner: Question withdrawn.

The Court: Does the agreement show it?

Mr. Egner: It does.

The Court: If it shows it, put it in.

The Witness: I cannot recall it.

The Court: Put the paper shown to the witness in evidence.

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Mr. Egner: I offer in evidence agreement of July 1, 1917, between the Surety Realty and McDonald.

(Paper marked Exhibit P. 10.)

ALFRED SACHS, sworn.

Direct examination by Mr. Bilder.

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Q Mr. Sachs, are you connected with the Al. A. Rosenbush Company? A I am.

Q Is that a corporation? A It is.

Q Does that own the capital stock of the R. E. McDonald Company? A It does.

Q And you keep the books of account of the Al. A. Rosenbush Company and of the R. E. McDonald Company? A I do.

Q Who keeps them? A They are kept in Boston by our bookkeeping department.

30

Q By the bookkeeping department. Are they under your supervision? A Partially.

Q Do those books contain the accounts of R. E. McDonald, Inc., also? A They do.

Q And have you examined those books for the purpose of preparing a statement with regard to the profits, if any, derived from the conduct of that business by R. E. McDonald and Company? A I have.

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The Court: Newark?

The Witness: Yes.

The Court: Or both?

The Witness: Both Newark and Boston.

The Court: Combined?

The Witness: Combined and separately. They have been considered from both angles, your Honor.

Q I show you that paper and ask you if that is a statement with regard to those profits? A It is.

Q Prepared by you? A Partially by me.

Q Who was it prepared by? A By our bookkeepers in Boston under my supervision.

Q Under your supervision? A Yes, sir. There is a later statement than this.

Q What is that? A There is another statement that you have, I believe, later than this. Possibly I have it in my case over there.

Q You mean typewritten statement? A Yes, sir; typewritten statement. There are some figures in different colored ink. You have it in your file over there, I think. Here it is. I have it.

Q Now does that show the net profit in each year derived from the Liggett store? A No, from the McDonald store.

Q I beg pardon. From the R. E. McDonald store? A R. E. McDonald store; profit or loss as the case may be.

Q Profit or loss. A Yes, sir.

Q Now, beginning with—it begins with 1914, does it? A It does.

Q And ends with what date? A October 27, 1925.

Q Now, can you tell us how those net profits, if profits are shown, were arrived at? A The question is rather general but I can express myself in this way. We took the sales of the retail store, also the gross profits of the retail store, from which were deducted the expenses of the retail store. That gave us a profit and loss amount. Then we took into consideration the purchase account—all shoes purchased—the cost of that merchandise in Boston, which showed the mark for profit in Boston, and subtracted or added, as the case may be, where profit or loss showed, which gave us the net profit of the business. 10

Q And what did you find the net profit for 1914? A $8,482.21.

Q For 1915? 20

Mr. Egner: I object on the ground that the profits have nothing to do with it.

A $9,954.60.

The Court: Objection sustained, but he will be permitted to answer.

A (Continuing.) 1916, $21,156.11; 1917, $26,-863.41; 1918, $27,887.22; 1919, $18,973.28; 1920, $18,310.22; 1921, $6,529.05; 1922, $7,216.63; 1923, $6,159.97; and a loss for 1924 of $6,263.98; and up to the period of closing in 1925, $3,221.22 loss. 30

Mr. Bilder: I offer this statement in evidence.

(Paper marked Exhibit McDonald—2.)

The Court: Upon what capital invested were these profits? 40

The Witness: I cannot tell you offhand. I would have to have my books to show the amount of money we have invested in the corporation, and the stock on hand, of course. I haven't that with me.

10 Q Can you obtain it? A I can. We will have our books over here by noon today.

Q You will have them by this afternoon? A Yes, sir; we will have all the books here.

Q Do you know how these losses—why there was not a net profit for 1924 and for the period of 1925? A I do.

Q Will you state the reason? A When we received word in an unofficial way that the City was to take over the property, we realized that we had a rather large stock on hand—(inter-
20 rupted).

The Court: Because of your closing out?

The Witness: Yes, sir.

The Court: Sacrifice sale of goods.

The Witness: Yes, sir.

The Court: Was advertised?

The Witness: Yes, sir; we did.

30 Q Can you tell us what loss was realized on closing out of the stock while conducting the sale—the sale itself?

Mr. Egner: I object.

Q Does the figure which you have given us of loss show—which you have given us there for 1924 and 1925—show all the loss that was sustained by R. E. McDonald upon its stock? A
40 Only on the stock sold at retail in the store.

When we closed the store we had a stock on hand of $20,323, which we could not dispose of to the public on which we took a further loss, and I have those figures here.

Q How much was the further loss you took on that?

Mr. Egner: I object.

The Court: Objection sustained. The witness will be permitted to answer.

The Witness: $17,884.25.

Q Was there any further loss that you sustained that is not embraced—that R. E. McDonald lost, which is not embraced in the figures you have already given us? A Yes, sir; we sustained a loss in the operation of the business during the closing out sale that was additional to our normal overhead.

Q How much did that amount to? A $11,817.

Q Did you personally make any effort to procure another location for R. E. McDonald, Inc.? A I did.

Q What were those efforts—describe them. A I discussed with several lessors the possibility of our subletting premises from them in order that we might continue in business.

Q Were you successful? A I was unsuccessful.

Q Do you remember any efforts—specific efforts to procure a lease, and if so, with whom? A I remember clearly discussing with Mr. Bergamo, the gentlemen who has the tailor shop on the opposite side of the street from us, the possibility of leasing a portion of his premises.

Q And what was the offer which he made to you? A He made an offer to lease a portion

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of the building to be erected after the City demolished the building on his side of the street—the property for which he held the lease for—providing we would erect a building, which would have compelled us to put forth a large investment of course, and in consideration of which he would
10 lease us the entire premises in the new building for a sum in excess of $60,000.

Q Do you know what that would have made your rent a front foot? A I do not know.

Q You cannot figure that out? A No, I don't know anything about that. It is out of my line entirely.

Q Do you remember any other effort that you made? A Yes, sir; I discussed the possibility of leasing the Williams store, which is about three doors towards the Court House
20 from McDonald.

The Court: West.

The Witness: With the gentleman who held the lease at that time, but whose lease was expiring in a comparatively short period. He in turn referred me to the man holding the lease for a period of years from the Frelinghuysen estate, the owners of that
30 property. I also interviewed—(interrupted).

Q What offer did you get there? A Oh, his proposition. He wanted a figure of $21,000 net providing we paid him a cash bonus of $10,000 a year and made all improvements in the building ourselves.

Q What was the location of the Frelinghuysen property? A I have a blue print there that I gave you. It is on Mr. Kaufman's desk. It will
40 show exactly where it is. It is a small blue

print and will show all these properties. It is three numbers west.

Q That is near enough, three doors west. A Yes, sir.

Q Do you remember the dimensions of that property? A I do not, not without—about 21 or 22 feet, to the best of my knowledge. Nothing unusual about it. I also became familiar with the proposition of the Ludlow & Squire building that was submitted to us by Ludlow & Squire, copy of which I have with me here. 10

Q Will you look and see that? A I have the actual option here from Ludlow & Squire (producing paper).

Q And that was the original offer for the property located at 97-9 Market street, is that right? A That is. 20

Mr. Bilder: I offer that in evidence.
(Paper marked Exhibit McDonald-3.)

Q That was an offer in substance of what? A That agreed to assign the lease—assign or sell the lease they had on the premises 97-99 Market street for the consideration of $125,000 in cash, providing that they received the consent from their landlord to sell or assign said lease; also on premises 239 Washington street. They agreed to enter into a long term lease at six per cent. upon the true market value of said property, the true market value for the next five years to be $200,000, said true market value to be fixed every five years; said rental to be net, tenant to pay all carrying charges. This is an option that held from September 30, 1925, to October 8, 1925, under the Ludlow & Squire corporate seal. 30

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Q Do you remember any other efforts that were made to procure a store? A Yes, sir; we combed—I personally combed every possible clue that I had—available locations at hand in the vicinity.

Q Do you remember any other specific incident where you received an offer? A I tried a restaurant on the other side of the street, opposite us, adjoining the Keith theater, or Proctor's, I believe it is called here.

Q What offer did you receive there? A A sum in excess of $20,000.

Q What space? A A space infinitely smaller than the space we occupied. The proposition was out of reason as far as our interests were concerned. We didn't go into any great detail on it.

Q Have you any recollection of any other offers? A No; that is all.

Q Do you know how much was spent in advertising R. E. McDonald, Inc.?

Mr. Egner: I object.

The Court: Objection sustained.

Q During the period of the occupancy of the McDonald store, which I understand began in 1914, is that right? A Quite right.

Q And ended with October 17, 1925, is that right? A 1914 to 1925, right.

Q Do you know how much was spent for advertising by—(interrupted).

The Court: Do not repeat.

Mr. Bilder: I want to cover the period.

The Court: I have ruled on the subject matter.

Mr. Bilder: May I have the answer for the purpose of the record?

The Court: No.

Q Do you know that by the terms of the lease with the Surety Realty Company a deposit of $7,500 was paid on account of the lease? A It was.

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The Court: Doesn't that appear?

Mr. Bilder: It is in the lease.

The Court: Why ask about it?

Mr. Bilder: I want to call his attention to another fact.

Q Do you know whether that deposit has been repaid?

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Mr. Egner: I object. I don't see how that has anything to do with the division of this fund.

The Court: What is the relevancy?

Mr. Bilder: If there is owing here by the Surety Realty Company—I mean if it appears from the evidence the Surety Realty Company owes us any money, we are entitled now, that the parties have the matter before them, to settle our rights.

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The Court: Objection sustained.

Q Do you know whether the basement in that store was used for selling or not? A A space in the basement was used for selling for the year 1922.

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Cross examination by Mr. Egner.

Q Did the McDonald Company or Mr. Rosenbush have any other stores in Newark? A Yes, sir; we did have other stores in Newark.

Q What other stores in Newark did you have during this period? A We had a store—(interrupted).

10

The Court: Who?

Mr. Bilder: The McDonald Company or Mr. Rosenbush.

The Witness: We had a store in the Wiss Building.

The Court: Who "we"?

The Witness: The Al. A. Rosenbush Company.

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The Court: Why are you going afield now? Stay closer to the issue.

Q Referring to Exhibit McDonald—2, which is statement of profit and loss during a period of years, I notice you refer to Boston profits. What was the course of business between Boston and Newark—in the first place who owned the stock of shoes that were held from time to time at Boston—what company? A Al. A. Rosenbush Company.

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Q And I understand the course of business was that the Rosenbush Company would sell goods at a price to the McDonald Company in Newark? A Yes, sir.

Q And that was the wholesale price? A That was the wholesale price.

The Court: Wholesale price with a profit?

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The Witness: Yes, with the profit.

Q With a profit to the Rosenbush Company? A With profit to the Rosenbush Company; that is right.

Q Do you know how that wholesale price was fixed? Was it the current wholesale market for the goods? A It was a price that was competitive with the price at which an individual retail unit might purchase merchandise were it in the market. 10

Q Elsewhere? A Elsewhere.

Q So that the Rosenbush Company in Boston tried to treat the McDonald Company in Newark just the same as any other manufacturer of shoes would treat it? A Manufacturer—(interrupted).

The Court: As a customer?

The Witness: As a customer; that is right. 20

Q So that your statement here shows the profits of the Newark store are based upon the price paid by the Newark store to the Rosenbush Company and deducting expenses of the marketing of the goods? A That is true.

Q Now, on the basis of that can you tell us how much profit the Newark store made in 1914? A The Newark store made no profit in the year 1914. The Newark store as an individual store showed a loss. 30

Q Of— A $4,765.43.

Q And in the year 1915 the Newark store lost $5,367.01? A The R. E. McDonald store lost that money; yes, sir.

Q And without undertaking to go through the figures for each year, the fact is that the figures shown in red under the caption "Profit and Loss" were the losses sustained by the Newark 40

store as a single unit here in Newark during the years opposite which the figures are placed? A May I trouble you to repeat that question? I did not quite follow you.

The Court: The red figures indicate losses for the store for the years indicated?

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The Witness: Yes, sir; the operation of that store, as their books show.

Q So that according to the books of the McDonald Company covering the period from 1914 to October 7, 1925, inclusive, the McDonald store lost $84,125.82? A Now, just what books do you refer to, Mr. Egner?

Q On the books showing the transactions in the McDonald store.

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The Court: The McDonald store lost that much money—McDonald lost it?

The Witness: Yes, sir; the McDonald store here lost it in its operation.

The Court: But the Al. A. Rosenbush Company made its money out of the losses sustained by—(interrupted).

The Witness: By the McDonald store.

The Court: Probably not just a loss, but the result of the profits was a loss to the McDonald store.

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The Witness: The result of its profits; that is quite right.

Mr. Bilder: The McDonald Corporation, taking into consideration the store is owned, in fact, by Rosenbush.

Mr. Bilder: That is all.

I have one more witness that I will put in a little later. I do not know that it will

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be necessary, but I will reserve the right if I find it necessary. I have one other witness that I will put on now.

BENJAMIN DALSER, sworn.

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Direct examination by Mr. Bilder.

Q What is your occupation? A Contract manager for Al. A. Rosenbush Company.

Q Are you familiar with the store of McDonald? A Yes, sir.

Q And have you been in it many times? A Yes, sir.

Q Familiar with the fixtures contained in the store? A Yes, sir.

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Q Have you had occasion to become familiar with the value of fixtures of that character, furniture and fixtures, and installation? A Yes, sir.

Q How have you become familiar with such values? A From buying them from time to time.

Q During what period? A The last fifteen years.

Q Now, can you give us an opinion as to the value of those fixtures in that store in May, 1924, and in October, 1925, as they stood in the store? A Yes, sir.

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Q Will you give us that opinion? A About $15,000.

Q And how much, if any, loss was there in removing those fixtures, such as could be removed, and such as could not be removed—what was the loss with regard to them? A Your question is not perfectly clear to me.

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Q The McDonald store was closed up on October 17, wasn't it, 1925? A I think about that date.

Q What were those fixtures worth after the McDonald store was closed up and such as were capable of being removed were removed? A About $500.

Q What is that? A About $500.

Q So that your estimated loss is how much? A $14,500.

Q Have you a list of the fixtures there? A Yes, sir.

Q You have it before you? A Approximate figures.

Q I see. Now, did you make any effort to get another location after it became known that the condemnation was to take place? A Yes, sir.

Q What effort did you make? A I tried to retain our location in that same block because of the peculiar position of our identity.

Q Yes. A McDonald was known in that block for ten or twelve years, and to have moved out of that block would probably have disrupted ourselves in so far as our following is concerned. McDonald in that 100 block or in that particular block was an asset. It has a value. People were accustomed to come into the store in that block, and to have gone across the street or into any other block we would have sustained a considerable loss by getting away from the trend of traffic.

Q Did you find another location and start up business again? A I did not—I was not successful.

Q Will you describe some of the offers which you received for space? A Yes, sir.

Q If you received them. A One of them was Ludlow & Squire property—that is two doors west of us.

The Court: We have had all that, haven't we, Mr. Bilder?

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Q You have heard the efforts that were made—(interrupted).

The Court: We have had all that.

Mr. Bilder: I want to see if there are any others that the other witness have not testified to.

Q You have heard the testimony of Mr. Rosenbush and Mr. Sachs with regard to the efforts that they made? A Yes, sir.

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Q Now, were there any efforts that you made that relates to property other than that which they had testified to? A Yes, sir; two more proposals in that same block; I think 73 and 75.

Q What was the space involved there? A The space involved there was about 22 or 23 feet by 190 feet. In fact, through to the next street or alley. The price asked was $20,000 net, we to sustain the carrying charges.

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Q Four-story building? A Yes, sir. We to sustain carrying charges and make whatever physical changes were necessary, adaptable to our purpose.

Q What was that? A $20,000 net.

Q Did you find that suitable or unsuitable for your business? A Unsuitable for our business. I immediately ruled it out because it was prohibitive.

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Q Have you received any other offer than already described here? A Yes, sir; the property adjoining it, six-story building.

Q How much? A Six-story building, approximately the same dimensions in width and depth.

10 Q What was the price offered? A $26,000 net.

Q And did you find that suitable for your business at the price? A Not at the price, no; absolutely prohibitive.

Cross examination by Mr. Egner.

Q How long have you been with McDonald or Mr. Rosenbush? A About ten years.

Q Were you with them when he acquired the 20 assets of Frazin & Oppenheim? A No, sir.

Q And you are not in a position to say whether his estimate of 75 per cent. of the fixtures in the store in October, 1924, and 1925, were there when they purchased from Frazin & Oppenheim? A Yes, sir; they were there.

Q They were there? A I am sure, because I have added to them since.

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LUDWIG O. SCHMIDT, sworn.

Direct examination by Mr. Horner.

Q You are the treasurer of the Liggett Company? A Yes, sir.

Q And have you been attempting to secure a lease on Market street? A I have.

Q To replace your Washington and Market street store? A I have.

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Q Did you finally locate one? A I did.

Q And lease has been made? A Lease was made to take possession May 1st of this year.

Q Where is that store located? A 159 Market street; it is in the Prudential Building.

Q What is the size of 159 Market? A It is by the alley. 10

Q What is the size of that? A Approximately 22 feet front by 65 feet depth, with basement.

Q And at what price did you lease it? A $51,000.

Q For how many years? A Fifteen years.

Cross examination by Mr. Egner.

Q That is within a very few feet of the corner of Broad and Market street, is it not? 20
A That is right.

GEORGE S. SALTER, sworn.

Direct examination by Mr. Horner.

Q You are connected with the Prudential Insurance Company? A I am. 30

Q And what are your duties there? A I am in the mathematical department of the Prudential, whose duties are to make computations in connection with life insurance and interest.

Q Figuring annuities and present values? A Yes, sir.

Q What is the present value—how long have you been doing that?

The Court: What is the present value—(interrupted). 40

Q Of one dollar for a period of four and a half years on a basis of four, five and six per cent.? A Four per cent., $4.04.

The Court: It is a table, isn't it?

The Witness: No; that has to be computed.

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Q All right, Mr. Salter. A Four per cent., $4.04; at five per cent., $3.94; at six per cent., $3.84.

Mr. Horner: Mr. Egner has consented that there be put in evidence as part of our case the cost of improvements made under our new lease of the 8th of June, 1922, which took effect in October 1, 1922, and which is the lease now under consideration, which had four and a half years to go from October 1, 1925. That cost is $1,573.57.

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Mr. Egner: I do not object to this manner of proving it, but I do object to the materiality.

(Harrington and Ace Radio Company.)

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LESTER BLAU, sworn.

Direct examination by Mr. Schwartz.

Q You are in the real estate business in Newark? A Yes, sir.

Q And are familiar with real estate values of property in Washington and Market streets, Newark? A I am.

Q As a matter of fact, you testified on behalf of the Surety Realty Company before the Com-

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missioners in the condemnation proceedings? A I have.

Q You are very well acquainted with this particular property? A Yes, sir; I am.

Q Coming to this property now, are you familiar with the store occupied by the Ace Radio Shop? A I am; yes, sir. 10

Q What would you say in your opinion is the actual rental value of that store on October 1, 1925? A I would give its value at $350 a front foot or $5,250 for 15 feet by 44 feet deep.

Mr. Schwartz: I might say at this time it is not for four and a half years because the lease expires September 15, 1926; that is, our lease with the Surety Realty Company. 20

Q Are you familiar with the store immediately adjoining that store on the north? A Yes, sir, I am.

Q What would be the value—the annual rental value of that store? A $3,000 a year, being 10 by 18. That is $300 a front foot.

Q Now, the third and fourth floor over the McDonald shoe store. What is your value or your opinion of the annual rental value of those 30 two floors? A My value would be for the third floor, 75 cents a square foot or $3,430 a year for 4,840 square feet, and for the fourth floor at 50 cents a foot or $2,420, making a total of $5,850.

Q Would that rental, in your opinion, be any less if there were no lease for a term of years on the property? A Well, there would unquestionably—if there were a lease there it would enhance the rental value of that property over the prices I have given, but I feel under the 40

monthly tenancy that the values I have given are correct.

Cross examination by Mr. Egner.

Q Then, it is your opinion, Mr. Blau, that on the basis of the monthly tenancy such as existing the Surety Realty Company were getting only about two-thirds of the monthly rental value of that property? A Yes, sir; I haven't computed it, but if that is the correct computation.

Q Did you have any customers for those two floors at any such prices? A No, I did not.

Q Is it your opinion that those floors were worth the amount you have specified without any alterations or changes in them? A I would say in answer to that that they were not, but that under those rental values the landlord could readily expect the tenant who would take the premises to make those changes.

Q So that it is your opinion that a tenant would be justified in paying those sums and in addition thereto making changes and alterations in the premises? A Yes, sir; whatever was necessary.

Q And this notwithstanding the fact that the possible limit of tenancy would be four and a half years? A Yes, sir.

Cross examination by Mr. Horner.

Q Would you say that the rental value of property on Washington street, approaching Market street from the radio store—the restaurant you speak of—would be more or less valuable? A I didn't get the question.

The Court: Suppose there were stores nearer to Market street than the one that you refer to—would they be worth more?

The Witness: Yes, sir; I would say so.

Q In other words, the value as you approach Market street of Washington street frontage would be more valuable as you approached Market street, would it not? A Yes, sir. 10

WILLIAM R. HEYER, sworn.

Direct examination by Mr. Schwartz.

Q Mr. Heyer, you are one of the defendants in this suit and with Mr. Hocter operate or operated a radio store from the Surety Realty Company at Washington and Market? A Yes, sir. 20

Q When did you get out of that?

The Court: They all went out in October, 1925.

Q Did you also occupy a store adjoining that property? On the north? A Yes, sir. 30

Q Did you occupy the entire store or—(interrupted). A The entire store.

Q What front did it have on Washington street? A Approximately fifteen feet.

Q Was there any part of that store vacant and unoccupied by you? A No, sir.

The Court: What was the rent of that?

The Witness: Month to month rental, $75 a month.

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The Court: Any other store north of you in that building?

The Witness: No; no other store north of us in that building.

Cross examination by Mr. Egner.

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Q You were right next to Liggett's, weren't you? A We had two stores; small store next to Liggett's and the one next to it formerly occupied by the lunch room.

The Court: The radio is the one next to Liggett's.

The Witness: Yes, sir.

The Court: Month to month?

20 The Witness: No; the one next to Liggett's we occupied on a lease.

Re-direct.

Q Were you ever given three months' notice or any notice to get out of the store formerly occupied as a lunch room? A No; never.

Q Did you get another store in the immediate vicinity or as nearly immediate as you could on

30 Washington street for your radio business? A We did.

Q Are you there now? A We are.

Q What is the number of that store? A 217.

Q With reference to that store, is that further north from Market street? A Yes, sir.

Q How much further north is it? A Well, it is on the next block—one block above—two blocks counting—between Academy and Bank—two doors from Bank.

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The Court: Bank is the first street north of Market?

The Witness: The first street is Campbell street.

The Court: In between Bank and Market?

The Witness: In between Bank and Market. 10

Q What are you paying rent there? A Monthly, four hundred and fifty dollars.

Q Under a lease? A Under a lease.

Q Is that the lease? A Yes, sir.

Mr. Schwartz: I offer it in evidence.

(Paper marked Exhibit H. & H. 1.)

Q In moving your store from the place at 241 Washington street to 217 Washington street, were you able to utilize any of the fixtures in the old store? A Very little, nothing but practically—nothing but a show case, that was about all. 20

Q Can you tell us in dollars and cents what the loss to your fixtures was in moving them from your old store to your present location? A Approximately $800.

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No cross examination.

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JOHN HARRINGTON, sworn.

Direct examination by Mr. Schwartz.

Q You were engaged in the business of conducting a billiard parlor on the third and fourth floor of the property on the northwest corner of Market and Washington street, were you not? A Yes, sir.

Q How long had you been there? A Between seven and eight years.

Q When you first came into possession did you hold under a written lease for a term of years? A I did.

Q Who was your landlord? A Mr. Kamm.

Q After that lease expired did you remain in possession? A I did.

Q Under what arrangement? A Monthly arrangement.

Q Can you give us any reason for your being in possession as a monthly tenant?

Mr. Egner: I object.

The Court: Let it in.

A Why, Mr. Kamm wouldn't renew the lease for me.

The Court: When did your lease expire?

The Witness: Well, from the time I started there—(interrupted).

The Court: When did your lease expire?

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

The Court: How long were you there as month to month tenant before you quit in October, 1925?

The Witness: Between two and three years.

Q Isn't it a fact, Mr. Harrington, that you had several conversations with Mr. Kamm concerning rental, but you could never agree on the rental and that nothing was said as to proposed condemnation and eviction?

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Mr. Egner: I object.

Q Did you ever have negotiations with Mr. Kamm as to the signing of a lease? A Well, I made Mr. Kamm an offer for the premises.

Q How much did you offer him? A $5,000.

Q Did he accept it? A No.

Q Give any reason for refusing it? A He walked away from me.

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Q Say anything? A Nothing.

Q How many billiard tables did you have in your place of business? A Thirty-four.

The Court: Both floors?

The Witness: Yes, sir.

The Court: Same price on both floors?

The Witness: Same price.

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Q You are familiar with the cost of billiard tables—retail value, are you not? A Yes, sir.

Q What, in your opinion was the market value of your pool tables on October 1, 1925?

Mr. Egner: I object.

The Court: Objection sustained. You may answer.

A $5,000.

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Q When you were evicted on October 1, 1925, what did you do with the pool tables? A Sold them.

Q Who did you sell them to ?

Mr. Egner: I object.

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Q What did you get for them?

Mr. Egner: I object.

Mr. Schwartz: I desire to establish our loss.

The Court: Same ruling.

Q Answer the question. A $1,750.

Q Will you explain the reason why you got so little money for them? A I got all I could for them at a sacrifice, and that is all they would bring at forced sale.

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(No cross examination.)

Mr. Lane: We want to call Mr. Kamm again.

The Court: Main case?

Mr. Lane: Yes, and something that was brought out by the accountant.

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LOUIS KAMM, recalled.

Direct examination by Mr. Lane.

Q Mr. Kamm, it was brought out yesterday on cross examination of your accountant that in your books commencing in 1913, you carried this lease at $30,000. Will you tell me under what

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circumstances that figure of $30,000 was put in the books? A The leasehold was one of the assets that I took in the dissolution of another company, of which I owned a fifty per cent. interest, and having owned the entire leasehold when I went into the Surety Realty Company I just arrived at that figure as part of the original cost of the leasehold, which at that time was $38,000.

Q That is the original cost? A The original cost of the leasehold; referring to an original payment of $25,000 that was paid to Kresge or the Kresge Company, and the balance was made up for improvements, steel construction work installing an elevator for the tenants.

Q You bought the lease from Kresge? A Yes, sir.

Q Paid them $25,000 for it, is that what you mean? A Yes, sir.

Q Will you tell me how that figure of $25,000 was fixed? A Paid in cash.

Q How the figure of $25,000 was arrived at. A Kresge had spent some money in the property and in a chat which I had with him—(interrupted).

Mr. Egner: I object to conversations with Mr. Kresge.

The Witness: I will change that.

The Court: Do not change anything.

The Witness: During the negotiations Mr. Kresge, who took a lease, corner of Green and Broad street—took it on contemplation of a new building being erected by Bamberger down the street—he had gone into this location—(interrupted).

Q Tell us what was said between you and Mr. Kresge by which, or the facts the result of which this $25,000 figure was fixed. A He spent that money. That was his cost.

The Court: You are not answering the question, even, of Mr. Lane.

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The Witness: Kindly put your question again.

Q What was the conversation between you and Kresge—not exactly what was said, but the substance of what you said and what Kresge said by which this figure of $25,000 was fixed. A Kresge said that he would like—the business of the Kresge Company in the store was not successful at that time from a leasehold rental standpoint; he had spent $25,000 on the premises and if he could get $25,000 that he would sell the lease. I happened to be in Detroit. I came back and closed the deal with him in Newark for $25,000.

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Q Now, was there at that time any attempt upon your part in the directing of the entry of this figure in your books to fix any value on that lease? A No; couldn't fix the value. That was the cost.

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The Court: Perfectly proper charge in his own account, Mr. Lane.

Q Could you at that time fix a value upon a long term lease? A No.

Q Why not?

Mr. Egner: I object.

The Court: The answer is so perfectly obvious I don't see why the question is

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asked. I suppose the $30,000 item was brought in to detract from the value that you put on it.

Mr. Lane: Yes. I am now trying to explain the $30,000 figure.

The Court: That he has done. As a charge against himself he used the item of $25,000 and $5,000 that he put in, in money. He put that down as $30,000. The argument is that it is no standard of the value of this lease. 10

Mr. Lane: Exactly. I am trying to show why it is not a standard of value of the lease and never was a standard of the value of this lease.

The Court: Isn't it shown without proof? 20

Mr. Lane: I was afraid not. That is all I wanted to show. I wanted to show the circumstances surrounding this transaction which would demonstrate that that figure or any other figure which might have been put down at that time was no criterion of value at all at the present time. In other words that the circumstances were such—(interrupted).

The Court: You may ask the question. 30

Q Now, Mr. Kamm, do you remember the question? You said you couldn't put a value upon the lease at that time and I asked you why not.

The Court: Because he did not know what he was going to get for it afterwards—didn't know what he was going to get out of 40

the property afterwards. That is the answer.

The Witness: Yes, sir.

Q Let me ask you one other question, Mr. Kamm. When was it, during the time of the existence of this lease—when was it that the value of this lease or the rentals to be obtained from it became—rather, was taken out of the speculative field? A When the last renewals were made of the term leases between Riker and Liggett, which leases are in evidence, the speculation was taken out.

The Court: There was certainty then?

The Witness: And when the McDonald lease—I got the security of the absolute financial guarantee in the form of Mr. Al. A. Rosenbush personally in addition to cash security, and the Liggett Company, of course, they are responsible, and with the two major leases, all speculation was taken out.

Q Did anything happen with respect to that neighborhood that had an effect upon the rental values there? A Yes, sir; the sale of the Bamberger property and the squaring of their store front which has accomplished the bringing of the Bamberger store up to my leasehold.

Q That was about when? A I can't give you the exact date when the last annex was built on there.

The Court: Which end was annexed, the Market street end?

The Witness: Yes, sir; right up to this property. It was the Credit System Build-

ing, Hyman's Building and property owned by Sickle there, all of which rounded out the Bamberger store and brought it up to the corner of Washington street.

Q And that was about 1921, wasn't it? A About 1921—I don't know, '21 or '22—'20 or '21. 10

Q It was at that time? A It was about that time, yes, sir.

Q Now, Mr. Kamm, at the time of the lease back in 1913, '14 and '15 and so forth, the rentals were not what they are now, were they? A No. The schedules—there is a schedule there. We have some old leases which shows Rosenbush originally paid $8,500 for that lease.

Q And the others were in proportion? A The others were in proportion, except—

Q Do you remember what your net return was in 1913? A 1913? 20

Q Yes. A The books are in evidence. They were about—

The Court: You do not claim any excess over your lease. You do not say your lease is worth more than the return you got from your sub-lessors?

Mr. Lane: No, sir.

The Witness: The present agreement, long term lease—(interrupted). 30

Q Some testimony has been given this morning—are you familiar with this schedule? If you are, will you refer to it and tell us what your net return was in 1913?

The Court: What is that?

The Witness: Memorandum I have of some papers. By referring to it I refresh 40

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my memory that the net annual income at the beginning of the term of the lease was $3,712.

The Court: You mean your profit?

The Witness: That is the beginning of the lease.

10 The Court: Your profit?

The Witness: Yes, sir; on my investment.

Mr. Egner: At the beginning of your ownership after you bought from Kresge?

The Witness: Yes, sir.

Q Now, do you know or, it has been testified, Mr. Kamm, that that valuation, if you call it such, placed on the books in 1913, has never been changed on your books. Do you know anything

20 about that at all? A I left that entirely to the accountants for information in figuring out what the proper income tax was, and paying it, but never changed the original amount that was expended for the lease.

Q Something has been said today by some of the witnesses—the witness before the last—occupying the whole of the store instead of two stores—rather where you said one half was occupied. A Well, one of them, I understood,

30 had been used as a permanent lease and the other as a temporary lease.

Q You said that the most northerly part of the store on Washington street was vacant; you are mistaken in that? A I am in error as to that, because it just changed recently.

Recess.

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DAVID HOUSTON, sworn.

Direct examination by Mr. Egner:

Q You are in the real estate business in Newark and president of the E. E. Bond & Houston Company? A Yes, sir.

Q How much experience have you had in real estate? A I have been in business in Newark for twelve years.

Q Are you familiar with the premises at the corner of Washington and Market street involved in this case? A I am.

Q Did you prior to the sessions before the Assessment Commissioners in connection with the widening of Washington street, examine these premises? A I did.

Q Will you tell us what, in your opinion—tell us first, whether, in your opinion, there was any change in the rental values of these premises as between October, 1924, and October, 1925? A Quite unappreciable.

Q Now, referring—you know what part of the premises were occupied by the Liggett Company? A I do.

Q Will you tell us what the rental value of those premises was in October, 1925—October, 1924?

The Court: October, 1925.

Q October, 1925. A $700 a front foot, in my opinion.

Q And what would that amount to for the space occupied by the Liggett Company? A Approximately $15,000.

Q Now, do you know what part of the premises were occupied by the McDonald Company? A I do.

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Q Will you tell us what, in your opinion, was the rental value of those premises as of the same date? A The McDonald store was 21 by 85, the ground floor. The value of that was $350 a front foot, and basement, approximately 1,600 feet at $1.00 a square foot—$7,350, the first item; 10 second item $1,600, for the basement, and the upper floor, approximately, inside measurements, about, approximately, 4,000 square feet at $2.00 a square foot.

Q That would make a total rental value of the entire portion occupied as how much? A $16,900—$17,000 in round figures.

Q Now, take the third floor, what would you say was the rental value of that third floor as of October, 1925, and in its condition as you found 20 it at the time of your examination of it? A Forty cents a square foot, about $1,600.

Q And will you give us the same testimony with respect to the fourth floor? A About thirty cents a square foot, in the condition in which the premises were.

Q And what would the amount be at thirty cents a square foot? A $1,200.

Q You say "in the condition in which the 30 premises then were." Is it your opinion that a larger rent could have been obtained with improvement and alteration? A Yes, sir.

Q Tell us what your opinion is as to the rental value of the store occupied by the Ace Radio Shop. A As I understand it, that store was 10 by 18. Is that the store you refer to?

Q No, that was the restaurant—yes, 10 by 18. A $200 a front foot, considering the short depth.

40 Q That makes how much? A $2,000.

Q And how about the store occupied as a restaurant, the last store on Washington street? A I haven't got the plan. I understand that store was 10 by 40, the depth.

Q 15 by 40. A 15 by 40, $250 a front foot, on the basis of a lease.

Q On the basis of a lease for how long? A Three or five years. 10

Q Now, in getting at these rental values, what considerations have you had to get around? A The location—the relative location, the approximate business requirement for the neighborhood and rentals that are fixed—any recent rental in the particular section, especially west of Market—west of Washington street.

Q Mr. Maier, Mr. Houston, in jusifying his opinion as to the rental value of these premises, referred to a lease of premises which he designated as 75 Market street, referring to the net rental of $12,000 a year. Are you familiar with those premises? A I think Mr. Maier made a mistake on the street number. That should be 73 Market street. 20

Q 73. The dimensions of that property are what? A 21.6 by 194.

Q Running through to Campbell? A Running through to Campbell street. Not an alley. It is a street. 30

Q And the rental reserve in that lease is how much? A $12,000 net. The taxes and insurance in addition, bringing it up to approximately —I haven't got the insurance, but the taxes are $4,400, and I assume the insurance of the building was probably in the neighborhood of $600, making $17,000 a year gross to the tenant.

Q Now, have you analyzed that rental so as to be able to tell us what, on the basis of that 40

rental, the front footage was for the store? A In the first place the store is 196 feet deep. It is a four-story building, the second floor being a secondary story—what we call a second story show room with large windows. I have averaged the—allowed a dollar, a very moderate sum—
10 a dollar a square foot for the second floor, which would be $4,000. There was 8,000 square feet in the two upper floors, which I have taken at 75 cents a square foot, which is $6,000 for the two upper floors—$10,000, leaving the balance of $7,000 with the basement, and included the first floor and basement, which brings it down to about less than $400 a front foot—about $375 a front foot.

The Court: Elevator service?
20 The Witness: No elevator.

Q Mr. Maier also referred to the premises 59-61 Market street. Are you familiar with those premises? A Those premises are not twenty or twenty-five years old. They are modern buildings, reinforced, in every way, situated at the corner of Plane and Market.

Q About how old is that? A About two
30 years or more. Modern building with modern show fronts—modern stores—suitable for a furniture warehouse, which it is rented and used as. There are six stories and could not be used as any particular bearing on this present property because the buildings are so entirely different.

Q Now, Mr. Houston, the city assessment commissioners have awarded as the value of the land taken, plus the damages to the remaining land, at the sum of $398,750. Will you tell us on real estate principles what that figure indi-
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cates the value of the remainder was as of the time of the taking?

Mr. Lane: I object.

The Court: Objection sustained.

Q Mr. Houston, will you give us your opinion as to the value of the strip which remains after eliminating therefrom the portion taken by the city and as of the time of the taking? 10

The Court: With the building down and out.

The Witness: That would mean a piece of property—(interrupted).

The Court: What is it worth?

The Witness: —115 feet front on an angle with no frontage on Market street and depth of 44 feet. 20

The Court: What is it worth?

The Witness: Might I make a little explanation, Judge? There are two ways of calculating.

The Court: I do not care. If you've got two opinions, give us two opinions. 30

Q I want you to be sure that you understand that question. I want the value of that property as an interior piece of property.

The Court: Do you know the property back there? What is it worth?

Q Not now, as an interior piece of property, the entire street frontage having been taken from it. 40

The Court: There have been no changes.

Mr. Egner: I am trying to get the value of this interior piece without any regard to the improvement that was to be made and for which an assessment is to be levied against the property.

10 The Court: You mean the back part with the buildings on?

Mr. Egner: The back part with the buildings removed and no street frontage taken into consideration.

The Court: How can he? I don't get you.

Mr. Egner: The Assessment Commissioners in appraising this property first of all arrived at a figure of what the entire

20 property was worth; then they determined what they were taking from the property and fixed the figure of that, which left some value attributable to the remainder. Now, that remainder, in the shape in which it was left then, was a triangle with no street frontage whatever. It has street frontage now, but because of the improvement.

The Court: You mean the street has been improved?

30 Mr. Egner: Yes.

The Court: You didn't expect the city to let it stand unimproved?

Mr. Egner: No; but we will have to pay an assessment for the improvement. I want an appraisement on this triangle as an interior piece of property without any street frontage.

The Court: If he gives you the value

40 now and tells you what the improvements

are worth, then you will have what you are after.

Mr. Egner: I would rather have him appraise it without the street frontage, if your Honor will permit me.

The Court: I don't think it will amount to much. Go on. 10

Q Can you give us an estimate as to its value without street frontage as an interior piece of property? A On the basis of 398,000, I would appraise that as one third of the whole, $130,000.

Q How much? A $130,000.

The Court: You are trying to get this man to reason the way the Commissioners reasoned. Is that what you mean? 20

Mr. Egner: I didn't mean to have him do that. That was my first question which you overruled. My second question is to leave out of mind now what the Commissioners did. I want your opinion as a real estate expert as to the value of this triangle as an interior piece of property without street frontage.

The Witness: I don't think I would alter my opinion. 30

Q You would still say it was $130,000? A Yes, sir.

The Court: What is it worth as it stands?

The Witness: With the street?

The Court: No, as it stands.

The Witness: With the street made?

The Court: Yes. 40

The Witness: With the street cut through and the frontage—that is just the point I was coming to. I appraised that on the basis of $5,000 a front foot, as Washington street frontage, with no—(interrupted).

The Court: How much? A That makes $575,000, but I think—there are two rules. If you take the City rule of 42, that would amount to 42 per cent., average depth of 22 feet—would make the value $240,000 for what remained with the street erected. If you take the Hoffman rule, which calls for a different proportion, thirty-three and one-third per cent., it would make the value $198,000. I would think the $198,000 would be the more equitable value on account of the shape of the property.

The Court: What is the Hoffman rule?

The Witness: It is one of our methods for appraising property, your Honor, in that way.

The Court: In Newark?

The Witness: It is used in Newark, New York and all over; it is a table.

Mr. Egner: I think the witness has started out by giving us his appraisement—(interrupted).

The Court: Never mind.

Q Without regard to the rules by which you arrive at the result, I want your opinion as an expert as to the value of that property at the present time with 116 feet frontage and an average depth of 22 feet? A $198,000.

Cross examination by Mr. Lane.

Q That is $198,000 as is and for sale purposes at the present time? A With the street cut and improved.

Q What you would expect to get for that property in the open market would be approximately $200,000? A I consider that a fair value. 10

Q I didn't ask you that. I asked you whether that is what you would expect to get for it in a fair market. A As an individual piece of property; yes, sir.

Q What do you mean by "as an individual piece of property"? A It might be worth more to some adjoining owners. It is a piece of property by itself. 20

Q Do you know what has been asked for it? A No.

Q Have you any information as to any offers having been made for it very recently? A None.

Q And since the improvements, which have been declined? A No.

Q Have you made any inquiry to ascertain what the owners hold it for? A No.

Q Haven't the least idea? A I am depending on my own opinion entirely, because any 30 offer that may be made might have an entirely different value than the value as it is of a piece of property standing by itself.

Q I know; but you can't value it simply as a piece of property standing by itself. Are you placing a value on it from a rental standpoint? A No, sir.

Q Well, then, what is the basis of your value, the sale price of it or what you would expect to get on sale? A As a piece of property, accord- 40

ing to my opinion of valuation on Washington street at that point.

Q Then the possibility of selling it for purposes other than standing there as a single piece of property has got to be taken into consideration in arriving at the value? A To a certain 10 extent; but there are so many different opinions. It might be worth so much to one man and much less to another. I cannot read the minds of the people that are next door.

Q This $198,000 is arrived at by the application of some fixed rule? A On the basis of the short depth; yes, sir.

Q With what as your first basis? What is your first basis? A $5,000 per front foot—for unit of value a front foot of 25 by 100.

20 Q You are familiar with the rentals that have actually been obtained—actually being paid on that property, are you not? A Yes, sir.

Q You know in one of your figures you are somewhat lower on the rental value than the actual rent paid? A I don't think I am. I don't think I am very far, Mr. Lane; approximately the same.

Q $3,500 and $3,000 a year? A Which one?

Q McDonald. What we call the McDonald 30 property. A I understand the McDonald was $17,000.

Q It worked out $19,000. A I understood it graduated up to $19,000; hadn't reached that amount yet.

Q October 1, 1925, as I understand it, it was $19,000. Does that make a difference in your rental value? A No.

Q Why not? A I think it is all it is worth. If the tenant pays more than it is worth it isn't saying the rental value is anything more.

40

Q You fix the rental value—(interrupted). A On my own opinion.

Q But you fixed your rental value on the McDonald property on the theory that the rent hadn't yet jumped, didn't you? A No, sir; I didn't fix it on the basis of the rental they are paying at all. 10

Q Well, your figure for the Liggett property is within $400 of what is actually being paid. You had no knowledge of what was actually being paid? A I knew what the Liggett property was actually being paid, and I know how they base other rentals.

Q It is important to know the actual rentals, isn't it, in fixing rental values? A Not always.

Q Didn't you so state in your testimony before the City Commissioners? A In fixing a general price, customarily it is. 20

Q You said before the Commissioners that the way to fix it—"the best test of rental value was what was being paid." A Yes, sir.

The Court: The proof of the pudding—

The Witness: Is in the eating of it.

Cross examination by Mr. Horner.

30

Q Would you say that the value of the Washington street property was more or less as you went north towards Market street? A You mean the rental value?

Q Per foot. A Actual value per foot?

Q Rental value per foot? A Going north it decreases.

Q Going south on Washington towards Market street? A It increases. The nearer the corner of Market street the more valuable it is. 40

Q Now, then, isn't the corner property more valuable than an inside property? A Absolutely.

Cross examination by Mr. Bilder.

Q You testified as to the value of this property before the Commissioners in condemnation,
10 didn't you? A I did.

Q What value did you put on the entire plot, 44 feet front, going back 106 feet?

Mr. Egner: I object.

A In the condemnation proceedings?

Q Yes. A I based my value—(interrupted).

Q What was the price you put on the whole property? I didn't ask you what you based it
20 on. A $570,000.

Q Five hundred and how much? A And seventy thousand dollars.

Q Sure you didn't get it up to $800,000? A No, sir.

Q And what was it a front foot on Market street? A On Market street, $10,000 a front foot.

Q That was only your land valuation; is that
30 right? A Yes, sir.

Q You didn't value the buildings? A No, sir.

Q You heard the buildings valued, did you not? A Yes, sir.

Q And you heard Mr. Egner call a witness on behalf of the owners as to the value of the buildings? A I have a recollection; I haven't paid particular attention.

Q Do you know what that witness valued the buildings at? A No, I can't give the figures.
40

Q Don't you know that it was $120,000 or somewheres near that? A No. I thought it was somewhere near $83,000.

Q You heard the figure here, $80,000? A Yes, sir.

Q That is what it has been said the Commissioners valued it at? A Yes, sir. 10

Q But it was valued by Mr. Egner's expert at more than $80,000, wasn't it? A Yes, sir.

Q How much more? A I don't remember. I wasn't particularly interested in that at all.

Q Well, assuming that the amount that Mr. Egner's expert put on the building was $120,000, and adding that to $570,000, you would have a gross of $690,000; is that right? A Yes, sir.

Q Now, do you think that the rentals you have prescribed here are a fair rental upon a property which you — a property valued at $690,000? 20

Mr. Egner: I object. This witness has not valued it at that.

The Court: Objection overruled.

The Witness: Would you mind reading that question?

Q (Question read.) A Exceedingly fair and above the average for property of its kind, considering the nature of the improvements on the property. There are numerous properties in Newark that are not paying two per cent. on the value of the land and building, and that building was yielding an abnormally high rental considering the old and dilapidated state of the building. 30

Q Will you mention any building which is opposite an improvement like Bamberger's which is producing only two per cent.? A I haven't 40

any in my mind particularly, Mr. Bilder, but there are numerous ones.

Q We are only interested in such as will help us on this problem. Now, do you know any? Can you mention any? A I haven't gone into that feature of it, but if I had time I could cer-
10 tainly bring a great many to you. Any real estate man knows that. Some of them don't pay much more than the taxes.

The Court: What makes the value then?

The Witness: Possibilities of the future. This property, the value is because of the location of the land.

The Court: I mean, what makes the valuation when the income is only two per
20 cent.?

The Witness: The possibility of improvements on the land that will produce an income worthy of the value of the land.

Q And this property was so located that it did produce a high income in your opinion? A Yes, sir.

30 The Court: That was due to what?

The Witness: Due to the location of the property.

Q Are you in the business of renting property? A We have a leasing department in our office.

Q What is the name of your concern? A David Houston, Bond & Company, Inc. We are successors to E. E. Bond & Company, the old
40 firm.

Q Have you leased any property on the same block in which the McDonald store is located? A No, sir.

Q Have you leased any on the opposite side of the street and same block? A Not in recent years. We are negotiating now. We haven't leased. 10

Q You haven't in recent years? A No. Further up the street.

Q Have you leased any on the opposite side of the street, east of Washington street? A No, sir.

Q Will you tell us how you arrived at the figures which you have given us, not having leased any property yourself? How did you arrive at the figures that you have given us for the McDonald property, taking first 21 by 85, the 20 store floor, which you say you put down at $350 a foot? How did you work that out? A On the basis of what I fixed as a rental for the corner, $700 a front foot; corner property is worth double what inside property is worth.

Q I see. Well, that $700 a front foot, you simply—you simply went by a rule and said the inside is worth twice as much as the corner; is that it? A No, sir; I didn't go by rule.

Q Why did you say twice and not three 30 times? A I went by my opinion.

Q How did you form that opinion that it ought to be twice and not three times or two and a half times? A By using ordinary reason.

Q Give me your reasoning. A In comparing relative locations? I would take the Liggett lease itself as bearing out my contention of $700 a foot. It is a well known fact that drug stores base their rentals on a percentage of their gross earnings—gross receipts. 40

Q Well, now, the inside property—that is because the drug store wants to get that much money out of the location? Isn't that the reason? A Yes, sir; and show front accommodations.

Q That is a special business, because in the special business of drug stores they have got to get—they allocate a certain percentage of their gross receipts as rent? A Yes, sir.

Q Is that a basis for a man who was in the shoe business or dry goods business? Do you know—have you had occasion to ascertain upon what basis shoe men or dry goods men—what percentage of their gross receipts they regard as representing rent? A I know it is much lower than drug stores.

Q They allow a smaller per cent.? A Yes, sir.

Q Do you remember any corner—shoe store—that you have in mind in which you can give me the percentage? A No, sir.

The Court: There is no such thing, is there?

Mr. Bilder: He says he goes by percentages.

The Court: There are no corner shoe stores. All the corners are taken up by the drug stores. Do you know of any corner shoe store?

The Witness: No, sir.

Q Do you know what percentage shoe stores regard of their receipts as representing rent? A No; I wouldn't want to swear to that, Mr. Bilder. I know it is lower. I know it ranges from three to seven and a half per cent.

David Houston, cross.

Q How do you know that? A General experience, in talking with experienced men.

Q Tell me one instance in which you observed it—name the case in which you observed it. A I haven't any cases to name. I have been going on the broad principle that that percentage is used. 10

Q I am asking you to name—(interrupted).

The Court: He says he hasn't any.

The Witness: I can't tell you. I don't know.

Q Do you know of any dry goods—percentage which the dry goods business allocate for rent to their receipts? A No; I haven't gone into that either. 20

Q So the reasoning you have given us is based upon nothing but your own experience; is that right? A No, sir; it is not right.

Q Well, I ask you to name me one case—any one of these cases. A I have other reasons besides that.

The Court: He told you he couldn't.

Q Do you recall the presence of the elevator in that building as making any difference? A Yes, sir. 30

Q How much difference does that make? A I have allowed for that in my appraisal.

Q How much did you allow? A About a dollar a square foot.

Q In other words, you have added to the value a dollar a square foot? A I allowed for that, on the elevator, on the second floor.

40

Q Did you allow anything for the basement? A No, sir. The basement isn't worth anything, it is just for storing rubbish.

Q If you were told it was used for selling merchandise would it make any difference to you in your valuation? A It wasn't used for sell-
10 ing when I saw it.

Q What? A It wasn't used for selling in 1925.

Q What month in 1925 did you see it? A Just before the condemnation proceeding, when I made an inspection of the building. As far as I could see it was used for rubbish and you can't pay more than—I allowed a dollar a foot for storing rubbish. I think that is big rental.

Q What year did you see it in? A 1925,
20 just before the condemnation proceeding.

Q Was it before you testified or after you testified? A Before I testified. I don't usually testify unless I find out what I am testifying about.

Q And you are sure when you were in those premises you found nothing but rubbish and no selling going on? A Dirty and dark. It wasn't in—it wasn't worth a dollar a square foot.

Q I am asking you as to the fact. You say
30 that the basement was not being used as a salesroom? A No; I didn't consider it as being used as a salesroom.

Q What is that? A I didn't consider it as being used as a salesroom.

The Court: He says it was dirty and dark.

Q If used for a salesroom what would it be
40 worth? A I don't think it is worth any more

than a dollar a square foot from the kind of building in which it was.

Q Is that the price that you put down for it, a dollar a square foot? A That is what I allowed you.

Q In other words, it was worth the same price for use for rubbish as for a salesroom in your opinion? A I gave you the benefit of the doubt. I gave you the benefit of that. 10

Q You say the price of the Liggett lease had some effect upon your amount as to the value of the leasehold; is that right; that the rental reserve in the Liggett lease had some effect on your mind in making your opinion; is that right? A Yes, sir.

Q Now you have testified here that the rental value of these premises in October, 1925—McDonald premises—were $17,000. A Yes, sir. 20

Q Did you know when you gave that testimony that their rate was $19,000? A Yes, sir.

Q You did know that? A Yes, sir.

Q Isn't it a fact that not until it was called to your attention by Mr. Lane a few minutes ago that the rate was $19,000, that you first learned of that fact? A No, sir; I had a schedule of the rates before me.

Q Who furnished you the schedule of the rents? A Counsel. 30

Q And you were shown that schedule of rents? A Yes, sir.

Q Before you were asked to go into the thing, is that right? A Yes, sir; I asked what the rents were—what the lease called for. It was my duty to find out what the lease was to know what I was going to testify about.

Q And you knew that counsel were endeavoring to show that the rental values were very low? A I didn't inquire into that. 40

Q Why did you have the rents before you if you were trying to give your own opinion?

The Court: He has already said that, proof of the pudding.

Q But am I correct in assuming that after you got this schedule of rents you then proceeded—of the amount being paid—you then proceeded to form your opinion; is that right? A I then proceeded to measure up and classify and form my own opinion.

Q Why did you need the rents that these tenants were paying in order to determine what your opinion was? A I didn't require them to determine what my opinion was.

Q Why were they furnished you? A I said I wanted to see the leases and know the terms and know what they were paying and what the leases were about.

Q Don't you know you were furnished that schedule to be sure that you didn't get much beyond it? A No, sir.

Re-cross examination by Mr. Lane.

Q Mr. Houston, your front foot rate on Market street is ten thousand dollars a front foot, isn't it? A Yes, sir. That was the basis at the condemnation proceeding.

Q You haven't changed your basis? A I wouldn't say I would change my basis today.

Q You haven't changed your mind from what you testified there? A Long prior to the condemnation proceedings.

Q It was worth ten thousand dollars a front foot on Market street? A Yes, sir.

Q It isn't worth any less now? A No.

Q It is worth more? A Probably.

Q And yet, just the moment you get around the corner, or triangle on Washington street, leading right into Market street, you drop fifty per cent. and you get a front foot rate of $5,000 only; is that right? A Yes, sir.

10

The Court: That is the Hoffman rule?

The Witness: No, sir; that is not; that is assessment rule. That is the usual way. When you get into a side street they drop the value to one-third of the main street value, but Washington street, being a main thoroughfare in comparison with Market street, you get fifty per cent.

Q It comes in on a curve. As you pass it you can't tell which is Market and which is Washington, can you? A Oh, yes.

20

Q You first gave the value of the property before the Assessment Commissioners as $657,-000, didn't you? A Well, I—(interrupted).

Q Didn't you? A I did with certain conditions, Mr. Lane.

Q And then it appeared in your examination that in making up that figure of $657,000, which you gave as a fair value of our property, you had added ten per cent. because it was a compulsory sale? A Absolutely.

30

Re-cross examination by Mr. Bilder.

Q Is it customary in making appraisements to appraise the corner at one and a half times the inside price? A Corner property?

Q Yes. A We usually allow in a case of property—two main thoroughfares?

40

Q Yes; two main thoroughfares. A We allow fifty per cent. for the corner for the first twenty-five feet. In other words, this piece of property, 44 feet front, $10,000 per front foot of 25 feet on the corner we allowed 50 per cent.

Q That is one and a half? A To the extent of 25 feet only.

10

Q That is one and a half. A No, it isn't. You are gettng it mixed up. It is 100 per cent.; there is no 50 per cent.

The Court: The inside lot would be $10, the corner lot would be $15. That is what he means.

Q Is that right? A No; that is not right. I will take a 25 by 100 lot, $100 per front foot.

20

Q Yes. A We take the basis, and the inside lot 25 by 100 would be $2,500.

Q $100 a foot? A $100 a front foot.

Q Now, what would the corner be? A The corner would be $3,750, 50 per cent. more.

Q That is one and a half, isn't it? A Well, one and a half if you want to put it that way.

The Court: What would you say?

The Witness: Fifty per cent. more.

30

Q Well, in making this valuation of mine you didn't use any such rule, did you? A Yes, sir. I think you've got the wrong testimony.

Q I am talking about Liggett. I want to get the way you worked out your value. You said Liggett $700 a front foot. A You are talking about leasing now?

Q Yes. A Oh!

Q You said Liggett $700 a front foot and you said McDonald, inside, $350? A Yes, sir; just one-half.

40

Q You didn't use the one and a half measurement? A That is cutting down. I have already put one and a half on the corner. I have given $700 as the value of the corner. The inside store is only one-half of that.

Q It is a fact you put the McDonald store at $350 and you put down Liggett at twice or $700? A I am giving you the benefit of the doubt. 10

Q And didn't you have to juggle these figures in this way so as to reach $700 which you thought was the amount of rent which we were paying? A No, sir.

Mr. Egner: Judge MacMahon and I have agreed that this abstract of title should be marked in evidence, with the understanding that either of us could refer to any of the title papers shown in it. May I have it marked? 20

(Paper marked Exhibit D. 11.)

Mr. Egner: I also offer in evidence extracts from the report of the City Plan Commission of the City of Newark, dated December 31, 1915, to show that as early as 1915 it had been recommended by the City Plan Commission.

The Court: Any question about that, gentlemen? 30

Mr. Lane: I object to it as immaterial.

The Court: It may have a very slight bearing on the judgment of some of these witnesses who said that they did or did not hear of this change before they made up their minds as to values.

Mr. Bilder: May I record the same objection?

40

The Court: It was generally agitated as far back as 1915, wasn't it, gentlemen, the widening of Washington street?

Mr. Fraizer: It was considered.

Mr. Egner: Will it be admitted that no rent has been paid by the Surety Realty
10 Company or any other tenant since October 1, 1925?

Mr. Lane: I may have said something which may have misled counsel this morning when your Honor asked whether we claimed anything more than the rentals which we wer receiving and I answered that we did not. There are in some particular cases where the properties are not under lease. I did not want it to be understood
20 that I—(interrupted).

The Court: With that exception.

Mr. Egner: I think your Honor was dealing with the Liggett and McDonald.

Testimony Closed.

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OPINION OF VICE-CHANCELLOR.

Filed June 29, 1926.

1. Irregularity in the proceedings upon which a tax title is based cannot be attacked collaterally at law or in equity. The remedy is by certiorari. 10

2. The refusal of the Supreme Court to review a tax title by certiorari because of laches or that the right to the writ is barred by statute is not a ground for equitable interference.

3. An equity will not be enforced on the ground of laches after fifty-five years of idleness and delay.

4. A stenographer's transcript of the proceedings of a trial is not evidence of the purported facts appearing therein.

5. Lands taken by condemnation terminates a lease and the relation of landlord and tenant 20 under Section 31 of the Landlord and Tenant Act (C. S. 3078), but the termination does not deprive the tenant from recovering the value of his lease out of the award.

6. A tenant is permitted to participate in the distribution of an award in condemnation to the extent of the difference between the fair market value of his lease and the rent reserved.

7. A tenant's loss of business, profits, good will, fixtures, cost of removal and the like are not elements of damage awardable in condemna- 30 tion proceedings for public highways and cannot be allowed out of the sums awarded to the owner of the land.

McCarter & English (Mr. Egner) for Cook, *et als.*

Cecil M. MacMahon, for Charles A. McEuen.

Stein, Stein & Hannoch, Merritt Lane and Spaulding Frazer for Surety Realty Company.

Lindabury, Depue & Faulks (Messrs. Bishop and Horner) for Liggett & Co.

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Bilder & Bilder (Mr. Kaufman) for McDonald & Co.

Max Schwartz for John Harrington and Radio Shop.

Backes, *V.-C.*

For the purpose of widening Washington street the City of Newark condemned the two four-story stores at the northwest corner of Market and Washington streets, Newark, and paid the award into court, $479,550. Both buildings were taken and razed, although only half the land was taken, that which lies southeasterly of a line extending from the northerly corner of the lot on Washington street to the westerly corner on Market street. Cook, *et als.*, are the owners in fee of a two-thirds undivided interest, and the holders of a tax title (called that for convenience) for the term of two hundred years, expiring in August, A. D. 2057; of the remaining one-third, the fee of which is in Charles A. McEuen. There are numerous claims upon the fund by a tenant and sub-tenants, and by McEuen, who takes the position that the tax title is invalid for irregularities in the proceedings on which it is based, and for fraud in its procurement, and that the court in these proceedings may hold it to be of no effect.

The title in 1850 was in one Leavitt, who conveyed an undivided two-thirds interest to Charles H. Sherman and a one-third to McEuen and his brothers and sister, by separate deeds, February 13, 1850. McEuen succeeded to his brothers' and sister's interest by inheritance. Title to the Sherman two-thirds interest passed to William H. Sherman and by mesne conveyances to Nehemiah Perry and from Perry to Martin Burne in

1866. About the same time Burne acquired the tax title. Burne remained in possession until his death in 1912, and Cook, *et als.*, hold by devise from him. On August 24, 1857, the property was sold by the City of Newark for an unpaid sewer assessment to John R. Weeks for two hundred years. He assigned to Perry and Perry to Burne. At the time of the assessment and sale the fee was in Abraham H. Sherman (who was also in possession) and the McEuen children, then infants. The assessment map designated Abraham H. Sherman as the owner of the lot; the McEuens were not parties to the proceedings. The deed to the McEuens did not come to their knowledge until 1869, and 1870 they brought an action in the Supreme Court against Burne to recover possession of their interest, and judgment was rendered against them. The "phonographer's" transcript of his notes of the trial at the September term, 1870, of the Essex Circuit is in evidence, without objection, and from it it appears that Abraham H. Sherman, the cotenant of the McEuens, furnished Weeks, the purchaser of the tax title, with the purchase price the day after the sale, and that Weeks, at the instance of Sherman, assigned the certificate of sale to Perry in 1861, who assigned it to Burne in 1866. Justice Depue, presiding, held the certificate of sale to be in due form and that the proceedings upon which it was founded could not be attacked collaterally, but only on review by certiorari, as provided by the then recent act of 1869, now Section 15 of the Sale of Lands Act (C. S. 4679); that the question of fraud, because Sherman procured the tax sale of Weeks instead of paying the assessment, or of a resulting trust because the purchase price was paid by Weeks,

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the co-tenant, was cognizable only in equity, and left to the jury the single question whether the money was furnished by Sherman to Weeks to procure the certificate of sale or paid to him to satisfy and extinguish the tax title, and if the latter they must find for the plaintiff; and the jury found that it was not so paid. Nothing further was done until just before the award in these proceedings (1925) when McEuen applied to the Chief Justice for a writ of certiorari, and, being refused, applied to the Supreme Court, and upon denial on the ground of laches (*re.* McEuen, 4 A. R. 548), appealed to the Court of Appeals, where it is now pending.

If by the tax sale McEuen's property was taken without due process of law, *i. e.,* without notice, and consequently in violation of his constitutional right to be heard, as he claims, his remedy is by certiorari. This objection to the tax sale would have been available in ejectment before the act of 1869, which made it reviewable by certiorari only. Baxter *v.* Jersey City, 36 N. J. L. 188. The act did not, as suggested, deprive him of his remedy by ejectment; it simply regulated the legal steps to the remedy. Bozarth *v.* Egg Harbor City, 85 N. J. L. 412. If McEuen is entitled to relief in these proceedings it cannot be granted until the certificate of sale is invalidated by certiorari. Until then it must be taken at its face value. The act applies as well to this Court as to the courts of law. Jurisdiction to set it aside is exclusively in the Supreme Court. Nugent *v.* Hayes, 94 N. J. Eq. 305; Sutton *v.* Maurice River Township, 93 N. J. Eq. 484. McEuen's right to review by certiorari, for invasion of his constitutional rights, was co-extensive with his right of action in eject-

ment, limited by statute to twenty years (C. S. 3169). It was not abridged by later legislation reducing the time to three years and now to eighteen months (C. S. 254). Groel *v.* Newark, 78 N. J. L. 142. The refusal of the Supreme Court to grant the writ on the ground of laches is not, as counsel states in his brief, "an invitation" to equity to intervene, and it does not argue that this Court has complete jurisdiction to hear the controversy because in this particular case the law has proved "deficient." The law is simply unwilling. Equity has jurisdiction in cases where the law cannot, not where it can, but will not grant relief.

McEuen is in no better position on the purely equitable grounds of fraud of his co-tenant in procuring the tax title to another, or of resulting trust because the purchase by his co-tenant inured to his benefit. Weller *v.* Rolason, 17 N. J. Eq. 13. The only evidence offered to sustain the charge of fraud or the claim of a resulting trust is the transcript of the testimony taken at the trial of the ejectment suit, and McEuen's offer to testify to what occurred, that is, to repeat what appears by the transcript to have taken place, and the check of Sherman to Weeks of August 26, 1857, for $178, the amount of the assessment. It was there proved that Sherman supplied Weeks with the purchase money for the sale certificate. Though the transcript was admitted in evidence without objection it is without legal effect. It has no place in our law of evidence as an official document and is without probative value. Its recital of legal testimony in that suit is but hearsay testimony here. And even it the transcript were treated as verity, as establishing the fraud or resulting trust, the

charge could not be entertained. McEuen's claim to relief, in this respect, rests upon a latent equity, enforceable, if timely pursued, but not if appeared that Burne was a purchaser for value without notice. Bridgewater *v.* Ocean City Assn., 85 N. J. Eq. 379; aff'd 88 N. J. Eq. 351. It is too 10 late to press it now. He slept on his rights too long before asserting the fraud or the equity against Burne or those who succeeded to the title, after he was fully apprised of his legal and equitable rights by Justice Depue fifty-six years ago. The proofs in the case are buried. The witnesses have all passed on—all but McEuen. Their tongues are stilled, and his voice is too feeble to be heard.

McEuen is the owner of the reversion and the 20 right to repossession one hundred and thirty-one years hence. It present value has been calculated at $46.85, and that sum, subject to correction, is awarded to him.

Cook, *et als.*, advance the proposition that the tenants are not entitled to compensation because of the provisions of Section 31 of the Landlord and Tenant Act (C. S. 3078): "That whenever any building or buildings erected on leased premises shall be injured by fire without the 30 fault of the lessee, the landlord shall repair the same as speedily as possible, or in default thereof, the rent shall cease until such time as such building or buildings shall be put in complete repair; and in case of the total destruction of such building or buildings by fire or otherwise, the rent shall be paid up to the time of such destruction, and then, and from thenceforth, the lease shall cease and come to an end; provided always, that this section shall not extend to or 40 apply to cases where the parties have other-

wise stipulated in their agreement of lease." By this enactment the harsh common law rule, that the tenant continued bound by his lease though deprived of its benefits, was abrogated and a more equitable one substituted; that in the event of the destruction of the building by fire, or by any other means as effectual, whereby the tenant lost the enjoyment, the term should come to an end and both landlord and tenant relieved of their obligation, one to the other (Carley *v.* Liberty Hat Mfg. Co., 81 N. J. L. 502), and having regard for the mischief aimed at and giving to "otherwise" the liberal construction to which it is entitled in this remedial legislation it cannot be seriously questioned that destruction by condemnation is included within the spirit and letter of the statute, and terminates the relation of landlord and tenant. That is, however, as far as it goes and it does not concern us in these proceedings. The act operates *inter sese* and does not disturb the rights of tenants to recover compensation from others for the loss of their estates taken from them by condemnation. If the city had taken them by unlawful methods the tenants would have had a direct cause of action against it, and having taken them by lawful means and shifted the obligation to the award paid into court, and though the issue now relates to the portions due the tenant, the recovery, in effect, will be from the City of Newark. The award was for the value of the property as a whole; what is left after satisfying the outstanding terms represents the value of the fee.

The buildings were under lease to the Surety Realty Company for twenty years, expiring April 1, 1930. They were sub-let in parcels: Liggett & Co., druggists, had the corner store

and basement; McDonald & Co., shoes, the store and basement adjoining on Market street, and the second floor of both buildings; John Harrington, billiard parlor, the third and fourth floors of both buildings; Ace Radio Shop, two stores on Washington street (one known as the restaurant), and the roof was rented for advertising signs.

The lease held by the Surety Company was made by Martin Burne to Sebastian A. Kresge for the term of twenty years from April 1, 1910, at a yearly rental of $18,000 for the first ten years and $19,000 for the remaining ten; the tenant to make repairs, pay water rates and any increase in insurance rates caused by tenants' improvements. The actual yearly yield from the sub-lessees for several years prior and up to October 1, 1925, was:

Louis K. Liggett,	$15,000	(Leased to April 30, 1930)
R. E. McDonald, Inc.	19,000	(" " " " ")
Radio Shop	2,100	(" " Sept. 15, 1926)
Billiard Parlor 3rd Floor	1,500	(Monthly tenancy)
Billiard Parlor 4th Floor	1,100	(" ")
Roof,	1,200	(" ")
Restaurant	900	(" ")
Total rental income		$40,800.00

DISBURSEMENTS

Rent to Burne Estate	$19,000.00	
Average carrying charges based upon charges for four years next preceding 1926	2,063.82	
Total carrying charges		21,063.82
Net profit per year		$19,736.18

The correctness of these figures of income, and that they represent the fair annual market value is not disputed, nor is there any protest by the owners against measuring the value of the leaseholds based upon them; but large as they are they deserve to be increased in respect of the

third and fourth floors and the restaurant store, which were under monthly tenancies, and which, it appears, could have been let upon better terms on lease for the balance of the term had it not been for the impending condemnation proceedings. It is well recognized that assurance of a long term commands a better price. It is the testimony that the third and fourth floors have a rental value on long term leases of from $2,800 to $5,500 per year, and that the tenant Harrington had offered $5,000, but was refused. Making due allowance for the partisanship in expert testimony, the things reserved in the offer, and for the difference between expectation and realization, the amount is fixed at $4,000; and for the same reason the restaurant, which was rated at from $3,750 to $5,250, is fixed at $4,000. The Surety Company has a reversionary right to the Radio Shop (10x18) on Washington street. The rent ($2,100) for this tiny place was all the traffic would stand. The owners' single objection is, that as against annual rentals there should be charged approximately $3,000, because in the income tax for some years an item of $2,080 was listed for salary to Mr. Kamm, the president of the company, and another for $960 for improvements. The company belongs to Mr. Kamm and he is entitled to all its income, and whether he takes it by way of salary or income is immaterial; and as to the improvement there is no likelihood of a recurrence. The total annual net profits, and which are found to represent the annual value of the lease, amount to $24,236.18. The market value of the lease for the unexpired term, calculated according to the rule land down in Holcombe *v.* Trenton White City Co., 80 N. J. Eq. 122, aff'd 82 N. J. Eq. 364; following West Jersey Railroad Co. *v.* Thomas, 23 N. J.

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Eq. 431, that "The true method of calculating the value of an unexpired lease is not by ascertaining the yearly rental value and then multiplying the figures by the number of years the lease has to run, but by calculating its value by the annuity tables, that is by multiplying the annual value by the value of one dollar per year for the number of years in the unexpired term" and at the present value of a dollar for four and a half years at six per cent., viz. $3.84, equals the sum due and allowed to the Surety Realty Company, subject to correction, $93,065.93. Upon first blush this seems disproportionate to the amount of the award, and it is suggested by the owner that a more equitable solution would be to pay the tenant the interest on the award, as it accrues, during the four and a half years of its term, and the tenant seems not to look upon it with disfavor if the owner will add to that sum the value of the half of the lot remaining which, it was testified, is $265,000, and which, it is asserted, was recently sold for $300,000, but the owner fails to justify his proposed course upon principles or authority. Though the allowance seems high, the rental value was no doubt an important factor in the award and is reflected in the enormous sum awarded. The interest on the award plus the interest on the amount of the value of the remaining land exceed the net rental value of the property by a substantial sum.

As to the claim of Liggett & Co., McDonald & Co. and the Radio Shop, it would appear that they are paying peak prices. There is testimony that leases of other stores could be had, and of the prices asked, all of which were higher than the rentals these tenants were paying, but there

are such marked differences in the structures, locations and circumstances generally from the demised premises that comparative figuration is of little or no value to the Court and of doubtful aid to the experts in forming their opinions. Their opinions were chiefly based on the "asking" price, none on the "bidding" price; none on vacant stores or those about to be vacated, but on places with a going business, some involving bonuses for their surrender, some not for the stores only, but for the business as well. The leased premises are in the business zone of the "Four Corners," two blocks away from the center, desirable, and in ready demand, no doubt, at prevailing rates, and perhaps at a premium in some instances because of the limited supply, but it is questionable whether any of the leases could be sold for more than the rent reserved. The trade would not warrant it, nor hardly the rent the tenants were paying. Liggett & Co. with their almost perfect business organization and heavy capital investment were able to make an annual profit of only $5,000, and McDonald & Co. had a deficiency in the last two years, which perhaps may be accounted for, as they tried to, by sacrificial sales of stock in contemplation of closing out and "milking" by their Boston supply house. The good will of a stand often plays an important part in rental value, but it cannot be said for either concern that theirs made any contribution in this respect. Liggett & Co. and McDonald's expert, Mr. Maier, gave as his opinion that the rental value of Liggett's store was $26,400 per annum—$800 per front foot; with an additional 50 per cent. for corner influence, and that McDonald's was $38,956.73, or more than double the rent reserved, and offered plausible explanations and

reasons, but it is difficult to share in his confidence and to accept his judgment, and it is thought that the more conservative and dependable figures of Mr. Berry, called by the Surety Company, and Mr. Houston, called by the owners, more nearly approximate the true
10 value. They estimate the fair rental value of the Liggett store at $15,400, or $700 a front foot, and the McDonald store and upper floor by Berry at $19,300, or $500 per front foot, and by Houston at $17,000. The latter is apparently of the opinion that the McDonald rent was excessive. The slight excess of $400 in one case and $300 in the other in rental values over the rent reserved does not warrant an allowance because it would be consumed in broker's commissions in the event of a sale.

20 Liggett & Co. argue, in support of Mr. Maier's opinion of the rental value of their lease, that the Washington street side of their store was a continuous show window seventy-four feet in length; that the opinions of real estate agents were that Washington street frontage was worth $300 per foot, adding an additional fifty per cent. for the fifteen feet nearest Market street, and that this, multiplied by the number of feet,
30 street length, made the total $24,500. This is ingenious but not sustainable. The testimony is that the $300 per foot is for store front, not show window front.

The Liggett and McDonald leases were made in 1923, and the consensus of opinion is that there was no marked change in rental values between that time and the condemnation, and that there was no likelihood of one until the terms expired in 1930. It has not been proved that the fair market value of the leases is more
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than the rent reserved, and consequently no allowance can be made to the lessees on this score.

The remaining question is, are the tenants entitled to compensation for the loss of their business, profits, good will, fixtures and cost of removal. The right to compensation for lands taken for public highways is purely statutory. 10
Before the Constitution of 1844 compensation was not required, and by that instrument it is provided that "land may be taken for public highways as heretofore until the Legislature has directed compensation to be made." The compensation is such only as is fixed by statute, whether it be adequate or inadequate, just or unjust. Simmons *v.* Passaic, 42 N. J. L. 619; Hudson Land Improvement Co. *v.* Seymour, 35 N. J. L. 47. The condemnation was had pur- 20
suant to Article 20, Section 23, of the act concerning municipalities (C. S. 2201; amended P. L. 1924, p. 501, P. L. 1925, p. 233), which provides for "an award for said lands and real estate or right or interest therein to be taken to the owner or owners thereof." Loss of business, profits, good will, fixtures and cost of removal and the like suffered by the tenants obviously are not lands or real estate or rights or interest therein in the legal sense and not within the 30
criterion fixed by the statute. In Freeholders of Hudson *v.* Emmerich, 57 N. J. Eq. 535, Vice-Chancellor Emery had before him the very question, which arose under a statute (P. L. 1888, p. 397), in effect indistinguishable from the one under consideration, in which he, in disposing of a claim for injury to a tenant's business, held: "As to the first ground, the general rule, as settled by the best authorities, is that injury to a business carried on upon the premises, either by 40

the landlord or tenant, is not a proper element of damage. *Lew. Em. Dom.* 487, and cases cited. And while no reported cases in our own courts have been referred to, this rule, as I understand, has always been applied in this State. Whatever may be the rule in other condemnations, the
10 damages to be given on the condemnation for public roads are, under our Constitution, such as are fixed by the Legislature. *Const. Art.* 1, 16; Crane *v.* Elizabeth, 9 Stew. Eq. 339 (Errors and Appeals, 1881). In this case the award is by the act clearly limited to the value of the land and damages to the remaining land of the owner after considering the benefits (P. L. of 1888, p. 406), and the damages are limited to the damages done to the fee simple where a single assessment is made for all the owners and per-
20 sons interested in any lot. This statute, as it seems to me, clearly excludes any allowance for injury to the business carried on on the premises taken and cannot by construction be extended to such damages." See also Phila. & C. Ferry Co. *v.* Inter-City L. R. R. Co., 76 N. J. L. 50. That is the law. It works hardships. The remedy lies with the Legislature; the courts cannot relieve. The rule, in principle, applies to all particulars
30 of damage set up by the tenants, including their claim for the value of the use of their fixtures during the remainder of their term, which was especially emphasized in the briefs, and their prayer to participate in the award, in which it must be presumed their losses did not figure, will be denied.

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ORDER AND DECREE ADJUDICATING RIGHTS OF PARTIES IN FUND AND DIRECTING DISTRIBUTION THEREOF.

Filed July 27, 1926.

It appearing that the City of Newark heretofore awarded the sum of $479,550.00 to Hugh F. Cook, Margaret Cook, his wife, Paul Burne and Frank Blanchet, individually and as executor under the last will and testament of Honoria Ann Blanchet, deceased, for land and real estate and rights and interests therein taken and appropriated by said City of Newark for the opening and widening of Washington street from a point about 106.58 feet north of the northerly line of Market street and southerly to the northerly line of Camfield Court in said city; 10 20

And it further appearing that because an uncertainty existed as to who was entitled to the said award by reason of the fact that conflicting claims had been made therefor, the said City of Newark asked permission of this Court to deposit the amount of said award into this Court in accordance with the statute in such case made and provided;

And it further appearing that by order duly entered herein on September 20, 1925, the said City of Newark was authorized and permitted to deposit the sum of $479,550.00 into this Court to be here distributed according to law; 30

And it further appearing that pursuant to said permission, the said sum of $479,550.00 was deposited with the clerk of this Court;

And it further appearing that by order duly entered herein on November 23, 1925, the sum of $102,750.00 was withdrawn from said deposit, 40

which said sum so withdrawn was charged against the interest in said fund of the said Hugh F. Cook, Margaret Cook, his wife, Paul Burne and Frank Blanchet.

And it further appearing that pursuant to the order and direction of this Court, all parties
10 who claimed to have any interest in said fund were directed to file with this Court an application in writing in such form as to advise the Court what claim or interest such person ought have in the said moneys on deposit in said Court;

And it further appearing that all persons who claim to have any interest in said sum have filed such application in writing, and it further appearing that proofs have been taken before this Court by all of the parties in interest herein in
20 support of their respective claims and interests in said fund, and the Court having heard Messrs. McCarter & English, solicitors for Hugh F. Cook, Margaret Cook, his wife, Paul Burne and Frank Blanchet, and Messrs. Stein, Stein & Hannoch, solicitors for Surety Realty Company, a corporation, and Messrs. Lindabury, Depue & Faulks, solicitors for Louis K. Liggett Company, a corporation, and Messrs. Bilder & Bilder, solicitors for R. E. McDonald, Inc., a corporation,
30 and Max M. Schwartz, Esq., solicitor for John H. Hocter and William R. Heyer, individually, and as partners trading as the Ace Radio Shop, and John Harrington, and Cecil H. MacMahon, Esq., solicitor for Charles A. McEuen; and the arguments of counsel having been heard and the Court having duly considered the matter and having determined that the rights and interests of the respective parties in and to the fund on deposit with the clerk of this Court are as here-
40 inafter more particularly set forth; and applica-

tion for counsel fees and taxed costs having been made on behalf of the respective parties, and the Court being of opinion that no counsel fees or taxed costs should be awarded to any of the said parties:

Now, Therefore, it is on this 27th day of July, 1926, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, and the said Chancellor, does by virtue of the power and authority vested in him, Order, Adjudge and Decree: 10

1. All applications for counsel fees and taxed costs be and the same hereby are denied.

2. That the clerk of this Court do pay to Charles A. McEuen, or to his solicitor of record, the sum of $46.85, together with any interest that may have accrued thereon from the date of the deposit of said fund with the said clerk, and which sum when paid shall be in full satisfaction and discharge of any and all interest which the said Charles A. McEuen may have in the fund on deposit herein. 20

3. That the clerk of this Court do pay to Surety Realty Company, or to its solicitors of record, the sum of $93,065.93, together with any interest that may have accrued thereon from the date of the deposit of said fund with the said clerk, and which sum when paid shall be in full satisfaction and discharge of any and all interest which the said Surety Realty Company may have in the fund on deposit herein. 30

4. That the clerk of this Court do pay over the balance of said fund, together with all accumulations thereon to Hugh F. Cook, Margaret Cook, his wife, Paul Burne and Frank Blanchet, or to their solicitors of record.

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5. That except as herein otherwise provided none of the parties in interest herein have any further right, title, interest or claim in and to said fund.

E. R. WALKER,
C.

10 Respectfully advised,

JOHN H. BACKES,
V.-C.

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EXHIBIT P. 1.

Blue print map showing property of Burne Estate at the northwest corner of Market and Washington streets and portion thereof taken by the City of Newark.

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EXHIBITS P. 2 and P. 3.

Photographs showing condition of Burne property prior to the taking thereof in the condemnation proceedings.

EXHIBIT P. 4.

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Bargain and sale deed from Nehemiah Perry, Sr. and wife to Martin Burne, dated May 10, 1866, recorded May 19, 1866, in Book Z-12 of Deeds for Essex County, pages 272, recited consideration $17,600, conveys premises at northwest corner of Market and Washington streets in the City of Newark described as follows:

> "Beginning at the northwest corner of Market and Washington streets and running 44 feet on Market street westerly to Caleb H. Andrus' line, thence 106 feet 7 inches to the rear, thence 44 feet across said rear to Washington street, thence 106 feet 7 inches to beginning."

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subject to mortgage in the sum of $8,000 given by said Perry and wife to the Mutual Benefit Life Insurance Company.

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EXHIBIT P. 5.

The Mayor & Common Council of the City of Newark to John R. Weeks

To all persons to whom these present shall come or may concern.

10 Whereas, The Common Council of the City of Newark, did on the Sixth day of August, in the year of our Lord one thousand eight hundred and fifty two by resolution, duly order and direct a sewer to be made and constructed.

Beginning at Academy Street, in Washington Street, thence running along the centre of Washington Street, to Market Street, thence along the centre of Market Street to the intersection of Washington Street on the Southerly side of
20 Market Street aforesaid, thence along the centre of Washington Street to Kinney Street thence along the centre of Kinney Street to the New Jersey Railroad Avenue thence along the New Jersey Railroad Avenue to the intersection of Alling Street thence along the centre of Alling Street to Market Street, thence along Market Street, and under the Morris Canal, to the City Wharf or Dock and under the same into the Passaic River, with a branch sewer from the
30 corner of Market and Washington Streets, extending along Market Street to or near the Court House of the County of Essex.

And Whereas, the said Common Council did, on the Second day of June in the year of our Lord one thousand eight hundred and fifty four, by resolution, order and direct the extension of the main sewer in Market Street, as proposed by the Committee on Sewers and drainage, commencing at the Westerly terminus of the sewer in Market Street near the Court House, thence

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running through West Market Place, to the Westerly line of High Street, with all the necessary culverts basins &c.

And Whereas, the whole expense of the aforesaid sewer, with the said branch and extension thereof, has been ascertained and fixed by the certificate and oath of the Street Commissioner and filed in the office of the City Treasurer, the amount of such expense being Sixty five Thousand, three hundred and Eleven Dollars, and seventy Six Cents as appeared by the certificate aforesaid. And Whereas the said Common Council did on the First day of December, one thousand eight hundred and fifty four appoint Commissioners to make an assessment of the amount of such expense either in whole or in part, upon the owners of property benefi*t*ed thereby. And if, by the judgment of such Commissioners a part only of such amount aforesaid should be assessed upon such owners of property, then to assess the balance of such expense upon the City of Newark, and requiring that the said Commissioners proceed in said assessment in the manner provided by the ninth section of the Act entitled "A further supplement to the Act, entitled An Act to incorporate the City of Newark," approved February the Twenty eighth, eighteen hundred and forty nine, And Whereas, the assessment made by said Commissioners, dated Newark July 6th, 1855, has by the Supreme Court of this State been adjudged invalid,

And Whereas, the said Common Council did on the Fourth day of April, in the year of our Lord eighteen hundred and fifty six, resolve that the resolutions theretofore passed by the said Common Council, for and in relation to the

construction of said sewer, be it in all things confirmed, and that all proceedings had under and in pursuance of the same, prior to the appointment of said Commissioners for assessing the said expense, be also in all things confirmed, and that the appointment of the said Commissioners, and all proceedings subsequent hereto be thereby vacated and set aside, And that Joseph Ward of the First Ward, William A. Righter of the Second Ward, Terah Benedict of the Fourth Ward, Lucius D. Baldwin of the Seventh Ward and Amos H. Searfoss of the Ninth Ward, disinterested freeholders of the City of Newark, be thereby appointed Commissioners to make an assessment of the amount of such expense, either in whole or in part, upon the owners of property benefited thereby, and if by the judgment of the said Commissioners a part only of such amount aforesaid shall be assessed upon such owners of property, then to assess the balance of the whole amount of such expense upon the City of Newark, and that the said Commissioners proceed in said assessment in the manner provided by the ninth section of the act entitled "A further supplement to the act entitled "An Act to incorporate the City of Newark" approved February Twenty eighth, eighteen hundred and forty nine." And that the said Commissioners be thereby authorized and directed, after taking upon themselves the duty to which they were thereby appointed, to cause reasonable notice to be given to the owners of property in their opinion benefited by the said sewer before any assessment be by said Commissioner concluded on against them, said notice informing said owners of property when and where they might have an oppertunity of

Exhibit P. 5.

being heard before the said Commissioners in relation to the said assessment, said notice to be given by advertising in three daily newspapers of the City the time and place of such hearing for at least twenty days prior to such hearing, and by a notice either served personally on, or left at the residence in the City of Newark, of the several owners of property so, in the opinion of the said Commissioners, benefited so far as the said owners or their residences could be ascertained and found at least ten days prior to such day of hearing.

And Whereas, the said Joseph Ward, William A. Righter, Terah Benedict, Lucius D. Baldwin and Amos H. Searfoss met, for the purpose of making said last directed assessment, having dulying according to the direction of said last mentioned resolution of said Common Council in their behalf, given notice as thereby directed, and were duly sworn according to law to make the said last directed assessment fairly, according to the best of their skill and judgment.

And Whereas, the said Commissioners did on the Fifth day of December, eighteen hundred and fifty six, certify and report in writing that they had made an assessment of a part of the whole expense of the said sewer, said part being the sum of Fifty two thousand nine hundred and seventy seven Dollars and ninety five cents, upon the owners of property benefited thereby, and whereas the said Commissioners did also accompany the said report with a Map designating the property referred to in the said report, which Map is by them certified and signed, bearing even date with said report, referred to therein and filed therewith in the Office of the City Treasurer.

And Whereas, the said Commissioners did assess as a part of the said sum of Fifty two thousand nine hundred and seventy seven Dollars and ninety five Cents, the sum of One Hundred and seventy one Dollars and twenty nine Cents on a certain lot of land situate on the
10 Northwesterly corner of Market and Washington Streets in said City of Newark.

Said lot being forty four feet in front on the Northerly side of said Market Street, by one hundred and six feet and six inches in depth on the Westerly side of said Washington Street, and is designated as lot number 259 (Two Hundred and fifty nine) on the aforesaid Map.

And Whereas, the said Common Council did, by resolution, passed the Fifth day of June in
20 the year of our Lord one thousand eight hundred and fifty seven direct that the said lot be advertised and sold by the Treasurer of the said City, for the purpose of raising the amount so as aforesaid assessed and the interest thereon, and the expense of said advertisement and sale.

And Whereas, the said sale was duly advertised for two months in two of the newspapers published in said City, once at least in each week,
30 such advertisement setting forth the time and place of sale together with a particular description of the said lot and specifying the amount assessed on the same as aforesaid

And Whereas, the amount so assessed on said lot, together with the interest thereon, from the day the same was paid to the day of the sale thereof, and the cost and expenses of the said Advertisement and sale did amount to the sum of One Hundred and Seventy eight Dollars and
40 eighty six cents, the said Common Council of

Exhibit P. 5.

the City of Newark, on the Twenty Fourth day of August in the year of our Lord, eighteen hundred and fifty seven, at ten o'clock in the forenoon of that day, at the City Treasurer's Office in the Market Building, in the said City of Newark, that being the time and place the same was advertised for sale, did cause the said lot, in said City, to be exposed for sale at public auction for the lowest term of years for which any person would agree to take the same and pay the said sum of One Hundred and Seventy eight Dollars and eighty six Cents, being the amount assessed as aforesaid on said lot, and the interest thereon, and the costs and expenses of the advertisement and sale and thereupon John R. Weeks of said City of Newark, did then and there offer to take the same for the term of two hundred years, and pay the said sum of One Hundred and seventy eight Dollars, & eighty six Cents, being the amount assessed as aforesaid on said Lot, and the interest thereon, and the costs and expenses of said advertisement and sale, And no person offering to take the same for so short a time, the same was accordingly openly and publicly cried off and sold to the said John R. Weeks for the said term of Two Hundred years. Now therefore be it known, that the said The Mayor and Common Council of the City of Newark in consideration of the said sum of One Hundred and seventy eight Dollars, and eighty six Cents paid by the said John R. Weeks the receipt whereof is hereby acknowledged, do hereby declare, and make known that the said lot of land and premises has been sold to the said John R. Weeks, for the said term of Two hundred years, for the payment of the amount, assessed as aforesaid

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on said lot, and the interest thereon, and the cost and expenses of said advertisement and sale, and the said John R. Weeks, his executors, administrators and assigns are entitled to hold and enjoy the same for his and their proper use, until said term of Two hundred years is completed and ended provided however, that if the
10 owner or owners, mortgagee or mortgagees of said Lot shall within the space of one year after the day of said sale, pay to the said John R. Weeks his executors, administrators and assigns the said sum of One Hundred seventy eight 86/100 Dollars, with legal interest, and all expenses for fencing the said Lot, in case the same be done, then the said owner or owners, mortgagee or mortgagees of said Lot as the case may be, shall be entitled to re-enter and
20 repossess the said Lot in the same manner, and to all intents, as if the said sale had not been made.

In Witness Whereof, The Common Council of the City of Newark, have caused their common seal to be hereunto affixed, and the Mayor of said City hath hereunto signed his name, this Fifth day of November in the year of our Lord one thousand eight hundred and fifty seven.

30 MOSES BIGELOW (L. S.)

Signed, sealed and delivered
in the presence of

Corra Drake.

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Exhibit P. 5.

State of New Jersey, } ss.
Essex County. }

Be It Remembered, that on this Fifth day of November, in the year of our Lord one thousand eight hundred and fifty seven before me Theodore Runyon A Master in Chancery of New Jersey, personally appeared Corra Drake who being duly sworn according to law doth depose and say that he saw Moses Bigelow, Mayor of the City of Newark, sign the foregoing Declaration of Sale, and affix thereto the Corporate Seal of the said City of Newark, and heard him acknowledge that he signed sealed and delivered the same as the voluntary act and deed of the Mayor and Common Council of the City of Newark, and that this deponent subscribed his name thereto as an attesting witness.

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CORRA DRAKE.

Sworn and subscribed on the day
and year aforesaid, before me.

Theodore Runyon,
Master in Chancery.

John R. Weeks to Nehemiah Perry
15 ct. stamp Canc'd.

30

Know All Men by These Presents, that I, John R. Weeks, of the City of Newark, New Jersey, for and in consideration of the sum of One Dollar to me in hand paid by Nehemiah Perry of the said City of Newark do hereby, assign, transfer and set over, unto said Nehemiah Perry a certain Declaration of sale made to me by The Mayor and Common Council of

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Exhibit P. 5.

the City of Newark, bearing date the Fifth day of November A. D. 1857, for certain land and premises on the corner of Market and Washington Streets in the City of Newark, of Abraham H. Sherman.

10 Together with the rest and residue of the term of Two hundred years therein mentioned yet to come and unexpired, and also all my right title and interest of in and to said land and premises To Have and To Hold all and singular the same unto the said Nehemiah Perry his heirs, executors, administrators and assigns forever.

In Witness Whereof, I have hereunto set my hand and seal this Fifth day of June in the year of our Lord one thousand eight hundred and sixty one.

20 J. R. WEEKS (L. S.)

Signed, sealed and delivered
in the presence of

George F. Tuttle.

State of New Jersey, }
County of Essex. } *ss.*

30 Be It Remembered, that on this Twenty Ninth day of September A. D. 1870, before me George F. Tuttle, A Master in Chancery of New Jersey, personally appeared, John R. Weeks, who I am satisfied, is the grantor in the foregoing Deed named, and I having first made known to him the contents thereof he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

40 GEORGE F. TUTTLE.

Exhibit P. 5.

This is to Certify, That on the Twenty Fourth day of August A. D. 1857, I, (as Treasurer of the City of Newark) sold divers pieces of property for unpaid assessments for the construction of a Sewer running through Washington Street, from the Canal to Market Street, and among other pieces one described as Abraham H. Sherman's on the corner of Market and Washington Street for amount of assessment interest and cost $178.86, which was purchased by John R. Weeks, for Two hundred years, and a Declaration of Sale, was delivered to him on the 29" day of May 1860, as recorded in the Sales Book, in the Office of the Treasurer of the City of Newark, and discribed as lot number two hundred & fifty nine (259) on the Sewer Map on file in said Treasurers Office.

J. HARTSHORNE,
Late City Treasurer.

Newark May 9, 1866.

Nehemiah Perry Sr. to Martin Burne.
15 ct. stamp canc'd.

Know All Men by These Presents, That I Nehemiah Perry Senior of the City of Newark New Jersey for and in consideration of the sum of One Dollar to me in hand paid by Martin Burne of said City of Newark do hereby assign, transfer and set over unto said Martin Burne, the Declaration of Sale within mentioned as having been made and delivered by The Mayor and Common Council of the City of Newark, to John R. Weeks for certain land & premises on the corner of Market & Washington Streets in said City of Newark of Abraham H. Sherman,

on the 29th day of May A. D. 1860, (which said Declaration of Sale was assigned to me by said John R. Weeks which assignment has been lost or mislaid)

TOGETHER with the rest and residue of the term of two hundred years, therein mentioned yet to come and unexpired, and also all my right, title and interest of, in and to said land and premises, To Have and To Hold all and singular the same unto the said Martin Burne his heirs, executors administrators and assigns forever.

IN WITNESS WHEREOF I have hereunto set my hand and seal the Ninth day of May eighteen hundred and sixty six.

N. PERRY L. S.

Signed sealed and delivered
in the presence of

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Received in the Office December 28 A. D. 1882.

Office of
REGISTER OF DEEDS AND MORTGAGES
Essex County, New Jersey.

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

I, HOWARD S. DODD, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain deed made by The Mayor & Common Council of the City of Newark to John R. Weeks and also of the certificate of acknowledgment

thereto annexed, as the same may be found recorded in my office in book Q-21 of Deeds for said County on pages 421-426.

In Testimony Whereof, I have hereunto set my hand and official seal (seal) this 13th day of April, A. D. 1926.

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HOWARD S. DODD,
Register of Deeds and Mortgages.

Compared by 20 & 3

Office of
Register of Deeds and Mortgages
Essex County, New Jersey

CERTIFIED COPY OF DEED

20

The Mayor & Common Council
of the City of Newark
to
John R. Weeks

Recorded December 28th, 1882,
In Book Q-21 of Deeds Pages 421-426.

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EXHIBIT P. 5a.

Last will and testament of Martin Burne, proved March 22, 1912 before the Surrogate of Essex County. This will devises the real estate of the testator to his five children, Honoria Ann Blanchet, wife of Frank A. Blanchet, Martin Burne, Jr., Lucien Burne, Margaret Cook, wife of Hugh F. Cook, and Paul Burne.

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EXHIBIT P. 6.

Bargain and sale deed from Lucien Burne and wife to Hugh F. Cook and wife, dated May 17, 1916, and recorded May 19, 1916 in Book H 57, page 481, conveys an undivided one-fifth (1/5) right, title and interest to the premises in question.

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EXHIBIT P. 7.

Last will and testament of Honoria Ann Blanchet, proved October 1, 1921 before the Surrogate of Essex County. This will devises all of her property, real and personal, to her husband, Frank A. Blanchet.

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EXHIBIT P. 8.

Warranty deed from Martin Burne and wife to Margaret Cook and Hugh F. Cook, Paul Burne and Honoria Ann Blanchet, dated November 5, 1920, and recorded June 21, 1921, in Book S-64 of Deeds, pages 292, etc. This deed conveys an undivided one-fifth (1/5th) interest in the premises to the grantees.

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EXHIBIT P. 9.

Ordinance covering the widening of Washington street, in the City of Newark, and involving the taking of the premises in question, passed by the Commissioners of the City of Newark on May 20, 1924.

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EXHIBIT D.—SURETY—1.

THIS INDENTURE made this First day of February, in the Year One Thousand Nine Hundred & Ten (1910) BETWEEN MARTIN BURNE of the City of Newark, in the County of Essex and State of New Jersey, of the first part, AND SEBASTIAN S. KRESGE of the City of Detriot, in the County of Wayne and State of Michigan, of the second part; WITNESSETH, That the said party of the first part does hereby demise and lease unto the said party of the second part, the lands and premises belonging to the said party of the first part, known as Nos. one hundred and five (105) and One Hundred and seven (107) MARKET STREET in the City of Newark. Said premises being about one hundred feet (100) in depth on Washington Street, with the buildings theron and with the appurtenances, and the sole and uninterrupted use and occupation thereof (except as hereinafter mentioned) for the term of twenty (20) years from the first day of April A. D. 1910, for the yearly rent during the first ten (10) years of said term, of Eighteen Thousand (18,000) Dollars payable in equal monthly installments of Fifteen Hundred (1500) Dollars each on the first day of each and every month during the first ten years of said term in advance, and for the yearly rent of Nineteen Thousand Dollars (19000) during the last ten years of said term, payable in equal monthly installments of Fifteen hundred and Eighty-three dollars and thirty-three cents ($1583.33) on the first day of each and every month during the last ten years of said term, in advance.

Said party of the second part does hereby agree to pay to the said party of the first part,

his heirs, assigns, agents or attorneys, the said yearly rental of Eighteen thousand (18000) Dollars during the first ten years of said term as aforesaid at the time and in the manner aforesaid, and also the said yearly rental of Nineteen thousand (19000) Dollars during the last ten
10 years of said term, at the time and in the manner aforesaid.

And it is hereby agreed by and between the parties hereto that the said party of the second part may assign this lease or sublet the whole or any portion of the premises hereby demised subject, however, in all respects to all the terms and conditions of this lease, and it is agreed that said party of the second part is not to use said premises nor permit any part thereof to be used for any other purpose than a store for the sale of
20 general merchandise, provided however, and it is agreed by said party of the second part that he will not at anytime overload said building or permit the same to be overloaded with merchandise or otherwise beyond the strength and capacity of the flooring and structure of said buildings, and that no dangerous, explosive, or unlawful substances and materials are to be kept or sold in said buildings or in any part thereof; It is un-
30 derstood and agreed, however, that said party of the second part is to have the right and privilege to sublet said buildings or any part thereof for the purpose of carrying on any lawful business or occupation which shall not be dangerous or detrimental to said buildings or premises and which shall not include as aforesaid the sale or keeping upon said premises dangerous or explosive materials. And it is further agreed that the said party of the second part is not to use said premises or permit any part thereof to be
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used for any business or any purpose which would increase the fire insurance rates upon the buildings upon said premises, provided, however, in case said Fire insurance rates are increased by and in consequence of any business or purpose for which the same shall be used or subletted, that in such case said party of the second part and his said subtenant so using said premises or any part thereof shall be liable to pay to said party of the first part, his heirs, executors, administrators or assigns a sum of money which shall be equal to such increase in such rates of insurance upon said buildings or any part thereof over and above the rates paid thereon by said party of the first part; his heirs or assigns prior to said increase of rates. And it is further agreed that in case said party of the second part, his executors, administrators or assigns shall not observe the covenants of this lease herein contained with respect to the overloading of said premises and the use and occupation to which said premises and the buildings thereon may be put by the said party of the second part or his assigns, said party of the first part, his heirs, or assigns may at his or their option enforce against said party of the second part, his executors, administrators or assigns, the penalty for such violation of such covenants of a forfeiture of this lease; and it is further agreed that said party of the first part, his heirs, assigns, agents or attorneys, may enter into and upon said premises at reasonable hours in the day time to examine the same, or to make such repairs or alterations therein as shall be necessary for the preservation thereof; and to exhibit them at anytime during the last three months of said term, from ten o'clock in the morning until five o'clock in the afternoon (Sun-

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day excepted), and to any persons or person; and to put up notices "TO LET" or "FOR SALE" on the outside wall thereof. If the said premises shall become vacant, or be deserted during said term, said party of the second part does hereby authorize the party of the first part, his heirs,
10 assigns, agents or attorneys, to re-enter the same at his and their option and re-let them and receive and apply the rents so received to the payment of the rent due by these presents.

And the said party of the second part does further agree to keep the premises in as good repair as the same shall be at the commencement of the said term (wear and tear arising from a reasonable use of same, and damages by the elements excepted); and at the expiration of said term to yield up the peaceable possession thereof
20 to the said party of the first part, his heirs assigns, agents or attorneys.

And the said party of the second part doth further agree to pay the water tax, assessed upon said property additional to the rent aforesaid, whether assessed by metered rates or otherwise

In case of the destruction of the buildings upon said demised premises or any portion of said buildings by fire prior to the expiration of the term hereby granted, if the said destruction of
30 said buildings shall be of such a character and to such an extent that the said party of the second part, his executors, administrators or assigns, are totally unable to carry on the business or businesses carried on by them upon said premises or to occupy the same, then, and in such case the rent hereby agreed to be paid by the party of the second part for said premises shall from the time of such destruction be not due and payable as provided for in this lease until the
40 said party of the first part, his heirs or assigns,

shall rebuild the said premises, so that the same may be occupied by said party of the second part or his assigns and used by them as prior to the destruction of said buildings the party of the first part doth for himself, his heirs, executors or administrators, agree to rebuild and restore said buildings as soon as practicable. In case of the partial destruction of said buildings or any part thereof, it is agreed by and between the parties hereto that until the partial destruction so caused by said fire shall be repaired by said party of the first part his heirs or assigns that the rent due and to become due by this indenture of lease shall abate proportionately as the rental value of that portion of the premises so partially destroyed by fire shall bear to the entire rental value of said premises.

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And it is further agreed by and between the parties hereto that said party of the second part is to have the privilege of making such alterations and repairs in and upon same demised premises he may see fit during the continuance of the term hereby granted provided, however, that said alterations and repairs to said buildings shall not be detrimental to said buildings or damage the same in any manner or impair their value.

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No change or alterations will be made in this lease except by writing properly signed by both parties.

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

Martin Burne (LS)
Sebastian S. Kresge (LS)

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Signed sealed and delivered
in the present of:

S. S. K. by Louis Kamm

John H. Meeker
as to Martin Burne.

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STATE OF NEW JERSEY }
COUNTY OF ESSEX }

BE IT REMEMBERED, that on this Nineteenth day of February in the year One Thousand Nine Hundred and Ten (1910) before me, a Commissioner of Deeds for the State of New Jersey, personally appeared SEBASTIAN S. KRESGE, whom I am satisfied to one of the parties mentioned in the within lease, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed:

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LOUIS SCHLESINGER.
A Commissioner of Deeds
for the State of New Jersey.

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EXHIBIT D.—SURETY—2.

Sub-lease from Surety Realty Company to Louis K. Liggett, dated June 8, 1922. This lease is sufficiently described in the record.

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EXHIBIT D.—SURETY—3.

This INDENTURE, made this Eighteenth day of April, in the year Nineteen hundred and twenty-two, between

SURETY REALTY COMPANY,

a New Jersey corporation having its principal office located in the City of Newark, County of Essex and State of New Jersey, of the first part and 10

R. E. McDONALD, INC.,

a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, in the County of New York and State of New York, party of the socond part; WITNESSETH,

1. That the said party of the first part does hereby demise and lease unto the said party of the second part, the store and basement underneath the same, commonly known as No. 105 Market Street, in said City of Newark, being the store immediately adjoining on the west the store now occupied by William B. Riker & Sons Co., on the northwest corner of Washington and Market Streets, in said City of Newark, the store and basement hereby demised each having a frontage of about twenty one feet and a depth of about eighty five feet, together also with the floor immediately above the store hereby demised, said floor running, however, to the full width of said building to Washington Street, and extending to the north to a point about twelve feet from the most northerly wall of said building, said twelve feet being especially reserved by the party of the first part for use as a hallway at that point, from the bottom to the top of said building, and being part of the same 20 30 40

premises mentioned in a certain lease made by one Martin Burne to one Sepastian S. Kresge, which lease is dated February 1, 1910, and recorded in Book S. 46 of deeds for Essex County, page 191, which said lease was thereafter acquired by the party of the first part by mesne
10 assignments, the said premises hereby demised being the same premises now occupied by the party of the second part.

2. The said party of the first part does hereby demise and lease unto the party of the second part, the said premises for the sole and uninterrupted use and occupation thereof, except as hereinafter mentioned, for the term of seven and one half years from the first day of October, 1922, to the thirty-first day of March 1930, at 12 o'clock
20 noon, at the following annual rentals, that is to say:

(a) The annual rental of Seventeen Thousand Dollars ($17,000) which shall be paid by the party of the second part to the party of the first part for the period beginning October 1, 1922 and ending March 31, 1925, in monthly instalments of $1416.66 to be payable on the first business day of each and every month during said first two and a half year period, in advance;
30 and

(b) The annual rental of Nineteen Thousand Dollars ($19,000), which shall be paid by the party of the second part to the party of the first part for the period beginning April 1, 1925, and ending March 31, 1930, in monthly instalments of $1583.33, to be payable on the first business day of each and every month during said five year period, in advance.

(c) In addition to the foregoing rentals the
40 party of the second part agrees to pay to the

party of the first part, as additional rent, 3% on all sales made by the party of the second part, its successors, assigns, sub-tenants and under-tenants, and subsidiary companies in said premises, in excess of $300,000 per year. In determining the amount of said sales allowance shall be made for all goods sold to customers but subsequently returned by any customers and accepted as such, and all such returned goods shall be excluded from the total sales aforesaid. Said gross sales shall be ascertained by an examination of the books of the party of the second part, its successors, assigns, sub-tenants and under-tenants and subsidiary companies, at the end of each year from the time this lease becomes operative as hereinafter let forth. For the last six months period of this lease said ascertainment shall be had at the expiration of said six months period, and said additional rental during said six months period, shall apply to all sales in excess of $150,-000. instead of $300,000. Said gross sales shall be ascertained by any Certified Public Accountant of the City of Newark of the selection of the party of the second part, and the party of the second part shall pay the cost of such accountant's services. Should the party of the second part, its successors, assigns, sub-tenants, under-tenants or subsidiary companies, fail, neglect or refuse to employ such accountant for such purpose. same may be done, upon reasonable notice, by the party of the first part, and the expense thereof shall be borne by the party of the second part. In any case, the party of the second part agrees to submit its books and cause the books of its sub-tenants, under-tenants and subsidiary companies to be submitted for the examination of such accountant for the purposes

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aforesaid. On the first day of the month succeeding the day when said greoss sales and said additional rent shall have been ascertained, said additional rental shall become due and payable from the party of the second part to the party of the first part as so much additional rent due
10 and owing from the party of the second part to the party of the first part, and the said party of the first part shall have the same rights and remedies with respect to the collection of said additional rent as it would have with respect to the other rentals hereinbefore set forth. For the purpose of more effectually including in the total sales hereinbefore referred to, not only the sales made by the party of the second part, its successors or assigns, but the sales made by its sub-tenants and under-tenants, or subletting that
20 may be made by the party of the second part with any such sub-tenant or under-tenant, there will be included a suitable provision for permitting the total sales of said sub-tenant and under-tenant to ne ascertained ny the Certified Public Accountant of the party of the second part, and for furnishing to the party of the first part hereto a copy of the report of such Certified Public Accountant, with respect to such sales no
30 sub-lease or under-lease from the party of the second part shall become effective or operative unless and until such a provision shall have been included therein.

3. And the said party of the second part, for itself, its successors and assigns, does hereby covenant and agree to pay to the party of the first part, its successors and assigns, agents or attorneys, the said rentals at the time and in the manner aforesaid.

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Exhibit D–Surety–3.

4. And the said party of the second part doth, for itself, its successors and assigns, hereby promise and agree that it will not, without the written consent of the party of the first part, relet or under-let the whole or any part of said premises, nor use or permit any part thereof to be used for any other purpose than a retail shoe store under the penalty of forfeiture and damages, except however, that permission is hereby given to the party of the second part, but submject to the provisions of paragraph #2, subdivision C., to sub-let any portion of said premises for the sale, at retail, of ladies cloaks, suits, waists and hosiery and millinery. 10

5. And it is further agreed between the parties hereto that the party of the second part will not assign this lease without the written consent of the party of the first part, its successors, assigns, agents or attorneys, under the penalty of forefeiture, and damages. It being expressly understood and agreed, however, that this lease may, at any time, be assigned to a corporation that may be organized under the laws of the State of New Jersey for the purpose of operating a retail shoe store on the said demised premises, providing the said corporation shall assume all the obligations imposed herein upon the party of the second part, it being understood, however, that this consent shall not be construed as granting any right to any further assignment of said lease or to any further sub-letting or under-letting of any part or the whole of said demised premises; and it being further understood that on such assignment, sub-letting or under-letting the liability of the party of the second part hereto and that of the guarantor who shall execute the guaranty agreement in connection with 20 30 40

this lease, shall not by said assignment or sub-letting or under-letting be lessened or diminished.

6. And it is further understood and agreed that the said party of the second part will not at any time overload the said building located on said premises, or permit the same to be over-
10 loaded with merchandise or otherwise, beyond the strength and capacity of the flooring and structure of said building, and that no dangerous, explosive or unlawful substance shall be kept in or sold in any part of said demised premises.

7. It is further agreed that in case the party of the second part shall fail, neglect or refuse to observe the covenants of this lease herein contained with respect to the overloading of said premises, or the use to which the said demised
20 premises may be put by the party of the second part, its successors and assigns, or with respect to the prohibition against sub-letting or under-letting the whole or any part of said premises, or of the assignment of said lease, or with respect to the inspection of the books of the party of the second part, or of its sub-tenants or under-tenants, if any, or of its subsidiary companies, if any, that the said party of the first part, its successors and assigns may, at its option, in
30 addition to any claim for damages or any other cause of action that it may have acquired thereby, enforce against the party of the second part, its successors or assigns, the penalty of such violation of said covenants by termination and forefeiture of this lease, and thereupon the party of the first part shall have the right to re-enter and take possession of said premises as of its former estate. But it is expressly understood and agreed that any waiver in the party of
40 the first part, its successors or assigns of any

default of the party of the second part, its successors or assigns, with respect to any of the aforesaid covenants, shall not be deemed a waiver of any subsequent defaults or of any abandonment of any of said covenants.

8. It is further understood and agreed that the said party of the first part, its successors and assigns, may enter into and upon said demised premises at any time to make such repairs as shall be necessary, and at any time during the last three months of said term exhibit said premises from ten o'clock in the forenoon until five o'clock in the afternoon, to any person or persons, and put up notices "To Let" or "For Sale" in the outside wall thereof, but the privilege herein given to the party of the first part for the purpose of making such repairs shall not be construed as an obligation on the part of the party of the first part to make such repairs, unless in this lease otherwise specified.

9. If the said premises shall become vacant or be deserted during said term, the said party of the second part does hereby authorize the party of the first part, its successors, assigns, agents or attorneys, to re-enter the same at its option and re-let them and receive and apply the rent so received to the payment of the rent due by these presents.

10. And the said party of the second part does further agree to keep the said premises in as good repair as the same shall be at the commencement of said term, (wear and tear arising from a reasonable use of the same and damage by the elements exececpted), and at the expuration of said term to yield up the peaceful possession thereof to the said party of the first part, its successors, assigns, agents or attorneys.

Exhibit D-Surety-3.

11. And the said party of the second part does further agree to pay the water tax assessed on said demised premises, additional to the rent aforesaid, and in case of the failure of the party of the second part, its successors and assigns, to make payment of said water tax when the same shall become due and payable, said payment may be made by the party of the first part and the amount so paid shall be added to the monthly rent to become due in the month or months following said payment or payments respectively, and the sum total shall thereupon be regarded as the amount of the rent due and owing to the party of the first part by the party of the second part, its successors or assigns, for such following month or months.

12. In case of the destruction of the building erected on said premises by fire, prior to the expiration of the term hereby granted, if the said destruction shall be of such a character and to such an extent that the party of the second part, its successors or assigns, is totally unable to carry on the business carried on by it upon said premises, or to occupy the same, then and in such case the rent hereby agreed to be paid by the party of the second part for said premises, shall, from the date of such destruction, be not due and payable as provided for in this lease, until the said party of the first part, its successors and assigns, shall repair the said premises so that the same may be occupied by the party of the second part, its successors or assigns, and used by it in substantially the same manner as prior to the destruction of such building; but in case of a total destruction of said premises, the party of the first part shall be under no obligation to repair the said premises. In case of a

partial destruction by fire, of any part of said premises hereby demised, it is agreed by and between the parties hereto that until the partial destruction so caused by said fire shall be repaired by the said party of the first part, its successors and assigns, that the rent due and to become due by this indenture of lease shall abate proportionately, as the rental value of that portion of the premises so partially destroyed by fire shall bear to the entire rental value of said premises, as fixed by the terms of this lease. 10

13. It is further understood and agreed between the parties hereto that no alterations shall be made on said demised premises by the party of the second part, its successors or assigns, without first obtaining the written consent of the party of the first part, but such consent shall not be unreasonably withheld. 20

14. It is further understood and agreed that the party of the first part will, during the period from October 1, to April 1, of each year, supply steam heat for said premises in such quantity and at such times as may be reasonably necessary.

15. It is further understood and agreed that the party of the first part shall under no circumstances be liable for any damage to the party of the second part, its successors or assigns, by reason of the neglect or negligent act of any of the tenants or other persons occupying the building of which said demised premises are a part. 30

16. It is further agreed that if at any time during the term hereby demised, proceedings in bankruptcy or insolvency proceedings of any kind shall be instituted by or against the party of the second part, its successors or assigns, and an adjudication had thereon, or if the party of 40

the second part, its successors or assigns, shall assign its estate or effects for the payment of its debts, or if any execution shall issue against the party of the second part, its successors, assigns, or any of its effects whatsoever, and remain unsatisfied and unsecured for thirty days or more,
10 or if a receiver or trustee shall be appointed of its property, or if this lease shall, by operation of law, devolve upon or pass to any person or persons other than the said party of the second part, then and in each of said cases, this lease shall cease and come to an end three days after notice shall be sent by mail by the party of the first part, its successors or assigns, to the party of the second part, its successors or assigns, addressed to the said demised premises.

20 17. As a further consideration for the execution of this lease the party of the second part has deposited with the party of the first part the sum of Seventy five hundred ($7500) Dollars, the receipt whereof is hereby acknowledged by the party of the first part, which sum the party of the first part agrees to repay to the party of the second part at the rate of Two thousand ($2,000) Dollars per year in monthly installments of One Hundred sixty six dollars and sixty seven cents
30 ($166.67) until the entire sum of Seventy five hundred ($7500) Dollars shall have been repaid to the party of the second part. The first of said payments shall be made to the party of the second part on October 1, 1922. In addition thereto the party of the first part shall also pay to the party of the second part interest at the rate of six per cent per annum, on all unpaid balances of said sum of Seventy five hundred ($7500) dollars, the first interest payment to be made on October 1, 1922, on said sum of Seventy
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five hundred ($7500) dollars and the remaining interest payments to be made at the end of each year thereafter until such time as said entire principal sum of Seventy five hundred ($7500) dollars shall have been fully paid.

18. This lease is made on this express condition and limitation that the same may be terminated by the party of the first part, its successors or assigns at any time after the first four years of said term by giving notice to the party of the second part, its successors or assigns, of such intention to terminate at least nine months prior to the time fixed for such termination and by paying the party of the second part the sum of Twenty five thousand ($25000) dollars, which sum shall be paid in the manner following:

Five thousand ($5000) dollars to be paid upon giving of said notice to the party of the second part, its successors and assigns, and the balance, to wit: the sum of Twenty thousand ($20,000) dollars, shall thereupon be deposited in any bank or trust company in the City of Newark at least twenty four hours before the time fixed for the termination of said lease, Said deposit to be made in escrow with said bank or trust company with instructions to pay the same to the party of the second part, its successors or assigns upon its removal from said premises as required by the terms of said notice and thereupon upon the removal of said party of the second part, its successors and assigns in compliance with said notice of termination, from the said premises the party of the second part its successors and assigns shall be entitled to receive said sum of Twenty thousand ($20,000) dollars from said bank or trust company. The party of the second part does hereby agree with the party of the first

part that upon receipt of notice with said payment of Five thousand ($5000) dollars as aforesaid that this lease will, at the expiration of the nine months period mentioned in-said notice, come to an end, anything hereinbefore to the contrary in anywise notwithstanding and that it
10 will peacefully and quietly remove from said premises and deliver up possession thereof to the party of the first part its successors and assigns.

19. This lease and all the terms, covenants and conditions thereof are in all respects subject and subordinate to the rights of the State, County and City in which the demised premises are situate.

20. And it is further understood and agreed
20 that no change or alteration will be made in this lease, except by writing properly signed by both the parties hereto.

21. And for the performance of all and singular the covenants and agreements hereinbefore mentioned, the said parties hereby bind themselves, and their respective successors and assigns forever.

In Witness Whereof, the said parties have, in
30 duplicate caused these presents to be signed by their officers thereunto duly authorized and their corporate seals to be hereto affixed the day and year first above written.

SURETY REALTY COMPANY
By Louis Kamm Pres.

Signed, sealed and delivered
in the presence of

Leo Stein as to
R. E. McDonald, Inc.
40 By Gold. Rosenbush Sec'y.

Exhibit D-Surety-3.

In consideration of the renting of the premises described in the foregoing lease and of the sum of One Dollar to me in hand paid, I, the undersigned, do hereby guarantee unto SURETY REALTY COMPANY, its successors and assigns, the lessor in said lease mentioned, the payment of all the rents reserved in said lease and the performance of all other terms, covenants, and conditions of said lease hereby waiving notice of default on the part of R. E. McDONALD, INC., a corporation, the lessee mentioned in said lease, its successors and assigns, and hereby waiving demand and also waiving any extension of time of payment which the said SURETY REALTY COMPANY, its successors or assigns may at any time grant to the said R. E. McDONALD INC., a corporation its successors or assigns.

This guaranty shall be binding upon the undersigned for any loss of rents, costs or other damage that may have been sustained by the said Surety Realty Company, its successors or assigns, notwithstanding that said R. E. McDonald Inc., its successors or assigns shall have abandoned said premises or shall have been dispossessed therefrom, or that a receiver thereof shall have been appointed or that it shall have been adjudged a bankrupt or shall have been dissolved, or that the said Surety Realty Company, its successors or assigns shall have re-rented said premises as the result of any forefeiture of said lease because of the violation by the said R. E. McDONALD, INC., its successors or assigns of any of the covenants of said lease for which forefeiture thereof is provided by the terms of said lease.

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In Witness Whereof, I have hereunto set my hand and seal this 18th day of April, 1922.

A. A. ROSENBUSH

Signed, sealed and delivered
in the presence of

10 A. M. Schutte.

EXHIBIT D.—SURETY—4.

Sub-lease from Surety Realty Company to John H. Hochter and William R. Heyer, dated August 30, 1923. This lease is sufficiently described in the record.

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EXHIBIT—McEUEN—1.

Deed from David Leavitt and wife to John R. McEuen, James P. McEuen, Mary L. McEuen and Charles A. McEuen, dated February 13, 1850 and recorded on January 14, 1870 in Book R-14 of Deeds for Essex County, pages 587, etc., conveys one equal undivided third part of the premises in question.

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EXHIBIT—McEUEN—2.

Copy of record of ejectment proceedings in the Supreme Court of the State of New Jersey, in an action wherein Martin Burne was defendant, and James P. McEuen, Charles A. McEuen, George H. Wheeler and Mary L. Wheeler, his wife, were plaintiffs. This ejectment proceeding sought possession of an undivided one-third part of the premises in question. Judgment in favor

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of the defendant, Martin Burne, after a verdict of the jury in his favor, was entered on November 8, 1870.

EXHIBIT—McEUEN—3.

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NEW JERSEY SUPREME COURT.

Martin Burne ads James P. McEwen & al.	*In Ejectment*

Take notice that the following is a bill of particulars of the claim or title of the defendant to the premises in question, viz:—

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1. Deed from

Peter Hubbell and wife to David Leavitt, dated April 9, 1840, for the whole of the premises in the declaration described; and recorded March 15, 1850, in the Essex County Register's office in Book N. 7 of Deeds for said County, pages 84 *et seq.*

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2. Deed from

David Leavitt and wife to Charles A. Sherman, dated February 13, 1850, for the equal undivided two thirds parts of said premises, and recorded March 14, 1851, in said Register's office, in Book N. 7 of Deeds for said County, pages 50 *et seq.*

3. Deed from

John McEwen to Charles A. Sherman, dated February 13, 1850, for the whole of said prem-

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ises, and recorded March 14, 1851, in said Register's office, in Book N. 7 of Deeds for said County, pages 51 *et seq.*

4. Deed from

Sylvester D. J. Judson and James P. Judson and wife, to Charles A. Sherman, dated February 13, 1850, for the equal undivided two thirds parts of said premises, and recorded March 14, 1851, in said Register's office in Book N. 7 of Deeds for said county, pages 52 *et seq.*

5. Deed from

Sylvester D. Judson and wife, to Charles A. Sherman, dated June 17, 1852, for the whole of said premises, and recorded July 23, 1852 in said Register's office, in Book B. 8 of Deeds for said county, pages 102 *et seq.*

6. Deed from

William Parson, Sheriff of Essex County, to Abraham H. Sherman, dated August 3, 1852, for the undivided two thirds of said premises and recorded November 26, 1852, in Book E. 8 of Deeds for said County, pages 544 *et seq.* Sold and conveyed under a decree and execution in Chancery, in said deed referred to.

7. Deed from

William Parson, Sheriff of Essex County, to Abraham H. Sherman, dated November 26, 1852, for said premises, and recorded March 30, 1854, in Book W. 8 of Deeds for said county, pages 553 *et seq.* Sold and conveyed under a judgment and execution in said deed referred to.

8. Deed from

Abraham H. Sherman and wife to Martin Burne, dated February 19, 1868, for said premises, and recorded February 21, 1868 in Book V. 13 of Deeds for said County, pages 156 *et seq.*

Exhibit McEuen–3.

9. Deed from
Elias N. Miller, Sheriff of Essex County to Nehemiah Perry, dated June 21, 1860, for said premises, and recorded July 2, 1860 in Book C. 11 of Deeds for said County, pages 518 *et seq.* Sold and conveyed under certain judgments and execution in said deed referred to.

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10. Deed from
Elias N. Miller, Sheriff of Essex County, to Nehemiah Perry, dated April 23, 1861, for said premises, and recorded June 3, 1861, in Book L. 11 of Deeds for said county, pages 243 *et seq.* Sold and conveyed under a decree and execution in said deed referred to.

11. Deed from
Nehemiah Perry, Sr., and wife to Martin Burne, dated May 10, 1866, for said premises and recorded May 19, 1866 in Book Z. 12 of Deeds for said county, pages 272 *et seq.*

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12. Declaration of Sale from The Mayor and Common Council of the City of Newark to John R. Weeks, dated November 5, 1857, of said premises for 200 years for non payment of assessment therein mentioned.
(See copy hereto annexed.)

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13. Assignment from
John R. Weeks, to Nehemiah Perry, dated June 5, 1861, of the declaration of sale last mentioner, and the assignors interest in the premises therein described. (See copy hereto annexed.)

14. Assignment from Nehemiah Perry to Martin Burne, dated May 9, 1866, of the declaration of sale mentioned, and the assignor's in-

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terest in the premises therein described. (See copy hereto annexed.)

None of the three last mentioned documents have been recorded.

Dated Oct. 10, 1870 Yours, &c.
10 To David A. Hayes, Esq., John W. Taylor
Atty. for pltffs. Atty. for deft.

EXHIBIT—McEUEN—4.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

September Term 1870.

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JAMES P. McEUEN, CHARLES A. McEUEN, GEORGE H. WHEELER and MARY L., his wife, *vs.* MARTIN BURNE.	*In Ejectment.*

Depue *J.* charged the jury as follows:

30 This, gentlemen, is an action of ejectment, brought by the McEuens, the plaintiffs, in this case to recover of Martin Burne, the defendant, the possession of the 1/3rd undivided interest in certain premises in this City, situate at the corner or Market and Washington Streets.

This being an action of ejectment the rule of law applicable to this case is this: That where the defendant is in possession of property the law presumes that he has the title for it, and if
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some other person claims the possession of the property, that person must come into Court, and must show that he in point of fact has the legal title to the premises before he can eject the defendant. And the defendant may defend in two ways:

First: He may deny the plaintiff's title; or say to the plaintiff, You have not any title. 10

Secondly: Show the title out of the plaintiff—may produce a title showing that at a certain period of time some other person had the legal title.

In this aspect the case presents itself to the jury, and the main question is whether the legal title was in the plaintiffs at the time of the commencement of the suits, which I believe was in June 1858.

Both parties claim from a man named Hubbell. 20

It appears at one time Hubbell was the owner of the whole tract, and in 1840 conveyed the property to a man of the name of Levitt who become owner of the premises and remained owner until sometime in 1850, when the deed to the McEuens, the plaintiffs for 1/3rd interest in the premises was extended; and on the same day a deed was given to a man named Sherman for the other 2/3rds interest. 30

In 1850 the title stood thus: Sherman was owner of equal undivided 2/3rds interest in the premises; and the McEuens, the plaintiffs, in this case, were the owner of the other equal undivided 1/3rd interest in the premises; and it is the 1/3rd interest represented by the deed of conveyance to the McEuens which is the controversy in this case. So that unless the de-defendant shows by the settled rules of law that the title of the McEuens to 1/3rd interest which 40

became vested in them by the deed of 1850, has become extinguished, plaintiff will be entitled to recover. And the question is whether the defendant has shown that the title originally in the McEuens became vested in other persons.

The insistment on the part of the defence is that although 1/3rd part was at one time the property of the McEuens, it subsequently became vested in John R. Weeks; and they make title under John R. Weeks under a tax sale by the authorities of the City of Newark.

It appears that a sewer was authorized to be constructed in some of the streets adjacent to these premises and that the assessment made under the City Charter amounted to the sum of $ and that in June 1857 the Common Council authorized the premises to be sold for payment of the assessment, and on the 24th of August 1857 the sale was made, and the property was sold to John R. Weeks for $178.86 for a term of 200 years.

In pursuance of that sale a Declaration of Sale was made to John R. Weeks bearing date the 5th November 1857, and by force of the provisions of the City Charter, and of that Declaration of Sale Weeks became the owner of the legal title to the whole of these premises for the term of 200 years. And that legal title has by subsequent conveyances come into possession of the defendant in this cause.

Unless, Gentlemen, you find the legal title which Weeks had by the Sale to him, has been overthrown by the evidence or has been shown to be extinguished, it must in this court prevail, whatever equities may exist, which may prevail in a Court of Equity.

If it has not been overthrown, or shown to be extinguished, then the defendant is entitled to your verdict, because, by force of that sale, the legal title to these premises became vested in Weeks.

The title of Weeks by force of this Declaration of Sale could not be overthrown by impugning the power of the City to convey to Weeks, for the reason that the Act of 1869 forbids it. 10

The Declaration of Sale recites the performance of everything necessary to sell the property; and the Act of 1869 makes these recitals evidence; and it further forbids that they shall be contradicted when called in question collaterally. And they are if called in question at all, called in question collaterally.

We must take the recitals not only to be correct, but conclusively so. 20

And for this purpose the plaintiffs are not at liberty to controvert the truth of the recitals in that deed: their remedy is to remove the proceedings to the Supreme Court by Certiorari, pursuant to the act, and there deny that all proper steps were pursued necessary to sell the property.

It was further attempted on the part of the plaintiffs to assail the legality of the sale to Weeks for fraud collaterally. The evidence was excluded by this Court, because the Supreme Court, and the Court of Errors have decided that fraud collaterally, under instruments of sale, cannot be set up in a Court of law, but by proceedings in a Court of Equity. 30

No evidence had been offered before the Court and jury tending to call in question the power of the City to sell this property, nor to over- 40

throw Week's title at the time the declaration of sale was made by the City to him.

The remaining question then will be whether that title has been shown to have been extinguished:—because although the Court and Jury may conclude that the title to Weeks when 10 the Declaration was made was a legal title which must prevail in a Court of law, yet, if that title by any established rule of law has been extinguished—that is, ceased—then the defendant will not be entitled to avail himself of that title by way of defence.

That is the sole question, whether that tax title ceased, or has been extinguished by anything subsequent to the time the sale was made.

The Charter of the City under which these 20 proceedings were conducted in specifying the steps necessary to make sale of the property uses this language.

"Any sale of, etc.—as if said sale had not been made"—

So if you find that Sherman, who was owner of the property paid to Mr. Weeks the amount of said purchase money, with the legal interest, and all reasonable expenses incurred by reason of this purchase, then, by force of this Statute, 30 although Weeks' title was legal, it has ceased to be a legal title, and Sherman or those entitled under him resumed such as owners.

It is insisted the money was paid. The jury could not be justified by the mere payment of money after payment made by Sherman with intent to redeem and re-possess himself of the title as owner.

That question has been settled by the Supreme Court in a case somewhat similar to this, and I 40 will read the opinion on this precise point.

Exhibit McEuen-4.

The Judge read opinion in v. (Smith). "The premises in dispute was originally owned by deponent, who, while owner, together with his wife extended two mortgages, &c. * * * entitled him to redeem the premises in the name above mentioned"—The case was removed and this is the language I call attention to—"By the payment of the money due on the bonds the estate created by the mortgages became extinguished, &c.—for the law will effectuate intentive"—

It is not then the mere payment but the intention of Sherman at the time he made this payment which must find force and effect to the extinguishment of the tax title or else payment will not have that effect.

On that subject you have the testimony of Sherman, and the production of the check; and the testimony of Weeks with respect to the arrangement between these parties before he became the purchaser; and the situation of the premises as to the mortgage held by the Mutual Benefit Life Insurance Company; and the Conveyance subsequently made by tax title: And it is for you to decide whether Sherman made payment of the amount to Weeks; and, if he did so, whether he made that payment with the intent to resume his ownership under the provisions of the City Charter.

If you are satisfied he did, then my charge to you is that notwithstanding it was a legal title originally, it then became by force of the City Charter extinguished, and no more a title to the premises. That is the sole question in this cause.

Plaintiff's Counsel prayed exception to the charge of the Court with respect to the construction of the Act. Also to so much of the

charge as related to necessity of proving the intent of payment—that the title was *ipso facto* extinguished—

Verdict for defendant.

The court to the foreman of the Jury:

You find the defendant not guilty?

Foreman: Yes.

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EXHIBIT—McEUEN—5.

Testimony in the ejectment proceedings above referred to, so far as this testimony is important it is covered by stipulations of counsel entered in the record.

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EXHIBIT—McEUEN—6.

Order dated March 16, 1926 entered in the Supreme Court of the State of New Jersey, on motion of McCarter & English, denying on the ground of laches application made by Charles A. McEuen for the allowance of writ of certiorari to review the certificate of tax sale Exhibit P. 5.

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EXHIBIT—LIGGETT—1.

Lease from Century Realty Company to Wm. D. Riker & Sons Co., dated September 19, 1912, and assigned to Liggett Co. This lease expired at the time the lease from the Surety Realty Company to Liggett (Exhibit D., Surety 2) took effect. It covered the same premises.

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EXHIBIT D.—SURETY—4.

SURETY REALTY CO.

EXHIBIT A.

ACTUAL RENTAL INCOME TO BE COLLECTED FROM OCTOBER, 1925, to MARCH 31st, 1930, INCLUSIVE, BASED ON RENTALS ACTUALLY COLLECTED IN 1925.

	1925 October To December	1926	1927	1928	1929	Three Months 1930	Miscellaneous
Store (Louis K. Liggett Company) See Note 1	$ 3,750.00	$15,000.00	$15,000.00	$15,000.00	$15,000.00	$ 3,750.00	Lease Expires March 31st, 1930
Store and Second Floor (R. E. MacDonald, Inc.) See Note 2	4,750.00	19,000.00	19,000.00	19,000.00	19,000.00	4,750.00	Lease Expires March 31st, 1930
Third Floor	375.00	1,500.00	1,500.00	1,500.00	1,500.00	375.00	Monthly Tenant
Fourth Floor	275.00	1,100.00	1,100.00	1,100.00	1,100.00	275.00	Monthly Tenant
Store (Hocter & Heyer)	525.00	2,100.00	2,100.00	2,100.00	2,100.00	525.00	Lease Expires September 15th, 1926
Portion of Store—Occupied as Restaurant	225.00	900.00	900.00	900.00	900.00	225.00	Monthly
Balance Vacant	....	....	....	....	....	....	
Roof	300.00	1,200.00	1,200.00	1,200.00	1,200.00	300.00	Monthly
	$10,200.00	$40,800.00	$40,800.00	$40,800.00	$40,800.00	$10,200.00	

Note 1: Tenant to pay as increased rent 10% on all sales over $150,000.00
Note 2: Tenant to pay as increased rent 3% on all sales over $300,000.00

RECAPITULATION:

October to December 1925	$10,200.00	
1926	40,800.00	
1927	40,800.00	
1928	40,800.00	
1929	40,800.00	
Three Months 1930	10,200.00	
Total Income for period beginning October 1st, 1926, and ending March 31st, 1930		$183,600.00

Exhibit D–Surety–4.

SURETY REALTY CO.

EXHIBIT B.

EXPENSES & CARRYING CHARGES FOR YEARS 1921, 1922, 1923 AND 1924

	1921	1922	1923	1924	Average
Repairs, not including improvements	$316.31	$ 584.45	$ 505.90	$ 74.24	$370.22
Insurance	262.51	492.80	638.44	429.13	455.72
Salaries	189.41	201.00	192.00	....	145.60
General Expense	15.00	26.00	248.00	1,206.74	373.93
Light and Coal	577.42	621.88	719.57	954.53	718.35
Totals	$1,360.65	$1,926.13	$2,303.91	$2,664.64	
Average Per Year					$2,063.82

SURETY REALTY CO.

EXHIBIT C.

RECAPITULATION FOR PERIOD BEGINNING OCTOBER 1st, 1925, AND ENDING MARCH 31st, 1930

Total Income for period beginning October 1st, 1925, and ending March 31st, 1930		$183,600.00
Total Average Expense per Year	$ 2,063.82	
Rental	19,000.00	
	$21,063.82	
	x 4½ Yrs.	
Total Expenses for Period October 1st, 1925 to March 31st, 1930		94,787.19

ANTICIPATED EXCESS OF INCOME OVER EXPENSES

Assuming that same rents are collected for balance of 4½ Years, as were collected in March, 1925	$ 88,812.81

EXHIBIT—McDONALD—1.

Complete Fixture Analysis
Estimated

	Item	Amount
125	Sautes	
1	Shelves	3000.
	Carpet	500.
	Linoleum	500-700
	Circuit	
	Lighting Fixtures	1000.
	Window "	300.
	Signs Outside	
	Electric Signs	500.
	Window Signs	
	Painting	200.
	Carpentering	
	Remodeling Basement	1500.
	Desks (3)	125.
	Ventilating System	565.
	Ladders	
	Mirrors	1800.
	Safe	45.
	Typewriters	
	Adding Machines	
	Time Clocks	
	Partition in ready to wear	1800.
	Lamson System	500.

10 20 30

EXHIBIT P. 10.

Agreement between Surety Realty Company and R. E. McDonald, Inc., dated July 1, 1917. This document is sufficiently referred to in the testimony.

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EXHIBIT—McDONALD—2.

R. E. McDONALD, NEWARK, N. J. PROFIT & LOSS ACCOUNT

Year	Sales	Gross Profit	Expenses	Officers Salaries Included in Expense	Surplus Adjustments	Profit & Loss	Purchase a/c	Boston Cost of Sales	Boston Profit	Net Profit
1914	88,242.49	27,601.84	32,367.27			**4,765.43**	60,640.65	47,393.01	13,247.64	8,482.21
1915	106,019.07	30,107.06	35,474.07			**5,367.01**	75,912.01	60,590.40	15,321.61	9,954.60
1916	133,809.86	39,662.80	35,377.48		**658.35**	3,626.97	98,432.38	78,903.24	19,529.14	23,156.11
1917	146,986.32	42,738.27	38,704.47		1,500.00	5,533.80	108,181.85	86,852.24	21,329.61	26,863.41
1918	150,716.59	46,974.93	43,202.52	1,250.00	**3,047.32**	725.09	135,950.81	108,788.68	27,162.13	27,887.22
1919	173,240.51	58,997.63	52,437.55	1,250.00	....	6,560.08	126,581.83	113,168.63	12,413.20	18,973.28
1920	177,996.87	62,683.38	57,340.38	1,250.00	**1,772.90**	3,570.10	120,161.70	105,421.58	14,740.12	18,310.22
1921	151,222.21	39,634.07	50,087.50	1,250.00	**388.30**	**10,841.73**	97,319.04	79,948.26	17,370.78	6,529.05
1922	122,236.43	37,070.39	47,786.95	1,250.00		**10,716.56**	94,586.62	77,653.43	17,933.19	7,216.63
1923	104,187.34	14,732.06	46,544.88	1,250.00		**31,812.82**	79,489.88	41,517.09	37,972.79	6,159.97
1924	127,797.19	27,461.26	51,396.04	1,250.00		**23,934.78**	88,354.01	70,683.21	17,670.80	**6,263.98**
1925 to Oct. 17	88,399.69	20,365.43	37,068.96			**16,703.53**	67,416.52	53,934.21	13,482.31	**3,221.22**
	1,570,854.57	448,029.12	527,788.07	8,750.00	**4,366.87**	**84,125.82**	1,153,027.30	924,853.98	228,173.32	144,047.50
										8,750.00 Off. Sal.
										152,797.50

Figures in bold face type are in Red Ink on copy.

EXHIBIT—McDONALD—3.

Option covering rental of premises #97-99 Market street, Newark. This document is sufficiently referred to in the testimony.

EXHIBIT—H. & H.—1.

Lease from Surety Realty Company to Hochter and Heyer. This lease is sufficiently described in the record.

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New Jersey Court of Errors and Appeals

Between CITY OF NEWARK, Petitioner, *and* HUGH F. COOK, *et als.*, Defendants-Appellants.	**On Appeal from Decree in Chancery.**

BRIEF ON BEHALF OF DEFENDANT-APPELLANT, LOUIS K. LIGGETT COMPANY.

Statement of the Case.

This is an appeal from a decree in Chancery advised by Vice-Chancellor Backes in a proceeding under Section 23 of Article XX of "An Act Concerning Municipalities" (P. L. 1917, Chapter 152, pages 379-380).

The City of Newark under this statute condemned the lands and building at the northwest corner of Washington and Market Streets, in the City of Newark, for the purposes of widening and altering Washington Street. Market Street is one of the principal thoroughfares of the City of Newark and the corner of Washington Street is two blocks west of the corner of Broad and Market Streets which is the heart of the City (Case, p. 79, ll. 10-15). The premises are directly opposite L. Bamberger's Department Store (Case, p. 79, l. 13). The corner of Market and Washington Streets is considered by real estate men as the second best corner for pedestrian traffic in the

City of Newark. The north side of the street is better than the south side (Case, p. 79, ll. 20-28).

At the time of the condemnation the appellant, Louis K. Liggett Company (hereinafter referred to as Liggett) occupied the first floor store in the building condemned, having a frontage of twenty-two feet on Market Street and seventy-four feet on Washington Street, together with a basement thereunder, under a lease from the Surety Realty Company, which rented the entire building from the owners. Liggett's lease ran from October 1st, 1922 to March 1st, 1930, and reserved an annual rental of $15,000.00 payable in monthly installments (Case, p. 111, ll. 35-39; Exhibit Surety 2, Case, p. 250; p. 49, l. 23—p. 50, l. 9; p. 48, l. 30—p. 49, l. 20; Exhibit Surety 1, Case, p. 245).

There was an entrance door to the store occupied by Liggett on the corner of Market and Washington Streets and another at the northerly end of the Washington Street frontage. The frontage on Washington Street between the two doors and the frontage on Market Street between the corner door and the westerly end of the store consisted of show windows (Exhibit P-2). This exhibit which is referred to in the state of the case, but not printed, appears on page 20 of this brief.

The Commissioners in condemnation fixed the total value of the land and buildings at $479,-550.00, which sum was paid into the Court of Chancery on September 25, 1925 (Case, p. 47, ll. 16-30). The City entered into possession of the premises on October 1, 1925, on which date Liggett vacated the store (Case, p. 48, ll. 17-20).

The proceedings were instituted in Chancery to determine the value of the various estates or interests in the property condemned and to apportion the moneys paid into Court between the

various owners of the several interests in the property (Case, pp. 16-43).

The proofs taken at the hearing showed that at the time Liggett's lease was made it spent $1,573.57 in alterations to the premises in the expectation that it would have the use of them until the end of the term (Case, p. 174, ll. 15-22). The fixtures in the premises at the time they were installed were worth $16,500.00 and there was no change in their value up to October 1, 1925 (Case, p. 128, ll. 14-18). Of these, fixtures valued at $3,500.00 became a total loss (Case, p. 128, ll. 19-24) and the value of the remainder after their removal was only $6,500.00 (Case, p. 128, ll. 20-24), so that Liggett's total loss on the fixtures was approximately $10,000.00 (Case, p. 129, l. 18). The cost of removing the fixtures was about $700.00 (Case, p. 130, ll. 38, 39). There was no contradiction of this testimony.

The testimony as to the annual value of the premises occupied by Liggett was conflicting. John J. Berry, a real estate expert called by the Surety Realty Company, the general lessee of the entire premises testified that the annual value of Liggett's store and basement was $15,400.00 or $700.00 a front foot (Case, p. 80, ll. 22-26). Edward J. Maier, a real estate expert called by Liggett testified that the annual value of the premises occupied by Liggett was $26,400.00 (Case, p. 112, ll. 4-7). This was based upon a value of $1,200.00 a front foot for the Market Street frontage, being a value of $800.00 with 50% added for corner influence (Case, p. 112, ll. 15-18). David Houston, a real estate expert who appeared on behalf of the owners, testified that in determining the value of corner property 50% of the frontage value should be added for corner influence for twenty-five feet from the corner (Case, p. 203, ll. 16-31; p. 210, ll. 1-9, 22-23).

Mr. Houston also testified that the annual value of the premises on Washington Street adjoining the Liggett store on the north was $200.00 a front foot for a store having a depth of only eighteen feet (Case, p. 190, ll. 37-39).

Mr. Berry and Mr. Lester Blau, a real estate expert called by the tenants who occupied the two Washington Street stores, north of the Liggett store, both testified that the annual value of the store fronting on Washington Street, and adjoining the Liggett store on the north, having a depth of eighteen feet was $300.00 a front foot (Case, p. 83, ll. 30-35; p. 175, ll. 22-27).

Mr. Fogg, an employee of Liggett, whose duty it was to secure another store, testified that he was unable to find anything available in the vicinity of the store vacated (Case, p. 120, l. 18). His inquiries disclosed no property in the vicinity that could be rented for less than $800.00 a front foot. The store at 102 Market Street, which is nearly opposite the premises in question, could not be had except for that amount (Case, p. 121, l. 27).

The store at 116 Market Street, which was also on the opposite side of the street from the premises in question and somewhat nearer Broad Street, could not be obtained for less than $800.00 (Case, p. 122, ll. 3, 4). The premises at 97-99 Market Street, which was on the same side of the street as the premises in question but somewhat further from Broad Street, could only be obtained for $1,500.00 per front foot for the first floor store and basement (Case, pp. 123, 124, 125). The premises at 93-95 Market Street, on the same side of the street and west of the premises in question could not be obtained for less than $1,200.00 per front foot (Case, p. 125, ll. 32-40) and the premises at 82 Market Street, on the south side of the street and further from Broad Street

could not be obtained for less than $1,000.00 per front foot (Case, p. 127, ll. 5-8). None of the foregoing were corner properties. Stores on the south side of Market Street were not as desirable as stores on the north side (Case, p. 127, ll. 8-12).

Liggett was finally able to obtain another store at 159 Market Street, which is near Broad Street, at an annual rental of $51,000.00 (Case, p. 173, ll. 1-21).

The Vice Chancellor found that the annual value of the Liggett store was $15,400.00 or $400.00 in excess of the rent reserved (Case, p. 224, ll. 10-20). The present value of $1.00 at 6% per year for four and one half years is $3.84 (Case, p. 174, l. 13).

The decree appealed from adjudged among other things that Liggett had no right, title, interest or claim in and to the fund paid into Court and denied Liggett's application for counsel fees and taxed costs (Case, pp. 227-230). From this decree Liggett has appealed.

The issues presented by this appeal are as follows:

1. Whether or not Liggett was entitled to any allowance from the fund paid into Court.

2. If Liggett was entitled to such an allowance, the amount thereof.

I.

Liggett was entitled to an allowance out of the fund paid into Court.

Section 23 of Article XX of the Act Concerning Municipalities (P. L. 1917, p. 380) under which the proceedings in Chancery were taken provides that in case of uncertainty as to who is entitled to an award, the amount paid into Court shall be

distributed to the person or persons entitled thereto.

Liggett at the time of the condemnation had an estate for four and one half years from October 1, 1925 to May 1, 1930 in the store and basement in question. Exhibit Surety 2. *Shimer* v. *Inhabitants of the Town of Phillipsburg, et al.*, 58 N. J. L. 506; *Tiffany on Real Property*, Section 37, p. 96, Section 39, page 98, Section 40, p. 100, and cases there cietd. This estate it could not be deprived of except upon the making of just compensation. Not only does all of the evidence in the case indicate that Liggett's estate was of value, but the Court of Chancery expressly found that the annual value of the premises occupied by Liggett was $15,400.00 a year, or $400.00 a year over and above the rent reserved (Case, p. 224, ll. 10-20). Multiplying this by $3.84, the present value of one dollar a year for four and one half years gives Liggett's estate a value as of October 1, 1925, of $1,436.00.

Although the Court below found that Liggett's estate had this value it declined to make any award to it for the reason that the amount was too small and would, in the event of a sale of the lease by Liggett, have been consumed by the payment of real estate brokers' commissions (Case, p. 224, l. 16). Although small by comparison with Liggett's actual loss, $1436.00 is too large to come within the maxim *de minimis non curat lex.*

Nor is there any warrant for holding that no award should be made to Liggett because, had it sold its lease, the value would have been eaten up by real estate brokers' commissions. There is nothing in the case to justify the assumption that Liggett would ever have sold its lease or that if it had it would have done so through a broker. If the principle embodied in this ruling of the Court

of Chancery is correct it would follow that every award in any condemnation proceeding should be reduced by the amount of a real estate broker's commission. This, however, is not the law. An owner whose property is condemned is entitled to be paid its value without any deduction for commissions which the owner might have been required to pay had he voluntarily sold it through a broker.

At the hearing below counsel for the owner of the reversion of the premises argued that because of the destruction of the building *which was subsequent to October 1st, 1925,* Liggett's interest as well as that of all of the other tenants of the premises had been terminated under Section 31 of the Landlord and Tenant Act (Compiled Statutes, p. 3078) and that none of the tenants therefore, were entitled to any compensation. The injustice of this contention was so apparent that it did not appeal at all to the Court below, and little argument seems necessary to demonstrate its fallacy. The amount paid into Court was the value of all of the estates or interests in the property and all of these were transferred to the City as a result of the condemnation proceedings. *Bright* v. *Platt,* 32 N. J. Eq. 362; *Crane* v. *City of Elizabeth,* 36 N. J. Eq. 339, 342; *Penna. R. R.* v. *Nat. Docks Co.,* 57 N. J. L. 86, 89, 54 N. J. Eq. 142, 148, 149; *Zimmerman* v. *Hudson and Manhattan R. R. Co.,* 76 N. J. L. 251, 253.

The City, by the condemnation proceedings acquired not only Liggett's estate in the premises for the unexpired term of its lease but also the estates of the other tenants as well as the reversionary interest of the owner, and the City paid the price of Liggett's estate into Court together with the price of all of the other estates in the premises. The tenants, of course, cannot be de-

prived of their right to receive the price of their estates in the property because after the money had been paid into Court, and the tenants had been evicted, and the City had entered into possession, it saw fit to tear down the building.

In re Willcox, 151 N. Y. S. 141 (Supreme Court, 1914), a similar argument was rejected by the Court. The argument there, however, was not based on a statute but on the terms of a lease which contained a provision almost identical with the provision contained in Section 31 of the New Jersey Landlord and Tenant Act. In disposing of this argument the Court said at pages 143 and 144:

> "The point of the landlord, that the tenant was not entitled to any compensation for the lease, is not well made. The proposition is that the lease contained a fire clause, providing that if the same should be partially destroyed by fire there should be repair, etc. 'but, in case of the total destruction of the premises, by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end', etc., and that the words 'or otherwise', covered this exercise of the right of eminent domain. But I think that the words 'or otherwise' must receive an *ejusdem generis* interpretation. * * *
>
> "The lease, as between the lessor and lessee, was not destroyed 'by fire or otherwise.' "

II.

Liggett should have been awarded the sum of $56,049.57 for its estate in the premises.

In deciding the amount of compensation to be awarded to Liggett, all of the circumstances having any bearing upon the value of its estate should, of course, be considered. The rule as to this is well stated in *Atchison, T. & S. F. R. Co.* v. *Schneider,* 20 N. E. 41 (Ill. 1889), where the Supreme Court of Illinois approved of the following instructions to the jury in a condemnation case:

> "The jury are further instructed that in determining the amount of compensation to be awarded to the defendants, respectively, in this case, they may properly take into consideration all evidence tending to show the actual value of the leasehold interest to the respective defendants, of which it is proposed to deprive them; the actual loss to be suffered by these defendants, respectively, from the loss, destruction, or deprivation of the improvements placed by them in the properties specially adapted to the conduct of their business, if any, shown by their evidence, the reasonable costs of removal, and of refitting in other localities for the further conduct of business, as shown by the evidence; and also any injury that the jury may find from the evidence will result to said defendants, respectively, by reason of the unavoidable interruption of their business, incident to their removal from their present site, and their establishing in new locations during the period of such interruption, if any, shown by the evidence."

The sum of $56,049.57 which should have been awarded to Liggett for its estate in the premises condemned is made up of the following items:

(a) The present worth for four and one-half years of the difference between the annual value of the premises occupied by Liggett and the rent reserved in its lease	$43,776.00
(b) The cost of removing the fixtures from the store (Case, p. 130, ll. 38-39)	700.00
(c) The value of such of the fixtures as became a total loss by reason of their removal (Case, p. 130, ll. 27-29)	3,500.00
(d) Depreciation in value of such of the fixtures as were not totally destroyed (Case, p. 129, ll. 11-13)	6,500.00
(e) The cost of improvements made by Liggett at the beginning of its term (Case, p. 174, ll. 15-22)	1,573.57
Making a total of	$56,049.57

(a) The value of $43,776.00 for Liggett's estate in the property is based upon the testimony of Mr. Maier above referred to that the annual value of the premises occupied by Liggett was $26,400.00. This is upon the assumption of a value of $800.00 a front foot for store property fronting on Market Street, to which he added 50% for corner influence. Mr. Maier stated that his value of $800.00 a front foot was based upon his knowledge of the rent reserved in the leases of other properties in the vicinity (Case, p. 112, ll. 24-28). That his estimate is not excessive is shown by the testimony of Mr. Fogg, whose investigation disclosed that there was no property on Market Street in the vicinity of the premises in question which could be rented for less than $800.00 a front foot.

If the value of the Liggett premises is correctly fixed, the same result should be reached whether it is determined by a consideration of the value of the Market Street frontage or by a consideration of the value of the Washington Street frontage.

The correctness of Mr. Maier's testimony that the annual value of Liggett's store was $26,400 is not only supported by the evidence as to the rentals demanded for other property in the vicinity but also by the testimony of all of the real estate agents except Mr. Houston, as to the value of Washington Street frontage. Mr. Berry and Mr. Blau both testified that the value of the store on Washington Street immediately adjoining the Liggett store, and having a depth of only 18 feet, was $300 per front foot (Case, p. 83, ll. 31-36, p. 175, ll. 24-27). While Mr. Houston testified that this store had a value of only $200 a front foot (Case, p. 190, ll. 37-40) he was unable to give any convincing reason for this estimate and it is significant that the value fixed by him are uniformly lower than those fixed by the other experts.

The testimony of Mr. Houston and Mr. Berry as to the value of the Washington Street frontage indicates that their estimate of the value of the Liggett premises based solely upon its Market Street frontage is inadequate. Mr. Houston fixed the value of the premises fronting on Washington Street and adjoining the Liggett property on the north at $200 per front foot. There is no support in the testimony for this view. Assuming, however, that his estimate is correct, the annual value of the Liggett property, determined by a consideration of its Washington Street frontage, would be as follows:

74 feet at $200	$14,800
50% additional for corner influence for the first 25 feet	2,500
making a total of	$17,300

which is $1900 a year more than the value to which he testified on the basis of the Market Street frontage.

The testimony of Mr. Berry and Mr. Blau, however, indicates that the value of the adjoining property on Washington Street is $300 a front foot. This would make the value of Liggett's property, considered solely as Washington Street frontage, as follows:

74 feet at $300	$22,200
Adding for corner influence $150 per foot for the first 25 feet from Market Street	3,750
making the total annual value of the Liggett property	$25,950

This is entirely at variance with Mr. Berry's estimate based on the Market Street frontage, but is only $450 less than Mr. Maier's estimate. In view of the fact that the Liggett store had a depth of 22 feet measuring from Washington Street whereas the property the value of which was fixed at $300 per front foot had a depth of only 18 feet, and of the additional fact that the Liggett store is nearer to Market Street, it is apparent that Mr. Maier's estimate of $26,400 is not excessive.

The present value as of October 1, 1925, of Liggett's interest in the premises is to be determined by multiplying the annual value of the premises by the present value of one dollar for four and one-half years. *West Jersey R. R. Co.*

v. *Thomas,* 23 N. J. Eq. 431, affirmed in 24 N. J. Eq. 567; *Holcombe* v. *Trenton White City Co.,* 80 N. J. Eq. 122, affirmed in 82 N. J. Eq. 364. The annual value of $26,400 for Liggett's premises is $11,400 more than the rental reserved in the lease. Multiplying this by $3.84 the present value of $1.00 for four and one-half years shows the value of Liggett's interest in the premises as of October 1, 1925, to have been $43,776.

The opinion of the learned Vice Chancellor states that the value of the premises must be determined from the value of "Store front" and not by a consideration of the value of "show window front" and that Liggett argued that its Washington Street frontage was a continuous show window front, seventy-four feet in length (Case, p. 224, ll. 31-33). In this the Vice-Chancellor was mistaken. As above pointed out the Liggett store had two entrances, one at the corner of Market and Washington Streets which fronted equally on both of them, and the other at the northerly side of the store which opened on Washington Street. The Washington Street frontage between these doors was show window as was the Market Street frontage between the corner door and the westerly end of the store. There is no just ground for considering the Market Street frontage as being any more "store front" than the Washington Street frontage.

In the court below the owner of the premises argued that, as the Surety Realty Company, the lessee of the entire premises was controlled by Louis Kamm, an experienced and able real estate operator, it must be assumed that it was charging its sub-tenants all that the premises occupied by them was worth. This argument is unsound both in fact and in law. It is contrary to the evidence as to values including that of all of the

real estate experts. Nor is there any warrant for the assumption by the Court that because the landlord was a successful real estate operator, it was charging as rent the entire annual value of the premises. This would have been to charge a "rack-rent", which is defined by Webster's New International Dictionary (1912) as "A rent of the full annual value of the tenement, or near it; an excessive or unreasonably high rent. A rack-rent has been defined by statute in Great Britain, as in the Public Health Act of 1875, to be (For the purposes of that act) a rent 'not less than two thirds of the full net annual value of the property out of which the rent arises'." It is obvious that in any fair bargain there must be some advantage for both parties, and no intelligent tenant should be expected to pay a rent so high that it constitutes the entire annual value of the property. Such rent must necessarily be a losing proposition for the tenant, and a losing proposition for the tenant is ultimately a bad proposition for the landlord. The evidence, referred to above, as to the rents demanded for other property in the vicinity negatives any assumption that Mr. Kamm's Company, the Surety Realty Company, was "rack-renting" the premises, and shows that it was getting at most only a fair rental which left a reasonable profit for the tenant. Adopting the proportion of two-thirds of the full annual value of the property referred to in the definition quoted above and also in *Truman* v. *Kerslake* (1894), 2 Q. B. 774, 777, it is apparent that at a rent of $15,000 a year the annual value of the premises (the rent being two-thirds the annual value) would be $22,500 a year which is almost exactly the value arrived at by allowing $300 a foot for the seventy-four feet of frontage on Washington Street, without the allowance for corner influence.

In addition to the present value of its leasehold estate, Liggett should also have been allowed the following items:

(b) The sum of $700 it expended for removing its fixtures from the premises.

In *City of Richmond* v. *Williams, et al.,* 77 S. E. 492 (Supreme Court of Virginia, 1913), the Court allowed the tenant, as part of the value of the leasehold interest, the cost of removing lumber from the premises. In *James McMillin Printing Co.* v. *Pittsburg, C. & W. R. Co.,* 65 Atl. 1091 (Sup. Ct. of Pa., 1907), the Court in discussing the proper rule in the case of the condemnation of a leasehold interest said:

> "The market value of the land taken is the test universally applied in an action by an owner, and it is as accurate a measure of his loss as any that can be set up. What he is entitled to is the value of the land ascertained by a fair appraisement, and of this value the selling price of land similarly situated is *prima facie* the best evidence. But market value is an unsatisfactory test of the value to a tenant of leasehold interest. It is really no test at all because a lease rarely has any market value. Generally it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensation, is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it, nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requir-

ing the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

(c) The sum of $3,500, being the value of such of its fixtures as were totally destroyed by removal.

In re Willcox, 151 N. Y. S. 141, Jenks, P. J., at page 143, said:

"It is insisted, second, that no award should have been made to the tenant for the destruction of fixtures for it is contended that 'these articles were all "trade fixtures" and were personal property.' I think that these articles were within the scope of the compensation to be made."

In re Post Office site in Borough of Bronx, 210 Fed. 832 (C. C. A., 2nd Cir. 1914), the Court, in allowing a recovery for machinery destroyed, at page 835, said:

"We, therefore, reach the conclusion * * * that the award rightly treated the machinery as fixtures for which the United States should pay."

In re Block bounded by Ave. A, etc., 122 N. Y. S. 321 (Sup. Ct. of N. Y. 1910), the Court said at page 339:

"The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they must all be regarded as real property; that is, as between the tenant and the city, the trade fix-

tures were real property and must be paid for by the city the same as a building and the tenant was under no more obligation to remove them than he would be to remove the building if he were the owner."

(d) The sum of $6,500, being the depreciation in the value of the remaining fixtures.

In *Philadelphia & R. R. Co.* v. *Getz, et al.*, 6 Atl. Rep. 356 (Sup. Ct. of Pa., 1886), the Court, at page 357, said:

> "If the location of the railroad so affected the property as to compel the removal of the business conducted by the tenant to another place, and there was some evidence to that effect, and the machinery, fixtures, etc., were in consequence depreciated as they stood, it is clear, as was said when the case was here before (105 Pa. St. 547), that the difference between the value of the machinery in connection with the business conducted on the property, and its value, if removed and applied to the same or other use, was a proper element of damage to be considered by the jury. If the removal was in fact the necessary consequence of the location of the road then the ascertainment of the value of the machinery as it stood after the injury would seem to involve the consideration of the probable and reasonable expenses of removing it."

(e) The sum of $1,573.57 expended by Liggett for alterations at the beginning of the term.

The foregoing items (b) to (e) were rejected by the Court below upon the authority of *Board of Chosen Freeholders of Hudson County* v. *Emmerich*, 57 N. J. Eq. 535 (Chan. 1898) and *Philadelphia and Camden Ferry Company* v. *Inter-City Link Railroad Company*, 76 N. J. Law 50. In the first of these cases Vice-Chancellor Emery held

that on condemnation of lands for a road no allowance could be made to the owner for injury to his business. In the second, Mr. Justice Garrison held that no allowance could be made to the Camden Ferry Company for any loss which it might sustain by reason of the competition of the railroad company. There is nothing in either of these decisions to warrant the denial of an award to cover physical improvements to the lands condemned or tangible fixtures installed thereon. Liggett makes no claim in this case for loss of business or for any incidental damage of that character. It does contend that it is entitled to be paid not only the value of the remainder of its term under its lease but also for the physical improvements and fixtures which it had attached to the premises and of which it was deprived by the condemnation. While it is true that it was allowed to remove certain of its fixtures from the premises condemned, it lost the improvements which it had made at a cost of $1,573.57 and the $3,500 worth of fixtures which could not be removed without entirely destroying them. The remaining $13,000 worth of fixtures were depreciated to the extent of $6,500 by their removal and Liggett's loss in this respect was further increased by the sum of $700 which it spent to remove them. Liggett was just as effectively deprived of the items in question by the condemnation as though the fixtures and improvements had been actually taken by the City. The authorities cited in paragraphs (b) to (d) above fully warrant an allowance to cover them, not as damages, but elements proper to consider in determining the value of the property taken.

Conclusion.

In consideration of the foregoing it is respectfully submitted that so much of the decree in Chancery should be reversed as adjudges that Liggett has no right, title, interest or claim in or to the moneys paid into Court, and that in lieu of such finding Liggett should be awarded the sum of $56,059.57 made up as follows: (1) The present value of Liggett's estate in the premises condemned, $43,776; (2) The sum of $700, expended for removing its fixtures; (3) The sum of $3,500, being the value of such fixtures which were totally destroyed by removal; (4) The sum of $6,500, being the depreciation in the value of the remaining fixtures; (5) $1,573.57, being the amount expended by Liggett for improvements at the beginning of its term.

Lindabury, Depue & Faulks,
Solicitors for Appellant,
Louis K. Liggett Company.

Frederic J. Faulks,
John W. Bishop, Jr.,
Burtis S. Horner,
Of Counsel.

October Term 1926.

Exhibit P. 2.

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

New Jersey Court of Errors and Appeals

Between THE CITY OF NEWARK, *Petitioner*, *and* HUGH F. COOK, *et als.*, *Defendants-Appellants.*	*On Petition, etc.*

BRIEF ON BEHALF OF HUGH F. COOK, et als., Appellants and Respondents.

Statement of the Case.

This was a proceeding in the Court of Chancery to determine how payments should be made of the sum of $479,550. paid by The City of Newark into that Court on account of the taking, by the City, of premises located at the northwest corner of Market and Washington Streets in the City of Newark, in connection with the widening of the latter thoroughfare.

Upon notice to all parties in interest, hearing was had before Vice-Chancellor Backes, who advised the decree in question (page 227).

Under the decree, the payment of $46.85, with interest, was directed to Charles A. McEuen; the payment of $93,065.93, with interest, was directed to Surety Realty Company; and the payment of the remainder of the fund, was directed to Hugh F. Cook, *et als.*, who claimed as owners of the fee and as the holders of a tax title for the term of two hundred years, given by The City of Newark, under date of November 5, 1857.

The matter is before the Court on five separate appeals, as follows:

(1) Appeal of Hugh F. Cook, *et als.*, who object to that part of the final decree which provides for the said payments to McEuen and Surety Realty Company;

(2) Appeal of Louis K. Liggett Co., which objects to the failure to allow anything to it and to the failure to allow counsel fees;

(3 Appeal of R. E. McDonald, Inc., which objects to the failure to allow anything to it and to the failure to allow counsel fees;

(4) Appeal of Surety Realty Company, which appeals from that part of the decree which provides for the payment of the sum above named to it, upon the ground that a greater sum should have been decreed in its favor; and

(5) Appeal of Charles A. McEuen, who appeals from that part of the decree which provides for the payment of the sum above named to him, upon the ground that a greater sum should have been decreed in his favor.

For the purposes of convenience, we shall discuss the points involved in all of the appeals, including those wherein we conceive the Vice-Chancellor reached the proper conclusion.

Facts.

As already stated, the premises taken by The City of Newark are located at the northwest corner of Market and Washington Streets, and constituted a triangle, of which the base, forty-four feet in width, fronted on Market street, the altitude, one hundred six and fifty-eight one-hundredths feet, fronted on Washington street, and the hypotenuse was one hundred and sixteen

feet in length. The property taken was exactly one-half of the premises of Hugh F. Cook *et als.* at that location, the original plot fronting forty-four feet on Market Street and having a depth of one hundred six and fifty-eight one hundredths feet on Washington Street, and being the same width front and rear.

After proceedings before the Commissioners for the assessment of damages, an award of $398,750. for the land and damages to the remaining land, and $80,800. for the building, or a total award of $479,550. (page 47) was made and paid into Court.

The City of Newark took possession of the premises on October 1, 1925, and at once demolished the entire building which had occupied the entire original plot (page 48).

Referring to the parties now before the Court, the principal claims to a share of the moneys in question were asserted by the following:

(a) Hugh F. Cook *et als.,* as the owners of the fee and the owners of a tax title for the term of two hundred years;

(b) Surety Realty Company, as the holders of a lease covering the entire premises, made by Martin Burne to Sebastian S. Kresge, and subsequently assigned to the Surety Realty Company. (See Exhibit D Surety 1, page 245.) This lease was for a term of twenty years from the first day of April, 1910, and provided for an annual rental of $18,000 during the first ten years, and $19,000 during the second ten years;

(c) R. E. McDonald, Inc., as the holder of a sub-lease from the Surety Realty Company, covering the store on Market Street, the basement thereunder and the first floor above the street

level, said lease being for the term of seven and one-half years, from the first day of October, 1922, to the 31st day of March, 1930, for an annual rental of $19,000 for the period beginning April, 1925, to the end of the term. The lease also contained a clause for a percentage on gross sales in excess of a certain amount per annum, and also a clause that the lease might be terminated at any time after the first four years of the term upon notice and the payment of the sum of $25,000; (page 251);

(d) Louis K. Liggett Company, as the holder of a sub-lease from the Surety Realty Company, dated June 8, 1922, covering the store at the corner of Market and Washington Streets and the basement thereunder, for a term beginning October 1, 1922, and terminating March 31, 1930, at a rental of $15,000 per annum, together with a percentage on sales in excess of $150,000 per annum, (page 49);

(e) Charles A. McEuen, as the alleged holder of a one-third interest in fee in the premises taken.

The learned Vice-Chancellor was of opinion, as follows: (page 213)

(1) That McEuen had a one-third interest in fee in the premises, but that his interest was subject to the unexpired portion of the tax term of two hundred years, ending August 2057, and that the present value of this one-third interest amounts to $46.85;

(2) That the Surety Realty Company was the holder of a lease covering the entire premises, and that in view of the fact that the rentals reserved under that lease were less than the actual rental value of the premises, by the sum of $93,065.93, as of the first day of October, 1925, when the premises were taken by The City of

Newark, that the Surety Realty Company was entitled to that sum;

(3) That both R. E. McDonald, Inc. and the Liggett Company were paying as much as the premises were worth and that they were, therefore, entitled to nothing, inasmuch as the Court could not take into consideration items of damage claimed by them because of alleged diminution in the value of fixtures which they had to remove and because of alleged loss of profits by being compelled to discontinue their businesses at the locations in question.

We shall now discuss the propriety of the decree below in the particulars adverted to above.

I.

Charles A. McEuen is, in no aspect of the case, entitled to a greater amount than that awarded to him below.

McEuen claims as sole survivor of four McEuen children, who were the grantees mentioned in a deed from one Sherman to Charles A. McEuen, dated 1850, but which was not recorded until 1870, some four years after the execution and record of the deed from Nehemiah Perry to Martin Burne, under which the latter acquired title (page 45). The deed from Sherman to McEuen purported to convey a one-third interest in the premises in question. The deed from Perry to Burne purported to convey the entire fee of the premises in question.

Litigation between McEuen, the then living members of his family and Mr. Burne came up in the Supreme Court in 1870 and resulted in favor of Mr. Burne, and since that time, up to the present proceedings, McEuen has done noth-

ing to vindicate his supposed rights in the property.

Our contention with respect to McEuen is:

1. If McEuen ever had any rights they have been barred by laches;

2. Mr. Burne and his successors in title have had adverse possession of the property for almost sixty years;

3. As far as the balance of the term granted by the tax title is concerned, the Court was required to accept the validity of that title;

4. Assuming that McEuen has a reversionary right at the conclusion of the tax term, that right in money at the present time is practically negligible.

1. *McEuen has been in laches.*

The facts which show the gross laches of the applicant are these:

(a) The tax sale in question was held on August 24, 1857, sixty-nine years ago.

(b) Martin Burne took his deed and an assignment of the certificate of sale under date of May 10, 1866, sixty years ago.

(c) The deed to McEuen, the applicant, upon which he bases his claim, was recorded in 1870, fifty-six years ago. The applicant was at that time twenty-four years of age.

(d) In 1870, ejectment proceedings brought by the present applicant against Mr. Burne came up for trial before Justice Depue at the Essex Circuit, and in charging the jury at that time, Justice Depue said that under the then recent act of 1869, applicant could not attack the tax title collaterally, and his only remedy was by application for a writ of certiorari. This was fifty-six years ago. Although applicant was

represented in those proceedings by eminent counsel, no step was made by him to carry out the suggestion of Justice Depue as to his proper remedy.

(e) Martin Burne, our predecessor in title, and who presumably was familiar with all the details concerning his purchase of the property, died in 1912, some fourteen years ago.

How a grosser cause of laches could appear, we can scarcely conceive. The applicant cannot plead ignorance of his rights, in view of the direct statement made by Justice Depue that his only remedy was by application for writ of certiorari. The applicant alleges no excuse whatever for his failure to act upon this suggestion for a term of fifty-six years, during all of which time our clients and their predecessors in title have been in undisputed possession and control of the premises, paying taxes during the many years before the development of Newark caused the property to attain its present value.

Both the Chief Justice and the Supreme Court have denied applications made by McEuen for writ of certiorari to attack the tax title. (See *In Re McEuen*, 4 A. R. 548.) This court at the present term has dismissed an appeal from that determination of the Supreme Court. Justice Depue in his charge to the jury said:

> "The title of Weeks by force of this Declaration of Sale could not be overthrown by impugning the power of the City to convey to Weeks, for the reason that the Act of 1869 forbids it.
>
> "The Declaration of Sale recites the performance of everything necessary to sell the property; and the Act of 1869 makes these recitals evidence; and it further forbids that they shall be contradicted when called in question collaterally.

"We must take the recitals not only to be correct, but conclusively so.

"And for this purpose the plaintiffs are not at liberty to controvert the truth of the recitals in that deed; their remedy is to remove the proceedings to the Supreme Court by Certiorari, pursuant to the act, and there deny that all proper steps were pursued necessary to sell the property."

2. *Mr. Burne and his successors in title have had adverse possession of the property for sixty years.*

The fact that Mr. Burne and his heirs have been in adverse possession of the property is not disputed. That was the admission at the hearing (page 48) and Mr. McEuen, himself, admitted that he has not had a dollar of the income of the property (page 67) and that he has paid no taxes thereon.

He also testified under questions by the Court (page 68), that his brother (one of his cotenants), "went to Mr. Burne time after time and wanted Mr. Burne to give him something for our interest in this property and Mr. Burne wouldn't do it, * * * he said that he would hold the property and would not pay anything, and my brother could not get a dollar out of him for this property." The brother in question died in 1903 (pages 59 and 68). This talk, therefore, must have happened prior to 1903 and accordingly, more than twenty years passed by after this unequivocable statement without any action upon the part of the McEuen interests to vindicate their rights.

We submit that a complete showing of adverse possession has been made.

3. *The right of the Burne interests to the property for the remainder of the term covered by the tax title cannot be disputed.*

As just shown from the quotation from Justice Depue's opinion, he charged the jury that the certificate of sale recited that all the necessary formalities had been complied with and that this recital could not be attacked collaterally. That is just as true now as it was then, and McEuen alleges no new or other title than he had at that time. The tax title cannot be inquired into collaterally any more now then it could then. As far as Burne and his representatives are concerned there is and can be no suggestion of any fraudulent action on their part which would justify the Court in reviewing the matter on general, equitable principles, assuming that such equitable proceedings could be invoked in a proceeding of this kind and that the function of the Court is not limited to apportioning the money among those that have a legal title thereto. It scarcely seems necessary to reply to the argument that Mr. Burne created any equity on the part of McEuen by setting up the tax title in the ejectment proceedings. His bill of particulars set up every title that he had, including his claim to the fee under the deed from Perry. It was not so at that time, nor is it now that under the Act of 1869 the certiorari proceedings might be procured "at any time," and that this means any time coincident with eternity. Even prior to the express limitation of three years for the review of tax proceedings in the certiorari act, the Supreme Court had held that the same limitation obtained as in cases of ejectment, that is to say, a limitation of twenty years.

New Jersey State Library

For authorities prior to the present provisions of the Certiorari Act, see—

Baxter v. *Jersey City,* 7 Vr. 188;
Alden v. *Newark,* 11 Vr. 92.

For authorities applying the limitation set forth in the Certiorari Act, see—

Bozarth v. *Egg Harbor City, etc.,* 56 Vr. 412;

Sutton v. *Maurice River,* 8 Gummere 504 affirmed by the Court of Err. & App. upon opinion below).

DeRaismes v. *Cahill,* 97 N. J. L. 565.

4. *Even assuming that McEuen has a reversionary right at the conclusion of the tax term, that right in money at the present time is practically negligible.*

Assuming for the moment that the Burne family has not acquired title to the fee by adverse possession in view of their possession for a period of sixty years under a deed purporting to convey a fee to Mr. Burne, and that consequently their present enjoyment is limited to the remainder of their term under the tax title, it appears that as of the date of the actual taking by the City and the destruction of the building, there still remained approximately one hundred and thirty-two years of the term reserved in the tax certificate, that is to say, from October, 1925, to August 24, 2057.

For the convenience of the Court we submitted to the Actuarial Department of the Mutual Benefit Life Insurance Company the problem as to the present value of the sum of One Dollar payable in one hundred and thirty-two years. The figures given were that the present value of One dollar payable in one hundred and thirty-two

years is .000456695. Another way of stating the problem is that One dollar paid now is worth the sum of $2,189.65 in one hundred and thirty-two years. Assuming then that McEuen has a reversionary interest of one-third after one hundred and thirty-two years, the present value on the above basis of every $100,000 of the interest is the sum of $45.67.

It is apparent then, in any event, that McEuen's interest is nominal at this time.

Where property condemned was subject to a lease having eighty years to run, the jury did not err in considering the reversion of no value.

Chicago & N. W. Ry. Co. v. *Chicago Mechanics Institute,* 87 N. E. 933; 239 Ill. 197.

In view of the small amount involved, we shall not take the time of the Court further to discuss whether McEuen has, in fact, lost whatever reversionary right he may ever have had after the termination of the tax title period.

II.

All rights of the Surety Realty Company, under its lease, terminated with the destruction of the building and no award should, therefore, have been made to that company.

In considering the legal effect of the taking of the property in question by condemnation and the destruction of the building thereon, we must bear in mind that the lease of the Surety Realty Company, the main tenant, as well as the leases of the sub-tenants and all occupation thereunder, were terminated by an act of a paramount power for which the owners were in no way responsible. Hence, rules, which may obtain in the unlawful

termination of a tenancy, are not applicable. The taking of the property was involuntary as well for the owners as the tenants, and no result can be justifiable which would penalize the owners because of the termination of these tenancies.

The learned Vice-Chancellor agreed with the contention of these appellants that Section 31 of the Landlord and Tenant Act (Comp. Stat. 3078) applied to the lease between Burne and the Surety Realty Company, and that, therefore, that lease was terminated by the destruction of the building on the premises. He held, however, that this termination of the lease would not operate to deprive the Surety Realty Company of the right to collect, out of the fund in Court, the total amount which the Court believed the tenant would have received out of the property had the lease not been terminated and have run for its appointed period. In this, we very respectfully submit, the learned Vice-Chancellor committed error most prejudicial to the owners of the property. Section 31 of the Landlord and Tenant Act, above referred to, provides:

> "That whenever any building or buildings erected on leased premises shall be injured by fire without the fault of the lessee, the landlord shall repair the same as speedily as possible, or in default thereof, the rent shall cease until such time as such building or buildings shall be put in complete repair; and in case of the total destruction of such building or buildings *by fire or otherwise*, the rent shall be paid up to the time of such destruction, and then, and from thenceforth, the lease shall cease and come to an end; provided always, that this section shall not extend to or apply to cases where the parties have otherwise stipulated in their agreement or lease." (Rev. 1877, p. 576.)

Although in the Compiled Statutes this section is preceded by the caption, "Injury to, or Destruction of Buildings by Fire," that statute itself, which was first enacted in the Public Laws of 1874, page 27, came in merely as a supplement to the Act Concerning Landlord and Tenant.

We submit that it is plain that this statute applies to the situation at bar and that it is most appropriate that it should so apply.

The design of the statute was to provide for a situation where the buildings might be destroyed through an act for which neither party to the lease was responsible, and the design of the act was to relieve the tenant from the harshness of the common law, which might otherwise obtain in that case.

Now the most usual way in which buildings are destroyed without fault of either party is through fire, and, therefore, specific reference is made to destruction by fire, but fire is not the only way in which a building may be destroyed, and to this end the draftsman of this section put in the all-inclusive term "or otherwise." There is nothing in the statute to indicate any intention that the causes of destruction should be in anywise limited, and we submit that any method of destruction is equally within the spirit of the act.

Thus, in the case of neighboring conflagration, a building may be removed by the fire authorities, under the police power. We submit that such a destruction would be covered by "or otherwise," even though no natural force entered into the destruction of the building itself, and the design of the act was to cover destruction by any cause or for any reason whatsoever,

provided only neither party was responsible for the destruction.

That clause of the statute has been read into every lease made since its enactment, unless the lease in question stipulated otherwise.

The lease between Burne and Kresge does not stipulate otherwise. The special provision of that lease relates to destruction of the premises by fire only and does not cover the destruction of the building by any other agency. Thus, the provision in this lease begins (page 248):

> "In case of the destruction of the buildings upon said demised premises, or any portion of said buildings, by fire * * *"

In view of the absence of any provision relating to the destruction of the buildings otherwise than by fire, the statutory provision has full application.

Section 31, of Vol. 3 of *Compiled Statutes of New Jersey* was construed by this Court in *Carley* v. *Liberty Hat Mfg. Co.,* 81 N. J. L. 502. In rendering the opinion of the Court, Justice Voorhees said, at page 447:

> "Of course, this statute was a remedy for the harshness of the common-law rule, which made the rent payable notwithstanding the destruction of the buildings upon the demised property. It provides for two cases: The first for injury to the buildings by fire, and makes it the duty of the landlord to repair under penalty of having the rent cease until the buildings shall be put in complete repair. This does not contemplate the termination of the lease. The other case is where there is a total destruction of the buildings. In that case the rent shall be paid up to the time of the destruction, and then the lease shall cease and come to an end. Reading these two clauses together, it cannot be said that the statute offers an option to the tenant to

be availed of by him within a reasonable time whether he will terminate the lease or not. The language expressly provides that the lease shall terminate and the word 'then' in the clause 'and then and from thenceforth' refers to the time of destruction. The severing of the relation between landlord and tenant may prove to be of substantial benefit to the owner by leaving him free to allow the premises to remain without buildings or to erect thereon new structures suited to the location and condition of the property. The termination is not made dependent upon the rent being paid to the time of the destruction. The statute means that there shall be a liability for the payment of the rent to the date of destruction and cessation of the terms, and provides that the tenant shall pay it. This is most equitable and a just change of the former rule, and, being within the plain words of the act, should be the construction.

"It has been suggested that this view would in some cases lead to injustice, and the case has been instanced where a plantation had been demised, having but a single structure upon it, the destruction of which would work a termination of the lease. The answer to that is that the parties contract with knowledge of the law, and may provide against such a contingency by agreeing upon the circumstances which shall terminate the lease."

In *Board of Chosen Freeholders* v. *Emmerich*, 42 Atl. 107, Vice-Chancellor Emery said:

"The third claim is based on the tenant's right to a portion of the award, as representing the damages which he sustains by the condemnation, in that he was thereafter obliged by his lease to pay the full rent reserved, and by the condemnation of a portion of the buildings he has been deprived of the beneficial use of the premises, either wholly or in part. The public road, as laid out, ran through the buildings leased, and as

the owner, Emmerich, says, required the removal of the house, and the tearing down of the other building. This change of the leasehold property was, in my judgment, such as to entitle the tenant to consider it as making the premises which were leased untenantable and unfit for occupancy as soon as the property was actually taken, under the statute. The lease expressly provides that in case the buildings on the premises be destroyed, or be so injured by the elements or any other cause, as to be untenantable and unfit for occupancy, the tenant shall not be liable for rent, but may quit and surrender the premises. Not being obliged to occupy any of the premises, therefore, after the occupation of the portion thereof condemned by the public authorities, or to pay rent, no damage, by way of abatement or apportionment of the rent after the award, can be allowed on this account. The award in court must now be distributed according to the rights and obligations of the parties (landlord and tenant) as they existed at the time of the award. Under the statute, the county, after the award, could take possession at any time, on tendering or paying into court the award, without interest; but, until such payment, it had no right to enter into possession, or interfere with the possession of the tenant. The tenant's possession subsequent to the award was still a possession, which, as between him and the landlord, was under the lease, and subject to its payment of rent. This possession of the whole premises under the lease (subject to the right of the tenant to terminate it, under the lease, when the portion condemned was actually taken) continued until October, 1897; and, the county then taking possession, the premises were surrendered, and the tenant's obligation to pay rent ceased, by the terms of the lease. Upon this third claim, therefore, I reach the conclusion that the tenant was not, under the lease, obliged to pay any rent for any of the premises, after the payment into court,

and the occupation by the county of the portion condemned, and that until such occupation the tenant had the right to occupy the entire premises leased, but only upon payment of the rent reserved. No allowance out of the award to the tenant (or his mortgagee) can be made by reason of these payments of rent subsequent to the award, as they must be considered as payments under the lease, as the price agreed on between the parties for the actual occupation of the premises, which still continued under the lease, notwithstanding the award, until the subsequent payment of the award into court. The exceptions are therefore overruled."

"Otherwise" is used twice in the statute; "total destruction by fire or otherwise;" and "this section shall not extend to or apply to cases where the parties have otherwise stipulated in their agreement or lease."

Dictionaries generally agree that "otherwise" means different; in a different manner or by other means.

As used in the last part of the statute, it could hardly be said that the legislature intended by "otherwise stipulated" the words or meaning of "similarly stipulated." When a word is used twice by the same legislature, in the same statute and in the same sentence of that statute, is it reasonable to suppose that opposite meanings were intended? Is it not more reasonable to conclude that the addition of the last provision that the parties might otherwise stipulate, shows that the legislature realized and intended the wide scope of its previous language?

The words used are "fire *or* otherwise," the use of the disjunctive "*or*" adding to the certainty that the natural meaning of the word was intended.

And, if the natural meaning was not intended, then nothing was intended; because the same argument might be used against any other manner of destruction. Fire is the only other word used; one word does not make a class; and the tearing down or destruction of a building by workmen at the instance of a city is a destruction otherwise than by fire, as much as any other manner of destruction is.

To argue otherwise, is to contend that had the City demolished the building by using fire, the lease would have ended, but since some other method may have been used, the lease did not.

If it is necessary to establish some kinship between destruction by fire and destruction by the workmen of a city either under condemnation proceeding or the police power, it can be pointed out that both methods are equally effectual and both are beyond the control of the parties.

As already stated, the learned Vice-Chancellor was of the opinion that the Surety Realty Company's lease was terminated under the statute, but he held that this termination did not disturb the right of the tenant to recover, out of the amount in Court, the value of his lease on the basis of its continuance to the end of its appointed term.

We submit that this cannot be so.

Under the view taken by the Vice-Chancellor, we have the anomalous situation of a lease being terminated for one purpose and not being terminated for another purpose. Yet the statute was intended for the relief, not only of the tenant, but also of the landlord. The design of the statute was to take care of the situation where, for a reason entirely beyond the control

of either party the circumstances had so changed as to make it improper that either side should continue to be held bound after the subject matter of the lease had been destroyed. To adopt the Vice-Chancellor's view is practically to negative the statute. The result of the decision below is that the entire loss arising from the destruction of the building will fall upon the owners, although the statute was intended for the relief of both the owner and the tenant.

That in the case at Bar the entire loss of the building would fall upon the owners, is apparent when we consider that the decree below gives to the tenant what the Vice-Chancellor deemed to be the entire value of its term, as though the building had not been destroyed and had continued to exist there until the end of the term. Yet, had the condemnation proceedings not been undertaken, the owners would, at the end of the term, have been in possession of their building. By virtue of the condemnation, they lose their building, but the tenant is paid on the theory of the continued existence of the building. The Vice-Chancellor says that the tenant is recovering compensation for what the City took from it, yet, the City has taken nothing from it. The City has taken the fee, and, in connection with that taking, has destroyed the building. The tenant's term has not been taken from him by the City. The tenant's term has been ended by the statute in question, which must be read into and which became a part of the lease between the owner and the tenant. Under the authorities, which will be referred to hereafter, it is very plain that all the City took was the land. The measure of compensation is the value of the land. What leases there were and what rents were reserved in those leases, had no importance

other than as items of evidence as to the value of the land itself. As Vice-Chancellor Emery pointed out in *Freeholders of Hudson* v. *Emmerich, supra,*

> "The damages are limited to the damages done to the fee simple, where a single assessment is made for all the owners and persons interested in any lot."

The assessment commissioners did not and would have had no right to take the leases and the rents thereunder into account, except as those leases threw some light upon the market value of the property. How then can the award to the owners be diminished by reason of considerations which did not enter into the award, especially when the statute says, that by reason of the taking and destruction of the building, the leases should cease? Let us suppose for a moment the instance of a property rented to a tenant at twice its fair rental value and for a sum out of all proportion to its market value, such a fact would not have justified the assessment commissioners in awarding a greater amount for the property than the fair market value, and if, upon the like assumption, we take the case of a property leased to a tenant, who, in turn, has been able to negotiate sub-leases at sums far beyond a fair return on the market value of the property, we would again have a set of circumstances of which the assessment commissioners could take no cognizance, with the result that if the tenant were awarded the amount he might be able to show of damages, on the theory of the continuance of his leases, the tenant would be profiting by an amount and the owner would be losing by an amount which would not have entered at all into the fixing of the award for the land taken.

In the case at Bar, the landlord and tenant entered into their lease with supposed knowledge of the law, and the statute became a part of their lease, and thus they are presumed to have had in contemplation the ending of the lease in condemnation proceedings which should result in the destruction of the building upon the premises. Had they intended that notwithstanding such destruction, the tenant should nevertheless be entitled to consideration on the basis of the continuance of the lease, then they should have so expressly provided in their lease. (*Carley* v. *Liberty Hat Mfg. Co., supra.*)

For the reason shown, therefore, neither the Surety Realty Company, nor any of its tenants, were entitled to any payment out of the sum awarded as the value of the land and on account of the damage to the remaining land.

III.

Assuming, however, that the statute does not preclude any payment to the Surety Realty Company, the amount awarded by the court below is excessive.

The learned Vice-Chancellor directed the payment to the Surety Realty Company of the sum of $93,065.93. As the Vice-Chancellor very well remarks, this sum, amounting as it does to almost one-fifth of the entire award, does, at first blush, seem disproportionate to the amount of the award, when we consider that the tenant's lease would have expired in four and one-half years and the owners and their successors would then have been entitled to the property for the rest of eternity.

The above sum was reached by taking what the Vice-Chancellor found to be the annual value

of the lease—$24,236.18—and multiplying that by the value of a dollar per year for the number of years in the unexpired term.

The inquiry on this head then is, whether the sum of $24,236.18, taken by the Vice-Chancellor, was justifiable. Exhibit D Surety 4, (page 275), referred to by the Vice-Chancellor in his opinion (page 220) sets forth the actual situation as to the rentals received by the Surety Realty Company up to the date of the taking of the property. There is no dispute as to the credit side of the ledger, which indicates total yearly rentals of $40,800. The Surety Realty Company charged itself with rent to the Burne Estate and average carrying charges together totaling $21,063.82, making a net profit per year of $19,736.18. The above figure, passing for the moment the question whether greater deductions should not have been made on account of disbursements, represents the utmost return that had been received per year from the property by the Surety Realty Company, whose president and owner, Louis Kamm, is one of the shrewdest and most resourceful real estate operators in the City of Newark. It certainly is a fair presumption that he had rented the property at the top of the market. If any demonstration in the record, as to his shrewdness, is necessary, it is found in the fact of this great income which he was able to secure from a property for which he, himself, was paying a rental of but $19,000 per year (out of which the unfortunate owners had to pay the taxes). Yet, notwithstanding this very generous return to the Surety Realty Company, because of the improvidence of Mr. Burne in making the original lease, the Vice-Chancellor added the sum of $4,500 to the rental value of the premises, increasing the total award to the Surety Realty

Company by some $17,279. This increase he made upon the theory that the third and fourth floors and the restaurant had a greater rental value than that received by the Surety Realty Company to the extent of $4,500 per year. He says that this rental value could not be realized by Mr. Kamm because of his inability to make leases for terms of years, in view of the fact that the proposed condemnation of the property, in connection with the widening of Washington Street, had been discussed for some years. Thus, in effect, he penalizes the owners by the sum of $17,279, because the City authorities saw fit, during a period of years, to discuss the possible widening of Washington Street, and the consequent condemnation of the property in question. Had the condemnation proceedings been postponed for four years, as might readily have happened, since they were under discussion as early as 1915 (page 211), that circumstance would still have continued to affect the Surety Realty Company's ability to rent for larger amounts the third and fourth floors and the restaurant. Yet, because the condemnation became an actuality, and without any responsibility therefor on the part of the owners, the owners are penalized by this sum of $4,500 per year, which the Surety Realty Company never had obtained and which they would not have been able to obtain had the property continued in its same condition until the end of the lease, and this large sum is taken from the pockets of the owners with no other authority than that of the opinions of so-called expert witnesses that the premises might have been rented for these larger sums had the Surety Realty Company been in a position to give a lease for a term of from three to five years. None of these experts purported to testify that he had any actual tenant that

would have paid that amount and the ability to get this larger sum is based upon speculation only. Furthermore this sum, as well as the sum up to that time obtained by the Surety Realty Company was awarded by the Court to that company without taking into account the possibility of vacancy, lack of responsibility on the part of tenants, or any of the numerous incidents which so often make a landlord's return from his property melt away.

And here it is proper to suggest that the only reasonable assumption from the facts is that the real reason why the Surety Realty Company had not rented these floors and this store for a larger amount, was that nobody wanted them on these terms. The fact that the condemnation proceedings were in contemplation apparently did not prevent Mr. Kamm from renting the other stores (much larger and more important parts of the property) and the second floor, to the Liggett and McDonald companies for a long term of years at rentals which the only competent experts agreed were the full rental values, and if Mr. Kamm was able to rent these more important sections of the property for adequate rentals and for long terms of years, it is ridiculous to suppose that with respect to the third and fourth floors and the small restaurant only he was thus prevented by the condemnation proceedings.

The supposed ability of the Surety Realty Company to rent these stores for a larger amount is altogether too fanciful and problematical to justify this additional inroad of $17,279 upon the amount awarded to the owners of the fee.

Multiplying $19,736.18, the amount shown on the Surety account (page 220) by the denomina-

tor 3.84, the result would be $75,786.93. But the above figure also, we submit, fails to allow for additional deductions, one of which being the salary of $2,080 per year paid by the Surety Company to Mr. Kamm, its president. (Here it should be noted that the Surety Realty Company had no other asset but this lease.) And there should also have been deducted something on account of improvements. For this purpose the Surety Realty Company spent $962 in the year 1923. Is it not reasonable to assume that during the remaining four and one-half years of the term, they would have had to spend something on this account? Especially when it is taken into consideration that it is the opinion of Mr. Houston, one of the experts, that the third and fourth floors could not be well rented without alterations and improvements therein, (p. 190, line 30).

The Vice-Chancellor refused to allow any deduction on account of improvements, on the theory that there was no likelihood of a recurrence. Was it not as reasonable to assume that there was an equal likelihood of recurrence? He refused to allow any deductions for the salary paid to Mr. Kamm, on the theory that Mr. Kamm owned the company anyway, and whether he took by way of salary or dividends was immaterial. However, personal services were necessary in looking after the property and in running the company which had no other asset than this lease, and if Mr. Kamm chose to assign $2080 of its annual income to this source, should he not be held now to this classification of that amount? By the removal of the building and the termination of the lease, Mr. Kamm is relieved from the necessity of performing those services further and it is to be assumed that he will, in the time thus released, make at least the

item of $2080 which compensated him for his services to the corporation.

If allowance is made for these items, as we submit should be, then, on the theory that the Surety Realty Company is entitled to anything, their recovery would necessarily have to be reduced even below the sum of $75,786.93, above referred to.

In the Court below we suggested as the equitable view of the situation, on the assumption that the lease continued, would be to give the tenant the income and profits of the property for four and one-half years, upon condition of the payment of an annual rental of $19,000 per year, with the suggestion that inasmuch as the property is now gone, there stands in substitution of it the fund in Court, plus the reasonable value of what remained (in its then condition) after the taking by the City.

If the problem is approached from that attitude, the result reached is practically the equivalent of the result obtained by the Vice-Chancellor's method, if the proper figures are taken, as outlined above.

Deducting from the net profit shown by the Surety Realty Company of $19,736.18, the sum of $2,080 for Mr. Kamm's salary, as well as an amount of $300 per annum on account of improvements, we have a net return of $17,356.18 per year. This checks off almost exactly with the result had on the computation we suggest. This appears as follows:

Amount of award........	$479,550.00
Value of remainder.....	130,000.00
Total	609,550.00
Income at 6% = ...	36,573.00
Deducting annual rental.	19,000.00
Net amount per year....	$ 17,573.00

From the above computations, we submit that either on the theory of the actual excess of rental value over rental paid, or upon the theory of allowing the tenant a net return on the fund in Court, plus the value of the remainder of the term, the result is practically the same, and indicates that the amount allowed by the Vice-Chancellor is excessive.

All of the above, of course, upon the assumption that the tenant is entitled to anything.

In answer to the suggestion just made, the Vice-Chancellor states that it was testified that the value of the remaining half is $265,000, and that it is asserted that this half was recently sold for $300,000 (page 222). With respect to this, we should say that this assertion appears nowhere in the record and that it is not the fact. Furthermore, although one witness, Mr. Berry, who is also one of the tax assessors of Newark, testified that what remained is worth $265,000, he had to admit that it is assessed by his own Board at the sum of $152,600 only, and that this assessment covers the premises as they now are, taking into consideration the improvement to the remainder by the new line of Washington Street and the consequent street frontage given to the remainder by this improvement. Now, obviously, that is not the amount that would have to be

taken in any such computation, because the owners will have to pay for that improvement by reason of assessment for benefits still to be imposed upon their property. The only evidence in the case as to the value of the remainder, without regard to the contemplated improvement, is the opinion of Mr. Houston, who placed the value of such remainder as it existed after the taking, and without regard to the contemplated improvement, at $130,000 (page 195). Hence, in our computation, we use that sum. And here it is worthy of note that Mr. Houston fixed the value of the remainder, plus the improvement, at the sum of $198,000 only.

IV.

The court below properly refused any recovery to the Liggett Company and the McDonald Company.

It is submitted that the opinion of the Vice-Chancellor on the subject of the Liggett and McDonald companies is entirely justified by the authorities under the Constitutional and statutory provisions in effect in this State.

In the first place, for the reason shown by the Vice-Chancellor, it is quite clear that neither the McDonald or the Liggett properties possessed any rental value in excess of what these parties respectively were paying, and as the authorities show, no other consideration can be taken into account in connection with the taking of land for highway purposes.

It is not necessary to add anything to the Vice-Chancellor's discussion of the authorities. (See *Simmons* v. *Passaic,* 42 N. J. L. 619; *Freeholders* v. *Emmerich, supra; Schill* v. *Freeholders*

of Essex, 131 Atl. (Backes, *V.-C.*) 584; *Philadelphia and Camden Ferry Co.* v. *Inter-City Link R. R. Co.,* 76 N. J. L. 50; *Whitman* v. *Boston and Maine R. R. Co.,* 3 Allen (Mass.) 133; *In re New York, etc. Bridge,* 4 N. Y. Supp. 422; *Mayor, etc. of Baltimore* v. *Gamse & Bro.,* 104 Atl. 429.

Although the Vice-Chancellor at the hearing was of the opinion that neither alleged profits, nor alleged losses on account of removal of fixtures could be allowed, he permitted the Liggett and McDonald companies to offer evidence on these subjects. The evidence thus offered demonstrates that neither applicant, in fact, lost any profits by losing the possession of these premises. Which fact, coupled with the lack of any additional rental value over the amount paid, demonstrates that neither company was, in fact, entitled to anything.

The evidence demonstrated that neither party had, in fact, made sufficient profit to render this item a real element in the case.

The Liggett Company, with its great organization and skill in management, was able to make profits for the year 1924 amounting to only $5,306.00, and for the year 1925, up to October 1st, only $3,209.00 (page 132).

The McDonald Company in the period from 1914 to October 17, 1925, suffered a total loss of $84,125.82 (page 168), and here it is appropriate to note that the McDonald Company followed in this location another shoe company, Frazin & Oppenheim, which failed in business (page 145). In this connection it cannot be said that the Newark store suffered on account of preferred treatment for the Boston store, because the testimony shows that the Boston store dealt with the Newark store the same as to

prices as any other manufacturer did (page 167) so that on the basis of buying its goods at market value, the Newark store consistently lost money, and even the combined stores lost money for the years 1924 and 1925 (page 159).

Nor is there anything in the suggestion of any of the tenants that they are entitled to an award because of diminution in the value of their fixtures by reason of the removal thereof. Such diminution is not one of the items for which compensation can be made, as appears in the authorities on this subject to which we shall refer. Furthermore, this is a loss which every one of the tenants would necessarily have had to bear in any event at the termination of its lease four and one-half years hence. Furthermore, Mr. Rosenbush, President of the McDonald Company, sought to value his fixtures at an excessive sum, yet he admitted that seventy-five per cent. of all of these fixtures were acquired by him at the Frazin & Oppenheim receiver's sale for $1,700.

Mr. Mayer, the witness who sought to boost up the rental value of the Liggett and McDonald premises, so overreached himself as to render his testimony of no value at all.

Thus, although Messrs. Berry and Houston practically agreed that both the Liggett Company and the McDonald Company were paying approximately the actual rental value of the premises (see pages 80, 82 and 189), Mr. Mayer assumed to testify that although McDonald was paying $19,000 a year, the actual rental value of the premises occupied by it was $38,956.75 per year (page 135), and that while the Liggett Company was paying $15,000 per year, the rental value of the premises occupied by it was $26,400

per year (page 112). As to the Liggett Company, his testimony was given without any knowledge of the covenants and conditions of the Liggett lease (page 119). His opinion is so far above any reasonable probability as to render his testimony worthless. If he is correct, then the Liggett Company, if required to pay the actual rental value of the premises, would have suffered a loss both in the years 1924 and 1925 of from six to seven thousand dollars, and one can scarcely conceive what the total loss of the McDonald Company would have been, had it been required to pay the true rental value (in Mayer's opinion), or just double the amount of rent they actually were paying.

It is notable that the Liggett Company, with its great organization and skill in merchandising, although paying a rent of $15,000 per year, were able to make a profit in 1924 of only one-third of the amount of rent they were paying, and in 1925 of an even less amount. The profits made by the Liggett Company and the losses suffered by the McDonald Company sufficiently indicate that these tenants, if anything, were paying more rent than they could afford to pay, and if these skillful business men could not make a profit on the premises in question, it is quite certain that no one else could have, and that to say the least, the Surety Realty Company's rents represented the very full rental value of the premises.

The testimony of the Liggett Company and the McDonald Company's representatives, as to negotiations had by them for other locations in the general vicinity, can have no bearing, for the reason that the witnesses on behalf of both frankly admitted that they considered the offers too high and that no negotiations actually proceeded to the point of a meeting of minds.

V.

The court properly refused to allow costs and counsel fees out of the fund.

Some of the appellants allege, as an objection to the Court below, the denial of costs and counsel fees.

Adopting the view most favorable to the appellants, this was a matter in the sound discretion of the Vice-Chancellor.

Counsel argued that they were entitled to costs and counsel fees on analogy of proceedings to construe wills, but that analogy, for obvious reasons, fails. The parties in question were not brought into Court and need not have come in. Each of them came in upon his own application asserting a right in his individual interest, and had they made no claim to the fund, they would have been subjected to no costs or expenses. The situation resembles more nearly proceedings in interpleader, where the Courts follow the uniform practice of refusing costs and counsel fees to the parties called upon to interplead.

On the entire record, it is respectfully submitted that the decree below should be reversed as to the allowances made to McEuen and the Surety Company, and it should, in all other respects, be affirmed with costs.

ARTHUR F. EGNER,
Of Counsel for Hugh F. Cook, *et als.*,
Appellants-Respondents.

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NEW JERSEY

Court of Errors and Appeals

Between CITY OF NEWARK, Petitioner, and HUGH F. COOK *et als.*, Defendants-Appellants.	On Appeal from Decree in Chancery.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT R. E. McDONALD, INC.

Statement.

Said defendant-appellant, R. E. McDonald, Inc., hereinafter called "McDonald," appeals from a decree advised by Vice Chancellor Backes, which decree purports to distribute a fund deposited with the Clerk of the Court of Chancery by the City of Newark, said fund being the amount of an award made in condemnation proceedings whereby lands and a building situate on the northwest corner of Market and Washington Streets, in the City of Newark, were condemned for the purpose of widening Washington Street. At the time of such condemnation McDonald was the owner of a lease for a store in said building, together with the basement underneath said store, and the entire floor above said store. McDonald and its predecessor in the occupancy of said leased premises had for a number of years prior to the date of condemnation

and up to such date been conducting thereat a retail shoe business.

McDonald claims that by such condemnation it lost the value of its leasehold, the good will of its business, the value of its furniture and fixtures, and suffered a further loss by the depreciation of the value of its stock of merchandise, which stock of merchandise it was obliged to sell at forced sale. McDonald at the time of such condemnation was unable to procure another similar suitable location in the same neighborhood, at which to continue its said business.

The decree appealed from fails to award McDonald any compensation for the losses aforesaid or counsel fees and costs, and this appeal brings up for review the question whether said decree should have awarded McDonald such compensation, counsel fees and costs.

1.

McDonald should have been awarded for the value of its leasehold the sum of $76,633.92 (Case, p. 11).

The building containing the premises demised to McDonald was located on a plot situate on the northwest corner of Market and Washington Streets, Newark, New Jersey, and was known as No. 105 Market Street. Said plot was 44 feet front on Market Street by 106.58 feet on Washington Street. The City condemned said building and one-half of said plot, and paid into court its award therefor, amounting to $479,550. On October 1, 1925, the City took possession of the entire building, including the premises then occupied by McDonald under its lease, which lease did not expire until March 31, 1930.

On February 1, 1910, Martin Burne, who was then the owner of said lands and buildings, leased the same to Sabastian S. Kresge for twenty years from April 1, 1910, for a rental of $17,000 for the first ten years and $19,000 for the second ten years of said period. Said lease was by mesne assignments subsequently assigned to the Surety Realty Company. Said Surety Realty Company by lease dated April 18, 1922, leased "the store and basement underneath the same, commonly known as No. 105 Market Street, in said City of Newark, being the store immediately adjoining on the west the store now occupied by William B. Riker & Sons Co., on the northwest corner of Washington and Market Streets, in said City of Newark, the store and basement hereby demised each having a frontage of about twenty one feet and a depth of about eighty five feet, together also with the floor immediately above the store hereby demised, said floor running, however, to the full width of said building to Washington Street, and extending to the north to a point about twelve feet from the most northerly wall of said building" (Case, p. 251, ll. 20-40). Said lease was for the term of 7½ years from the 1st day of October, 1922, to the 31st day of March, 1930, at the annual rental of $17,000 for the period from October 1, 1922, to March 31, 1925, and $19,000 for the period from April 1, 1925, to March 31, 1930 (Case, p. 252, ll. 20-40). The said lease also contained a provision in paragraph 4 thereof which permited McDonald to sublet the premises for the sale at retail of ladies cloaks, suits, waists, hosiery and millinery (Case, p. 255, ll. 1-17).

Said lease also contained a provision that it might be terminated at any time after the first four years of the term (October 1, 1926) upon giv-

ing nine months' notice prior to the time fixed for such termination by paying to McDonald $25,000 in the manner provided for in said lease (Case, p. 261, l. 10).

The building containing the demised premises was located at the corner of Washington and Market Streets, directly opposite L. Bamberger & Co. department store, within two blocks of the corner of Broad and Market Streets, which is the business center. It is in the retail section specializing in women's wear and furniture. This corner is considered by most real estate men as the second best corner in the City of Newark for pedestrian traffic. The north side of Market Street (this building is on the north side) is better than the south side (Case, p. 79, ll. 10-39). This building was at a transfer point with respect to traffic resulting from the use of trolleys and jitneys (Case, p. 79, ll. 39-40; p. 80, ll. 1-9). That L. Bamberger & Co., department store, through its extensive advertising operations, brings people from all over the northern part of New Jersey to this particular center (Case, p. 85, ll. 18-23).

The Liggett store occupied the corner of the first floor and was 22 feet front on Market Street by 74 feet in depth (Case, p. 80, ll. 10-20). The McDonald store adjoined the Liggett store on Market Street, and was consequently 22 feet from the corner of Market and Washington Streets while the floor over the store occupied the entire Market Street frontage of said floor as well as all of the Washington Street frontage of said floor in said building.

The McDonald premises consisted of a store 21 x 85 feet, a basement underneath 25 x 85 feet, and a second floor over the store 44 x 98 feet covering the entire building (Case, p. 132, ll. 36-40; p. 133, ll. 1-10).

Edward J. Maier, a real estate expert of nineteen years experience, whose qualifications as such expert were not seriously challenged, testified that the rental value of the McDonald premises as of May 20, 1924, was $34,176.50 (Case, p. 134, ll. 10-15); and as of October 1, 1925, $38,956.75 (Case, p. 135, ll. 11-19). That there was an elevator connecting the basement store floor and second floor, thus bringing the three parcels constituting the McDonald premises in contact so as to become one unit (Case, p. 136, ll. 8-17). Mr. Maier further testified:

> "I took into consideration that the second floor had a rather unique position, inasmuch as it was directly opposite the Bamberger store having a display of show windows on the second floor of 44 feet on Market Street and approximately 98 feet, or over 90 feet on Washington Street, making it in full view from both sides of Market Street in a heavy shopping district, so that in that respect the property was—stood in a class by itself and not comparable with other property on that particular block on Market Street, on account of the display which it had on this great broad side, which could be used for advertising.
>
> Now, with relation to the McDonald use of it, it is very apparent from the photographs that we have here that that second floor not only gave McDonald a display there, but it brought his store floor which was on Market Street and not on Washington Street—it brought them out to the view of the people who were doing shopping at Bamberger's corner and made it practically the same as the Bamberger corner, with relation to its exposure and so on, so that that second floor had a specific and unique value that was not comparable with other properties in the immediate neighborhood, with relation to its use.

Q. Now, with regard to the prominence of this corner, its locality and visibility. Have you anything to say with regard to that? A. Well, it is very evident—you can see that the corner is in full view from—coming through either Washington Street or Market Street—that the Bamberger store on Market Stret is really the center of activity there. There is really only two corners, and one other corner that is comparable with that. If you go to the other side of the street the traffic isn't as heavy by any means, and on this side of the street the only other corner would be the corner of Halsey—northeast corner of Halsey and Market.

Q. Did you take into consideration that Bamberger sells shoes? A. Yes, sir. That is a great feature. The idea is to have a location opposite a department store and become able to sell the same kind of merchandise that the department store sells. That adds to the value of the location.

Q. Do you think that the display windows would affect Bamberger's customers? A. Exactly. Not necessarily—yes, the customers that would come into Bamberger's store.

Q. Was the McDonald premises located in a district which was specially devoted to any particular kind of business? A. Women's wear, generally" (Case, p. 136, ll. 35-40; p. 137; p. 138, ll. 1-21).

The only testimony which is adduced by the landowners bearing on the subject of the value of the leasehold in question is that of David Houston (Case, pp. 189-211). His testimony, in substance, is that the rental value of the McDonald premises was "$16,900-$17,000 in round figures" (Case, p. 190, ll. 1-15). It will be observed that the lease in question provides for an annual rental of $17,000 during the first five-year period from October 1,

1922, and ending March 31, 1925, and $19,000 during the period April 1, 1925, to March 31, 1930, so that the lessee already since April 1, 1925, and at the time of condemnation, October 1, 1925, had been paying $19,000 per annum. *So this expert placed the rental value of the premises at $2,000 per annum less than the lessor was then actually receiving.* Mr. Houston had the impression that in October, 1925, McDonald was only paying $17,000 per annum. He had that erroneous idea in his mind when he was moulding his testimony to the end that his valuation would not exceed $17,000. This was shown by his testimony (Case, p. 198, ll. 23-34):

> "Q. You know in one of your figures you are somewhat lower on the rental value than the actual rent paid. A. I don't think I am. I don't think I am very far, Mr. Lane; approximately the same.
>
> Q. $3,500 and $3,000 a year. A. Which one?
>
> Q. McDonald. What we call the McDonald property. A. *I understand the McDonald was $17000.*
>
> Q. It worked out $19,000. A. *I understood it graduated up to $19,000; hadn't reached that amount yet.*"

And that the witness in testifying as an expert as to rental values had a rule or standard all his own. He admitted that he testified before the Commissioners that "the best test of rental value was what was being paid" (Case, p. 199, ll. 22-24). Manifestly, such a test is not a valid, legal or logical test, because if that were so, then $19,000, being the rent which the Surety Realty Company was paying to the landowner in the year 1925, would be the rental value of the entire building, and even the landowner does not claim any such thing in

this proceeding. The McDonald lease made on April 18, 1922, provided for a term of seven and one-half years, the first two and one-half years of which to be at the rental of $17,000 and the balance of five years at the rental of $19,000. Perhaps on April 18, 1922, the fact that the lease was made for these premises reserving the rent of $17,000 would be material evidence that on April 18, 1922, the rental value of said premises was $17,000. In other words, the payment of $17,000 or $19,000 as rent in 1925 under a lease made in 1922, is no proof that the rental value of said premises in 1925 was only $17,000 or $19,000. Houston admitted that in testifying before the Condemnation Commissioners he valued the land alone at $570,000 (Case, p. 201, ll. 18-20). He admitted that he heard Mr. Egner, expert for the Condemnation Commissioners, value the building at more than $80,000 (Case, p. 201, ll. 11-12). This would make the landowners' valuation of land and building before the Condemnation Commissioners more than $650,000, and upon an aggregate valuation of $690,000 he regarded the rentals described by him in his testimony in this cause as a fair rental upon a property valued at $690,000.

Mr. Houston's rent valuations are as follows:

Liggett (Case, p. 189, ll. 35-37)	$15,000
McDonald (Case, p. 190, ll. 14-16) ...	17,000
Third floor (Case, p. 190, ll. 10-20) ..	1,600
Fourth floor (Case, p. 190, ll. 20-30) .	1,200
Ace Radio Shop (Case, p. 190, ll. 30-40)	2,000
Restaurant (Case, p. 191, l. 1)	3,750
	$40,550

That this land increased in value from April, 1922 (when the McDonald lease was made), to October 1, 1925, must be conceded. Even Mr. Berry testified that as tax assessor the assessment upon land is increased every year because the property becomes more valuable (Case, p. 102, ll. 10-20).

Mr. Berry testified that the triangular strip of land remaining and not taken in the condemnation proceedings was of the value of $265,000 on September 15, 1925 (Case, p. 87, ll. 27-30). Adding this sum to the $479,550, the award by the Condemnation Commissioners, would make the total value of this property $744,550. This aggregate valuation would seem to indicate that the annual rental valuations claimed by the various owners of leaseholds represents a fair rental value of all of the property.

Mr. Houston admitted that the location of this property caused it to produce a high income (Case, p. 202, ll. 1-20). He never leased any property on the same block, nor in recent years on the opposite side of the street in the same block (Case, p. 203, ll. 1-10). He testified that he fixed the value of the Liggett leasehold on the basis of $700 per front foot, it being a corner property, and that it was worth double what the inside property was worth (Case, p. 203, ll. 10-20). He claimed that in 1925, just before the condemnation proceedings, he made an inspection of the building, and that is how he learned that the basement was not being used for selling goods (Case, p. 206, ll. 1-10); but it will be remembered that he only testified in the condemnation proceedings as to the value of the land. Therefore, he would have had no occasion for or reason to inspect the interior of the building. Houston stands as a discredited witness if he did not inspect the cellar and falsely testified that the cellar was not being used to sell goods.

The testimony of the McDonald witnesses that the cellar was being used as a salesroom is not contradicted by any witnesses.

Mr. Houston fixed the valuation of the cellar at $1 per square foot, and said it was being used merely for storing rubbish, but even if it was used as a salesroom, it would not be worth more than $1 per square foot (Case, p. 206, ll. 20-30). We think that this opinion of the witness demonstrates how little weight ought to be attached thereto. It does not require an expert to say that a cellar which for storage purposes is worth $1 per square foot must be worth a good deal more than $1 per square foot if it can be used as a salesroom.

He admits that he had a schedule of the rents being paid before him before he prepared himself to testify (Case, p. 207, ll. 30-40). This shows that he was given to understand in advance that in his expert opinion of values he would not exceed the rents being paid and unwittingly he went further than the landowners expected him to go, that is, he appraised the McDonald lease at $17,000 per annum when McDonald was already paying $19,000 per annum.

He also testified that it was customary for appraisers to appraise corner property at one and one-half times the inside price (Case, p. 209, ll. 30-40); but he valued the Liggett lease at $700 per front foot (corner property) and McDonald $350 per front foot (Case, p. 210, ll. 30-40), although it is the customary rule to value corner property at one and one-half times the value of inside property. In this instance he valued the Liggett lease (corner property) at $700 per front foot and the McDonald at $350 per front foot, which was not at a one and one-half basis, *but on a double basis* (Case, p. 211, ll. 1-10).

As suggested in the question propounded to the witness, our belief is that he arbitrarily made a valuation of $350 per front foot so as to produce a computation of *$17,000 per annum* as the rental value of the McDonald leases (Case, p. 211, ll. 10-20), under the mistake that $17,000 was being then paid by McDonald.

The testimony of John J. Berry, who was called as a witness by the Surety Realty Company (Case, pp. 78-90), we respectfully submit, should have no bearing on the valuation of the McDonald lease.

The Surety Realty Company, as we see it, are not interested in what sum the landowner is required to pay to McDonald as its damages. Perhaps the object of the proof offered in so far as relates to the McDonald lease was merely to show that the McDonald leasehold was not worth less than the rent reserved; that is to say, the annual rental value of the McDonald premises was equal to the rent reserved from the Surety Realty Company to McDonald.

Berry made the total rental value of the McDonald lease $19,300 per annum. *It is to be noted that he made the rental value $2,300 more than Houston.* We think this further discredits Houston. That the premises in question had a great rental value is indicated by what all of the experts have testified to.

The Surety Realty Company was not only interested in adducing proof that the annual rent of $19,000 reserved in the McDonald lease and the annual rent reserved in the Liggett lease was equal to the annual rental value of the said premises in October, 1925, but the Surety Realty Company was also interested in endeavoring to prove that the annual rental value of said premises was not much more than was reserved in said leases. The Surety

Realty Company, in paragraph 6 of its application filed in this matter, makes the following allegation:

> "The estate granted to your applicant under the terms of the lease held by it, was of considerable value, and by reason of the acts of said City, not only has the value thereof been lost to your applicant, but, in addition thereto, *your applicant has been subjected to substantial claims for damages alleged to have been sustained as a result of said taking by sub-tenants of your applicant*" (Case, p. 42, ll. 30-40).

It will thus be seen at a glance, in view of its foregoing admission of liability of claims for damages, that the Surety Realty Company certainly had a strong motive upon the trial to keep down the rental value of the premises leased to McDonald and Liggett to about the amount of the rent reserved in such leases.

Mr. Maier, in discussing the valuation which he placed upon the McDonald premises, took into consideration that there was a provision for the cancellation of the lease upon the payment of $25,000, and was of the opinion that, notwithstanding such provision, the valuation fixed by him was fair and reasonable (Case, p. 135, ll. 20-40).

A suggestion has been made on the cross-examination of Mr. Rosenbush that in *1917* or *1918* the Surety Realty Company reduced the McDonald rent some $1,500 in each of those years, but Mr. Rosenbush did not recall it, and thereupon the landowners offered in evidence an agreement dated July 1, 1917, between the Surety Realty Company and McDonald, so that the case in that regard stands merely with a paper in evidence that the rent was reduced by the lessor during a period long antedating the date of the lease now in question, that lease being dated in *1922*. The inquiry

is not what the rental value of this property was in 1917 or 1918, but what it was on October 1, 1925.

The so-called cancellation clause in the McDonald lease (par. 18), we think, does not diminish in any manner the value of this leasehold, and under the facts in this case it cannot have any application. Said clause provided a method whereby under certain conditions the Surety Realty Company might bring about cancellation. This right was never exercised, and in any event inhered only in said Surety Realty Company. Up to October 1, 1926, this right had not been exercised, and in fact was never exercised. The City in contemplation of law became the owner of these premises by at least October 1, 1926, the award paid by the City into this Court being substituted in the place of the land and all of the parties to this proceeding.

Besides, such cancellation was impossible without the payment of $25,000, so that the cancellation clause could only be considered in connection with this lease as being the equivalent of $25,000 if resorted to by the Surety Realty Company.

That the Surety Realty Company had in mind in April, 1922, the possibility that the leasehold would increase in value is indicated by the very presence of this cancellation clause. By the use of the cancellation clause, this lease might have terminated and come to an end at the option of the Surety Realty Company on October 1, 1926. Therefore, on October 1, 1925, McDonald had an absolute right to remain in possession as against the Surety Realty Company until October 1, 1926, plus the right to $25,000 if the Surety Realty Company desired to have said lease come to an end on October 1, 1926. We contend, therefore, that McDonald's

minimum right to compensation can in no event be less than $44,956.75, being the value of its leasehold for the year ending October 1, 1926 ($19,956.75 plus $25,000). Said sum, perhaps, is subject to a slight reduction if the present value at 6 per cent. in one year of $19,956.75 be substituted in the place of said item of $19,556.75 in the foregoing computation.

Mr. Maier, in reaching the value which he did on the McDonald lease, had in mind also the leases which he considered in forming his opinion with regard to the Liggett lease (Case, p. 141, ll. 10-15). In arriving at his valuations, he took rentals that had been paid in the vicinity, thus arriving at a basic front foot rental value (Case, p. 112, ll. 10-14). He thus arrived at a front foot valuation of $800 (Case, p. 112, ll. 10-18). That Mr. Maier was justified in his valuations is shown by the efforts which Liggett made to procure another store. Liggett's employees were unable to find anything suitable in the neighborhood (Case, p. 120, l. 18). No property could be found in the neighborhood that was procurable for less than $800 per front foot. The store at No. 102 Market Street, almost opposite the McDonald and Liggett stores, could not be had for less than $800 per front foot, that store being procurable only by the purchase of a lease therefor (Case, p. 121, ll. 20-30). The store at No. 116 Market Street, on the opposite side of the street from the Liggett and McDonald stores and nearer Broad Street, could be procured at a rate of rental which figured $800 per front foot (Case, p. 122, ll. 1-3). The property at 97-99 Market Street could be obtained at a rental which figured that the first floor and basement would cost $1,500 a front foot (Case, p. 123, ll. 24-25). The premises 93-95 Market Street, which is on the

same side of the street as the McDonald and Liggett stores, but west therefrom, the same being a store and basement, at a rent which figured $1,200 a front foot (Case, p. 125, ll. 32-40). The premises 82 Market Street could be procured at a rental which figured about $1,000 a front foot (Case, p. 126, ll. 30-36; p. 127, ll. 1-10).

McDonald's unsuccessful efforts to procure another store corroborates Mr. Maier's testimony as to the great value of the McDonald lease. McDonald's efforts disclosed that at 73-75 Market Street, a property 22 x 190 feet could be rented at a rental of $20,000 net, which meant the payment of taxes and carrying charges in addition, but this location was unsuitable (Case, p. 170, ll. 20-40). The property adjoining the property above mentioned was procurable at a rental of $26,000 (Case, p. 172, ll. 1-15). Property located on the other side of the street from McDonald was procurable at $60,000 per annum (Case, p. 161, ll. 30-40; p. 162, ll. 1-10). Another property three doors west of the McDonald property was procurable at $21,000 net, but it required an additional payment of a cash bonus of $10,000 (Case, p. 162, ll. 30-40). This property had a 21-foot frontage (Case, p. 163, ll. 9-10). Property at 97-99 Market Street involved the assignment or sale of a lease for a cash consideration of $125,000; also, 239 Washington Street involved a net rental of 6 per cent. on the market value of the property, which was fixed at $200,000 (Case, p. 163, ll. 26-40).

Mr. Edward J. Maier, the expert produced by the lessee, testified in substance that the annual rental value of lessee's premises on October 1, 1925, was $38,956.73; the rent reserved under the lease in question for the period from October 1, 1925, to the expiration of said lease (March 31, 1930) was

$19,000, the difference between said two sums being $19,956.75; so that the lessee's claim to damage in substance is for losing the value of its leasehold, which had yet four years and six months to run, the profit on which to said lessee would have been at the rate of $19,956.75 per annum.

We claim that the lessee is now entitled to receive such sum as damages which, if put out at lawful interest, would with such interest accumulation aggregate at the end of four years and six months four and one-half times $19,956.75. We think that result is produced by multiplying $19,-956.75 by $3.84 (Case, p. 174, ll. 10-15); $3.84 is the present value of $1 for a period of four and one-half years, on the basis of 6 per cent. The last mentioned computation produces the sum of $76,633.92.

The above value of McDonald's leasehold has been calculated by us pursuant to the rule laid down in the following two cases:

In *West New Jersey Railroad Co.* v. *Thomas,* 23 N. J. Eq. 431, Chancellor Zabriskie determined the value of a lease. In that case it was found that $14,400 was the clear annual value of the lease itself, which covered a period of fifteen years and four months. At page 435 the Court says:

> "The value of this for fifteen years and four months can be ascertained exactly by annuity tables, which are calculated with as much certainty as the multiplication table, and of which courts will take notice as they do of that table."

In *Holcombe* v. *Trenton White City Co.,* 80 N. J. Eq. 122, the Court had under consideration the proper method of valuing a lease. The Court says, at page 153:

> "The true method of calculating the value of an unexpired lease is not by ascertaining

> the yearly rental value and then multiplying the figures by the number of years the lease has to run, but by calculating its value by the annuity tables—that is, by multiplying the annual value by the value of one dollar per year for the number of years in the unexpired term. This was expressly decided in West Jersey Railroad Co. v. Thomas, 23 N. J. Eq. (8 C. E. Gr.) 431, 434."

The Vice Chancellor in substance found that the annual value of the McDonald lease was $19,300, or $300 in excess of the rent reserved (Case, p. 224, ll. 10-20). The present value of $1 at 6 per cent. for four and one-half years is $3.84 (Case, p. 174, l. ~~137~~ 13-14). Multiplying said $300 by $3.84 gives $1,152, the value of McDonald's estate as of October 1, 1925. We see no reason for the Court's failing to award even this sum to McDonald, nor do we find any justification of the Vice Chancellor's finding that the amount was too small to be dealt with and would have been consumed by the payment of real estate broker's commissions. McDonald might for that very reason, if its estate were so small, have sold the leasehold without utilizing the services of a broker.

The Vice Chancellor made no deduction from the amount awarded to the Surety Realty Company for broker's commissions, and if he seriously thought that that was a proper item of deduction, he would not have failed to consider it.

We believe that we have shown that McDonald was entitled to have awarded to it for the value of its leasehold $76,633.92; that if the cancellation clause contained in the lease cut down the value of said leasehold (which we do not admit), it was entitled to at least $44,956.72. If the Vice Chancellor was correct in disregarding the foregoing valuations, we claim he was obliged in any event

to find that the leasehold had a value to McDonald consisting of the value of its right to remain in undisturbed possession of the premises to the end of the term of the lease, and to have the store produce the profits which it had theretofore produced and which created a good will value of $50,000, as testified to by Rosenbush (Case, p. 155, ll. 1-10); that, in any event, on the Vice Chancellor's finding of $19,300 as the annual rental value of the McDonald leasehold (the correctness of which finding we do not concede), McDonald was entitled to $1,152.

2.

McDonald should have been awarded not only compensation for the loss of its leasehold, but also $14,500 for the loss of its furniture and fixtures, $50,000 for its good will, $17,-884.25 for loss upon forced sale of its merchandise, and $11,817 loss on close out sales for expenses additional to the normal overhead (Case, p. 11).

The premises in question had been, for a number of years prior to the date of said lease to McDonald, devoted to the conduct of a retail shoe business. It was an old retail shoe stand. The premises had been occupied by Frazin & Oppenheim, and thereafter McDonald continued the conduct of said business until October, 1925. The fixtures thus purchased cost about $17,000, but were carried upon the books of McDonald at $1,700 (Case, p. 146, ll. 10-30). From time to time additional fixtures and furniture were installed by said lessee, and the loss involved in the removal of such fixtures in October, when the premises were surrendered,

aggregated approximately $14,500 (Case, p. 170, ll. 10-15).

There was derived in profits from the conduct of the business of said store profits annually, from 1914 to 1923, inclusive, running as high as $27,-887.22 in 1918, and as low as $6,159.97 in 1923, a loss being sustained in 1924 and 1925 because of the sacrifice sale of goods in those years (Case. p. 159). Our computation of the ten-year period beginning with 1914 indicates that the total of the profits would be $151,532.70, thus making the average annual profits for the period about $15,000, derived through the operation of said store; and upon the basis of average annual profit of $10,000, the good will of that store in May, 1924, and in October, 1925, was about $50,000 (Case, pp. 157-160, inclusive; also exhibit on p. 278).

The lessee had a stock on hand when the store was closed of $20,323 which could not be disposed of to the public, upon which a loss of $17,884.25 was sustained (Case, p. 161, ll. 1-13).

The lessee also sustained a loss on the closing out sale for expenses additional to the normal overhead, amounting to $11,817 (Case, p. 161, ll. 15-22).

The lessee endeavored to save itself from loss and preserve its good will by endeavoring to procure another location for its business, and the testimony is replete with proof of the unsuccessful efforts made to get another suitable location in the vicinity of the store in question and the fruitlessness of such efforts.

The testimony of Sacks in substance is that the Rosenbush Company would sell to McDonald goods at the wholesale price with a profit to the Rosenbush Company (Case, p. 166, ll. 30-40; p. 167, ll. 1-3), and that while the Newark store is an individual store, yet the so-called losses of the individ-

ual store constituted the profits of the Rosenbush Company (Case, p. 168, ll. 20-40), the Rosenbush Company, through its stock ownership of the McDonald Company, owning the store in question; Al. A. Rosenbush Company owned all the stock of the McDonald corporation (Case, p. 166, ll. 20-30). Said Rosenbush Company has fifty chain stores, of which McDonald is one (Case, p. 145, ll. 1-10). At page 168, lines 20 to 40, the Vice Chancellor gives the impression that he did not understand that the McDonald shoe store was being conducted at a loss but that the result of the profits taken by the Rosenbush Company was a loss to the McDonald store.

Exhibit "McDonald 2," being a profit and loss account of R. E. McDonald, Inc., sets forth in the last column that the net profit derived from the store was $152,797.50 for the period beginning with 1914 and ending with October 17, 1925. It is true that the said statement also shows profits and loss respectively sustained by the "corporation," treated as a separate entity, but in a court of equity the corporation ought to be regarded as merely the agency or subsidiary of the Rosenbush Company, which through its stock ownership was the owner of said corporation and said store, and the real beneficiary of the operation of said store.

We contend that, by reason of the foregoing facts, the store in question had a good will based upon the profits thus derived, the damage for the destruction of which is recoverable by McDonald.

Considering McDonald as a separate entity, it does not appear that through the operation of this store McDonald was enabled to turn over profits to Rosenbush as above enumerated. These profits were derived from the conduct of this store, and were turned over to Rosenbush only by reason of

his control of said store through his stock ownership. The Vice Chancellor took cognizance of this situation, for we find this significant language in his opinion:

> " * * * McDonald & Co. had a deficiency in the last two years which perhaps may be accounted for, as they tried to, by sacrificial sales of stock in contemplation of closing out and 'milking' by their Boston supply house" (by the "Boston supply house," the Vice Chancellor meant Rosenbush).

If profits were derived from the conduct of this store, they are none the less profits because McDonald permitted Rosenbush to take them. In modern times, when so much of merchandising is done through the chain store system, it is, we think, a matter of common knowledge that the profits of the subsidiaries or chain stores are absorbed by the parent company, and the fact that the chain store does not show any profit for itself, owing to the bookkeeping system whereby the profits are diverted to the parent company, does not render such store unprofitable or lead to its discontinuance. That Rosenbush was, through the system in force, enabled to get the profits from the disposition of his merchandise in this store, gave this store a peculiar good will which made it of special value in a chain store system, so that upon a sale to another chain store system the good will in question based upon said profits could have been realized upon, and another parent company could in turn in the same manner and at like profits dispose of its merchandise.

A.

That good will is property in the eyes of the law is well settled.

Good will is property for taxation purposes. In *Re Dupignac's Estate,* 204 N. Y. Supp. 273, on page 281, the Court says:

> "Good will is property within the provisions of the Transfer Tax Law. Von Bremen v. MacMonnies, 200 N. Y. 41, 51; 93 N. E. 186, 32 L. R. A. (N. S.) 293, 21 Ann. Cas. 423; Matter of Ball, 161 App. Div. 79, 146 N. Y. Supp. 499; Keahon's Estate, 60 Misc. Rep. 508, 113 N. Y. Supp. 926; Allen on the Law of Good Will, p. 85; Rogers on Good Will, p. 22."

On said page the Court also says:

> "The courts in this country have not adopted any inflexible rule for ascertaining the value of good will. They have decided that the value of good will may be fairly arrived at by multiplying the average net profits for a number of years by a number of years purchase, such number being suitable and proper, having regard to the nature and character of the business as a question of fact, depending upon the facts in each case."

In *State* v. *Chapman,* 69 N. J. L. 464, 55 A. T. Rep. 94, at page 466, the New Jersey Supreme Court said:

> "*A calling, business or profession, chosen and followed, is property.* Barr v. Essex Trades Council, 8 Dick. Ch. Rep. 101, 112; Slaughter House Cases, 16 Wall. 36, 116.
>
> *The legislature can no more destroy a business by statute, without providing for compensation, than it can authorize a corporation to take a piece of real estate for public use, except upon compensation."*

This case was affirmed in the Court of Errors and Appeals in 70 N. J. L. 339.

Re Ball's Estate, 146 N. Y. Supp. 499, Appellate Division of the Supreme Court, Second Department, per Burr, J.:

> "Mr. Justice Story says: 'Good will may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' Story on Partnership (7th Ed.), Sec. 99; Boon v. Moss, 70 N. Y. 465, 473. * * * This good will is property, and although intangible, the transfer thereof is taxable, under the law relating to taxable transfers."

In New Jersey good will is regarded as property and is subject to decedents' transfer tax. In *Re Hall,* 94 N. J. Eq. 398, at page 407, the Court says:

> "We come now to the last contention of appellants, namely, that the appraisement of the good will or interest was erroneous and excessive and the tax computed thereon therefore likewise erroneous and excessive. As already noted, the value of the right to acquire the good will, free, is essentially the same as the value of the good will itself. The value of the good will of a business is naturally not susceptible of determination with exactitude. The usual method is to take the actual annual net profits of the business for a period of years, add them and divide by the number of years, thus obtain-

> ing the average annual net profit, and then to multiply that average profit by a certain number of years. This last multiplier is called the 'number of years purchase' and varies, of course, with the particular circumstances in each case."

It is apparent that McDonald could not obtain another suitable store in the vicinity. Besides, it must be conceded that this store had such a unique location that it was incapable of being substituted by another, so that the essential element of good will, which is the custom or habit of trade to return to the "stand" of the merchant, was by the condemnation destroyed. McDonald, by the condemnation of this "stand," lost the place to which customers were in the habit of returning to trade with McDonald.

Philadelphia & Camden Ferry Co. v. *Inter-City Link Railroad Co.*, 76 N. J. L. 50, was a case in which the Supreme Court dealt with the award of Commissioners appointed on the application of said railroad company, in condemnation proceedings of certain lands of the ferry company which the railroad company sought to take for its terminal and depot purposes, in which an award of damages was given for the value of the land, property and crossing, but no damages were awarded to the ferry company by reason of loss in its business in the carriage of passengers due to the diversion to the tunnel of the passengers of the ferry company. The ferry company contended in substance that the taking of such land was an interference with its franchise and that it was entitled to compensation therefor, but it appeared in that case that the land thus taken was only a part of the land owned by the ferry company, not used in the

exercise of its franchise. At page 52, the Court uses this significant language:

> "The franchise to operate a ferry is taken in this constitutional sense if the power to exercise or the means of exercising such franchise be destroyed under the right of eminent domain, but the taking of land that is owned by a ferry company, but is not used in the exercise of its franchise, neither detroys its power to exercise its franchise nor impairs its employment of the means secured to it by its charter. The taking of such land is not a taking of the ferry franchise, however much the emoluments of such franchise may be reduced by reason of the competitive use to which the land so taken is put."

In the case at bar, the taking of the McDonald place of business destroyed and made impossible the enjoyment by McDonald of the good will which had been built up during many years, and is analogous to the destruction of a franchise of the ferry company, which would result from the taking of the very land from which such ferry company operates and which is essential to its operation.

B.

The fixtures and furniture were an integral part of the leasehold and their value should have been added to the value of the leasehold and the aggregate of such values awarded McDonald.

With reference to the item of $14,500, McDonald's claim to damages with regard to the furniture and fixtures:

The value of the McDonald leasehold is made up of two parts:

(1) The difference between the rent reserved in the McDonald lease and the annual rental value of the premises for the period of four and one-half years;

(2) The value of the use of the furniture and fixtures in question for such four and one-half year period.

The right to the occupancy of the McDonald premises for four and one-half years carried with it a valuable right to the use of the fixtures and furniture in question. The McDonald proof is that the value of said furniture and fixtures on October 1, 1925, was $15,000 (Case, p. 169, ll. 30-40), and that the furniture and fixtures after removal were worth only $500 (Case, p. 170, ll. 1-11). In substance, it would cost $15,000 on October 1, 1925, to replace said fixtures at said premises; that they were worth $15,000 as they were in said premises, and that when removed they were only worth $500, so that the only value that the furniture and fixtures had was their use for the four and one-half year period involved. If McDonald had on October 1, 1925, installed similar furniture and fixtures, it would have been in the same position as if it had been obliged to pay for the use of said furniture and fixtures during said four and one-half year period $14,500, inasmuch as upon removal the fixtures would have been worth only $500.

The presence of the furniture and fixtures in the McDonald premises on October 1, 1925, and the right to the use of said furniture and fixtures, we contend, added $14,500 to the value of that lease. It is therefore impossible in our opinion to separate

the value of the use of the furniture and fixtures for the four and one-half year period from the value of the lease. They added to the rental value of the premises, in the respect that if the McDonald Company had sublet the premises for a retail shoe business, they would have been in a position to procure in annual rent $38,956.73 plus $14,500 (the replacement value of the furniture and fixtures less $500). Had they rented the premises to a retail shoe merchant as an empty store, the retail shoe merchant would have been obliged to spend $15,000 for furniture and fixtures, which at the end of the four and one-half year period would have only been worth $500.

The Vice Chancellor disallowed the McDonald claims for loss relating to fixtures and furniture upon the authority of *Board of Chosen Freeholders* v. *Emmerich,* 57 N. J. Eq. 535, and *Philadelphia & Camden Ferry Co.* v. *Inter-City Link Railroad Co.,* 76 N. J. L. 50. Both of these cases dealt merely with the question whether the Court would allow compensation for injury to business. *Neither of these cases deal with the question as to whether compensation may be allowed for fixtures and furniture placed upon the leasehold premises, the value of which are lost or diminished by the condemnation.* The effect of the condemnation upon McDonald was the same as if the fixtures, improvements and furniture had been actually taken by the City. These items represent things of value taken by the City.

In *Atchison, T. & S. F. R. Co.* v. *Schneider,* 20 N. E. 41 (Ill., 1889), the following instructions to the jury in a condemnation case were approved:

> "The jury are further instructed that in determining the amount of compensation to

> be awarded to the defendants, respectively, in this case, they may properly take into consideration all evidence tending to show the actual value of the leasehold interest to the respective defendants, of which it is proposed to deprive them; the actual loss to be suffered by these defendants, respectively, from the loss, destruction or deprivation of the improvements placed by them in the properties especially adapted to the conduct of their business, if any, shown by their evidence, the reasonable cost of removal, and of refitting in other localities for the further conduct of business, as shown by the evidence; and also any injury that the jury may find from the evidence will result to said defendants, respectively, by reason of the unavoidable interruption of their business, incident to their removal from their present site, and their establishing in new locations during the period of such interruption, if any, shown by the evidence."

In *City of Richmond* v. *Williams et al.*, 77 S. E. 492 (Sup. Ct. of Va., 1913), the Court allowed the tenant, as part of the value of the leasehold interest, the cost of removing lumber from the premises.

In *James McMillan Printing Co.* v. *Pittsburg, C. & W. R. Co.*, 65 Atl. 1091 (Sup. Ct. of Pa., 1907), the Court said:

> "The market value of the land taken is the test universally applied in an action by an owner, and it is as accurate a measure of his loss as any that can be set up. What he is entitled to is the value of the land ascertained by a fair appraisement, and of this value the selling price of land similarly situated is prima facie the best evidence. But market value is an unsatisfactory test of the value to a tenant of leasehold interest.

It is really no test at all because a lease rarely has any market value. Generally it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensation, is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it, nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

In *Re Willcox,* 151 N. Y. S. 141, Jenks, P. J., at page 143, said:

"It is insisted, second, that no award should have been made to the tenant for the destruction of fixtures for it is contended that 'these articles were all "trade fixtures" and were personal property.' I think that these articles were within the scope of the compensation to be made."

In *Re Post Office Site in Borough of Bronx,* 210 Fed. 832 (C. C. A., 2nd Cir., 1914), the Court, in

allowing a recovery for machinery destroyed, at page 835 said:

> "We, therefore, reach the conclusion * * * that the award rightly treated the machinery as fixtures for which the United States should pay."

In *Re Block Bounded by Ave. A, etc.,* 122 N. Y. S. 321 (Sup. Ct. of N. Y., 1910), the Court said, at page 339:

> "The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they must all be regarded as real property; that is, as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building and the tenant was under no more obligation to remove them than he would be to remove the building if he were the owner."

In *Philadelphia & R. R. Co.* v. *Getz et al.,* 6 Atl. Rep. 356 (Sup. Ct. of Pa., 1886), the Court, at page 357, said:

> "If the location of the railroad so affected the property as to compel the removal of the business conducted by the tenant to another place, and there was some evidence to that effect, and the machinery, fixtures, etc., were in consequence depreciated as they stood, it is clear, as was said when the case was here before (105 Pa. St. 547), that the difference between the value of the machinery in connection with the business conducted on the property, and its value, if removed and applied to the same or other use, was a proper element of damage to be considered by the jury. If the removal was in fact the necessary consequence of the location of the road then the ascertainment of the value of the

machinery as it stood after the injury would seem to involve the consideration of the probable and reasonable expenses of removing it."

C.

McDonald had a lease and was entitled to compensation for the taking of its lease.

Land, in equity, has always been regarded as unique in specific performance cases. As was said in 25 *Ruling Case Law,* p. 272, l. 72:

> "The jurisdiction to grant specific performance rests on the assumption that damages will not constitute an adequate remedy. Damages are not regarded as the equivalent of specific relief because the exact counterpart of any particular piece of real estate does not exist anywhere else in the world."

The Court below recognized this rule, for in commenting on the experts' testimony, although we think it subsequently erred in adopting the views of one expert, it said:

> "There is testimony that leases of other stores could be had, and of the prices asked, all of which were higher than the rentals these tenants were paying, but there are such marked differences in the structures, locations and circumstances generally from the demised premises that comparative figuration is of little or no value to the court and of doubtful aid to the experts in forming their opinions" (Case, p. 222, ll. 36-40; p. 223, ll. 1-5).

This is a clear-cut recognition of the rule as laid down above and concedes at the outset that McDonald had a lease for premises the exact counter-

part of which does not exist anywhere else in the world. Since the leasehold premises, therefore, were so unique they had a value *to the tenant* for which it has received no compensation by the order of the Court below.

The value of this lease and the rights therein of which it has been deprived, and for which it is entitled to compensation, have been clearly set forth.

Nicholls on Eminent Domain, Vol. I, p. 714, l. 233, contains the following statement:

> "To fix the market value of an unexpired term is no simple matter. Leases commonly are not assignable without the consent of the landlord, and are so infrequently sold and vary so much in length of term, rent reserved and other particulars as well as in the character of the property, that it is almost impossible to apply the customary test of market value to a leasehold interest. It would seem that a lease might well be held to fall within the class of property not commonly bought and sold, and that consequently *the intrinsic value, or the value to the owner might be taken as the best and one, available test of market value.* The value to the owner of a lease when he is paying the full rental value of the premises as rent, is the right to *remain in undisturbed possession to the end of the term* and it is sometimes held that the loss resulting from the deprivation of this right is the proper measure of the tenant's compensation" (citing *McMillan Printing Co.* v. *Pittsburg C. & W. Ry.*, 65 Atl. 1091; *North Coast Ry.* v. *Kraft,* 115 Pac. 97).

The foregoing principle of law sets forth the items which the Court must consider in valuing the lease of McDonald. What value did it have to

the tenant? It appears from the testimony that McDonald was a unit in a chain of stores conducted by a parent company, the Rosenbush Company of Boston, Massachusetts. It had been conducting its business at the location for about twelve years. It had renewed its prior lease when it had expired. It was located directly opposite the Bamberger department store in the heart of the shopping district of Newark. The condemnation proceedings destroyed that right of McDonald to continue in business at that site undisturbed.

The Court, therefore, should not have taken the value of the lease as given by Mr. Houston as the sole criterion of the value of the lease. The Court erred in holding the tenant suffered no damage because he believed that the landlord had rented the premises for all that it was worth. The Court should have considered the rights of the tenant to stay in possession, the profits that had been earned by the tenant in the conduct of its business, the loss it sustained in the removal of its fixtures and stock, its loss as the result of the cessation of its business.

The decisions seem to indicate that it is the province of the Court to consider all these items in determining the value of a lease.

West Coast Ry. v. *Kraft,* 115 Pac. 97, the Court said in this case:

> "We think that evidence (expense of moving machinery, stock, fixtures, damages in removal of the same) was admissible not as a basis for a specific claim but as showing the value of the unexpired term."

The Court then quoted from *Seattle* v. *Scheike*, 29 Pac. 88:

> "It is difficult if not impossible, to lay down a rule of universal application as to what may be considered as elements of damage as the equities of the parties must more or less depend on the particular fact and circumstances. This is particularly true as applied to a leasehold which may have no market value in excess of the rent reserved. The appellant is entitled to be paid the value of the unexpired term. The items under consideration are but constituent elements of that value. In principle and according to what we consider the better authority they are not recoverable as something apart from the leasehold interest. They form an essential part of its value."

McMillan Printing Co. v. *Pittsburg C. & W. Railway Co.*, 65 Atl. 1091. This was an action taken by a sub-tenant to recover the loss sustained by the taking of the leased property by the defendant for the construction of its railroad. At page 1094 the Court said:

> "Market value is an unsatisfactory test of the value to a tenant of a leasehold interest. *It is really no test at all because a lease rarely has a market value.* Generally it is not assignable at the will of the tenant and he pays in rent all that the right of occupation is worth. The right of which he is deprived and for which he is entitled to full *compensation is the right to remain in undisturbed possession to the end of the term.* The loss resulting from the deprivation of this right is what he is entitled to receive. The value of the right he is forced to *sell* cannot ordinarily be measured by its market price for there is no market for it; *nor can it always be measured by the difference between the rent reserved* and the rental value,

> if the lease should be a favorable one. If, as was the case here, a tenant engaged in a business requiring the use of heavy machinery and appliances should secure a new place equally well adopted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others not as substantive elements of damages but as tending to prove the value of the leasehold interest."

In our case it is clearly proved that the profits derived from the operation of the McDonald store and paid over to the parent company over the period of years from 1914 to October 17, 1925, was $152,797.50, upwards of $12,000 per annum over a period of twelve years (Case, p. 278, McDonald Exhibit 2).

The destruction of its lease deprived the tenant of its right to continue in business and earn profits. Yet the Court refused to consider this right of the tenant to remain in undisturbed possession and earn profits. The Court refused to consider the losses incident to a cessation of business as an element to be taken into consideration in fixing the value of our leasehold. The Court simply took the viewpoint that, because the landlord rented this property at the highest figure he could get, therefore the lease had no value to R. E. McDonald in these proceedings. In this we think the Court erred.

The Court should have awarded to McDonald upon the theory above indicated for the value of its leasehold a sum representing the good will, fixtures, furniture and the losses it sustained by reason of the forced sale of its merchandise occasioned by the condemnation.

D.

The condemnation was not such a destruction of the building as terminated the lease within the meaning of the New Jersey law relating to landlord and tenant.

The suggestion that the landowner's lease became terminated immediately upon condemnation, pursuant to provisions of a Supplement of the Landlord and Tenant Act, found on page 3078 of the New Jersey Compiled Statutes, we think ought not receive any consideration.

In contemplation of law the condemnation is in substance an involuntary sale by the landlord and the various persons having an interest or entitled to compensation, of all of their rights to the City. At the time of the destruction of the building, the landowner was no longer the landlord. The landowner was merely the owner of the fund deposited in court subject to the payment therefrom of the sums to which the Surety Realty Company and its sub-lessees were entitled. It is not the destruction of a building while the landowner was the owner of the land and building contemplated by the statute.

The amount paid into court was the value of all of the estates or interests in the property and all of these were transferred to the City as a result of the condemnation proceedings.

Bright v. *Platt*, 32 N. J. Eq. 362.
Crane v. *City of Elizabeth*, 36 N. J. Eq. 339, 342.
Penna. R. R. v. *Nat. Docks Co.*, 57 N. J. L. 86, 89; 54 N. J. Eq. 142, 148, 149.
Zimmerman v. *Hudson and Manhattan R. R. Co.*, 76 N. J. L. 251, 253.

The City by the condemnation proceedings acquired not only McDonald's estate in the premises for the unexpired term of its lease but also the estates of the other tenants as well as the reversionary interest of the owner, and the City paid the price of McDonald's estate into court together with the price of all of the other estates in the premises. The tenants, of course, cannot be deprived of their right to receive the price of their estate in the property because after the money had been paid into court, and the tenants had been evicted, and the City had entered into possession, it saw fit to tear down the building.

In *Re Willcox,* 151 N. Y. S. 141 (Supreme Court, 1914), a similar argument was rejected by the Court. The argument there, however, was not based on a statute but on the terms of a lease which contained a provision like Section 31 of the New Jersey Landlord and Tenant Act. The Court said at pages 143 and 144:

> "The point of the landlord, that the tenant was not entitled to any compensation for the lease, is not well made. The proposition is that the lease contained a fire clause, providing that if the same should be partially destroyed by fire there should be repair, etc., 'but, in case of the total destruction of the premises, by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end,' etc., and that the words 'or otherwise' covered this exercise of the right of eminent domain. But I think that the words 'or otherwise' must receive an ejusdem generis interpretation. * * *
>
> The lease, as between the lessor and lessee, was not destroyed 'by fire or otherwise.' "

3.

The decree deprives McDonald of its property without due process of law and is in violation of the Constitution of the United States (Case, p. 11).

Said decree deprives McDonald of the equal protection of the laws and is in violation of the Constitution of the United States (Case, p. 11).

McDonald claims that the failure to award it compensation for the loss of its business, good will, fixtures, furniture, loss upon the forced sale of its merchandise and loss on its closing out sale heretofore described, deprives it of its property without due process of law, and is a denial to it of the equal protection of the laws guaranteed to McDonald by the Constitution of the United States.

A reading of the Vice Chancellor's opinion shows at page 225 of the printed case that he found as a matter of law that the Court was powerless to award compensation for "loss of business, profits, good will, fixtures and cost of removal," because the same were not lands or real estate or rights or interests therein in the legal sense and not within the criterion fixed by the New Jersey Statute, which relates to compensation for lands taken for public highways.

On page 226, ll. 25 to 36, the Vice-Chancellor says:

> "That is the law. It works hardships. The remedy lies with the Legislature; the Courts cannot relieve. The rule in principle applies to all particulars of damage set up by the tenants including their claim for the value of the use of their fixtures during the

remainder of the term which was especially emphasized in the briefs and their prayer to participate in the award in which it must be presumed that their losses did not figure, will be denied."

Vice Chancellor Backes in his opinion on page 225 says:

> "The right to compensation for lands taken for public highways is purely statutory. Before the Constitution of 1844 compensation was not required, and by that instrument it is provided that 'land may be taken for public highways as heretofore until the Legislature has directed compensation to be made.' The compensation is such only as is fixed by statute, whether it be adequate or inadequate, just or unjust. Simmons v. Passaic, 42 N. J. L. 619; Hudson Land Improvement Co. v. Seymour, 35 N. J. L. 47. The condemnation was had pursuant to Article 20, Section 23, of the act concerning municipalities (C. S. 2201; amended P. L. 1924, p. 501, P. L. 1925, p. 233), which provides for 'an award for said lands and real estate or right or interest therein to be taken to the owner or owners thereof."

The landowner contends that, because of the New Jersey Law and constitutional provision aforesaid, McDonald is not entitled to said compensation.

The Supreme Court of the United States has uniformly held that the taking by the State of private property for public use without compensation deprives the owner of his property without due process of law, denies him the equal protection of the laws and constitutes a violation of his rights in that regard guaranteed to him by the Federal Constitution.

The Federal Constitution is the supreme law of the land. It must, therefore, follow that any act

of the State attempted to be done under the authority of Section 16, Article 1 of the State Constitution, or under any State law which conflicts with the rights guaranteed by the Federal Constitution can have no validity. The Federal constitutional provision in question is found in Article 14, Section 1 of the amendments to the Federal Constitution, which provides: "* * * nor shall any state deprive any person of life, liberty or property without process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The case of *Appelby* v. *Buffalo,* 55 Law Ed. 838 (221 U. S.), was a case in which the United States Supreme Court reviewed the judgment of a New York State Court in a condemnation proceeding. At page 841, Justice Day says:

> "If it be taken that the exceptions in this respect amount to a claim of violation of the due-process-of-law clause of the Constitution, which protects against the taking of private property without compensation, and that the effect of the judgment of the court of appeals is to deny this claim, we proceed to inquire, do the proceedings show a want of due process in the result reached and affirmed by the court of appeals in its judgment answering the questions propounded by the appellate division?
>
> That the 14th Amendment of the Federal Constitution forbids a state to deprive any person of property without due process of law, and to take private property for public use without compensation amounts to such deprivation, is recognized and affirmed in a case wherein the subject was given much consideration. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct.

Rep. 581. After a review of the authorities this Court said:

'Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.'

And furthermore:

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state, or under its direction, for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner of that instrument.'

In harmony with those views, we may say in the present case that the state court, having jurisdiction of the subject matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the 14th Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See also Marchant v. Pennsylvania R. Co., 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894."

In *Smyth* v. *Ames,* 169 U. S. 466, 42 L. Ed., p. 819, United States Supreme Court, by Harlan, J., at page 841 says:

> "It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole operates to divest the other party of any rights of person or property. In every Constitution is the guaranty against the taking of private property for public purposes, without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In the same case, paragraph 6 of the syllabus is as follows:

> "A state law, or regulation made thereunder, establishing rates for transportation by railroad that will deprive the carrier of just compensation, is repugnant to the 14th Constitutional Amendment, as depriving the carrier of his property without due process of law, and denying to it the equal protection of the laws."

In *Sinnickson* v. *Johnsons,* 17 N. J. L. 129, at p. 145, the New Jersey Supreme Court, by Dayton, J., says:

> "The right to take private property for public use does not depend on constitutional provisions, but is one of the attributes of sovereign power; and the constitution of the United States recognizes it as such, when it says, the right shall not be exercised without just compensation. This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principal of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle; Puffendorf, b. 8 Ch. 5, p. 222; 2 Montesquieu, Ch. 15, p. 200; Vattel, 112, 113; 1 Black, C. 139; 2 Kent, C. 339, 340; 2 J. C. C. 168; 1 Peter's Comm. R. 99, 111; 3 Story's Com. on Constitution, 661; Bonaparte v. Camden and Amboy Rail Road Company, Bald. R. 220. The language of Judge Baldwin in the case last cited, is 'The obligation' to (make compensation) 'attaches to the exercise of the power' (to take the property) 'though it is not provided for by the State Constitution, or that of the United States had not enjoined it' (Vol. 11).
>
> And Story, calls the provision on this subject, in the constitution of the United States, merely 'an affirmance of a great doctrine established by the common law.' This principal of public law, has been made by express enactment, a part of the Constitution of the United States (vid. 5th amendment), but it has been decided that as a constitutional provision, it does not apply to the several States, Barron v. Mayer of Baltimore, 7 Peters, 247;

Livingston's Lessee v. Moore, 7 Peters, 551, 2. Still if the opinions of the above distinguished jurists be correct, it is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution."

This case is cited with approval by the United States Supreme Court in Chicago, *Burlington & Quincy RR. Co.* v. *Chicago,* 41 Lew Ed., p. 979 (166 U. S. 227), at page 985.

In *Monongahela Navigation Co.* v. *United States,* 37 Law Ed. 463 (148 U. S. 313), at page 468, Justice Brewer says:

"By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In Charles River Bridge Proprs. v. Warren Bridge Proprs., 36 U. S. 11 Pet. 420, 571 (9:773, 833), Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay

annually to the college in behalf of the old one a hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the county only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: Com. v. Pittsburgh & C. R. Co., 58 Pa. 26, 50; Pennsylvania R. Co. v. Baltimore & O. R. Co., 60 Md. 263; Isom v. Mississippi Cent. R. Co., 36 Miss. 300.

In the last of these cases and on page 315, will be found these observations of the court: 'The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so.'

We are not, therefore, concluded by the declaration in the Act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

At page 472:

"Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office

is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation."

In *Chicago, Burlington & Quincy Railroad Co.* v. *City of Chicago,* 41 Law Ed., page 979 (166 U. S. 227), the second and third paragraphs of the syllabus are as follows:

"The prohibition of the 14th Amendment of the Federal Constitution against taking property without due process of law refers to all instrumentalities of a state, and is therefore violated whenever any person, by virtue of public position under a state government, deprives another of any right protected by that Amendment against deprivation by the state.

A judgment of a state court, even if it be authorized by state statute, whereby private property is taken for the state or under its direction for public use without compensation made or secured to the owner, is wanting in the due process of law required by the 14th Amendment of the United States Constitution."

See also pages 983 to 986 of the opinion.

To the same effect, see *Long Island Water Supply Co.* v. *Brooklyn,* 41 Law Ed. 1165 (166 U. S. 687).

To presume that the City authorities in the sum awarded did not include damages for our good will, fixtures, furniture and costs of removal (if as a matter of law we are entitled to same) is to assume that the City has taken our good will *without process of law.* Presumptions are always in favor of validity and constitutionality. So it must be presumed that in the sum awarded it included the sum which is to compensate us for the loss of these items *which* the lower Court has heretofore erroneously held to be a species of property for the taking of which the Legislature has not provided for compensation.

It was illegal, therefore, for the Court below to refuse to award such compensation out of said fund on the ground that under the State law and State Constitution the State may deprive McDonald of said business, good will, fixtures, furniture, etc., without awarding McDonald compensation therefor.

4.

The failure to award McDonald compensation for the value of its furniture and fixtures, its good will, loss upon the close out of its stock of merchandise and expenses incident to its closing out sales is the taking of the private property of McDonald for public use without compensation in violation of the Constitution of New Jersey.

Section 16 of Article 1 of the New Jersey Constitution provides:

> "That private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore, until the legislature shall direct compensation to be made."

We do not think that under the above provision *personal property* may be taken without compensation. It is a fact that concurrently with the taking of said land the value of the personal property for which compensation is here claimed was destroyed. Such destruction, in legal contemplation, is the same as the taking of the same for public use.

CONCLUSION.

The decree should be reversed in so far as it adjudges that McDonald has no right, title, interest or claim in and to the fund. The decree should be modified so as to award to McDonald for the loss:

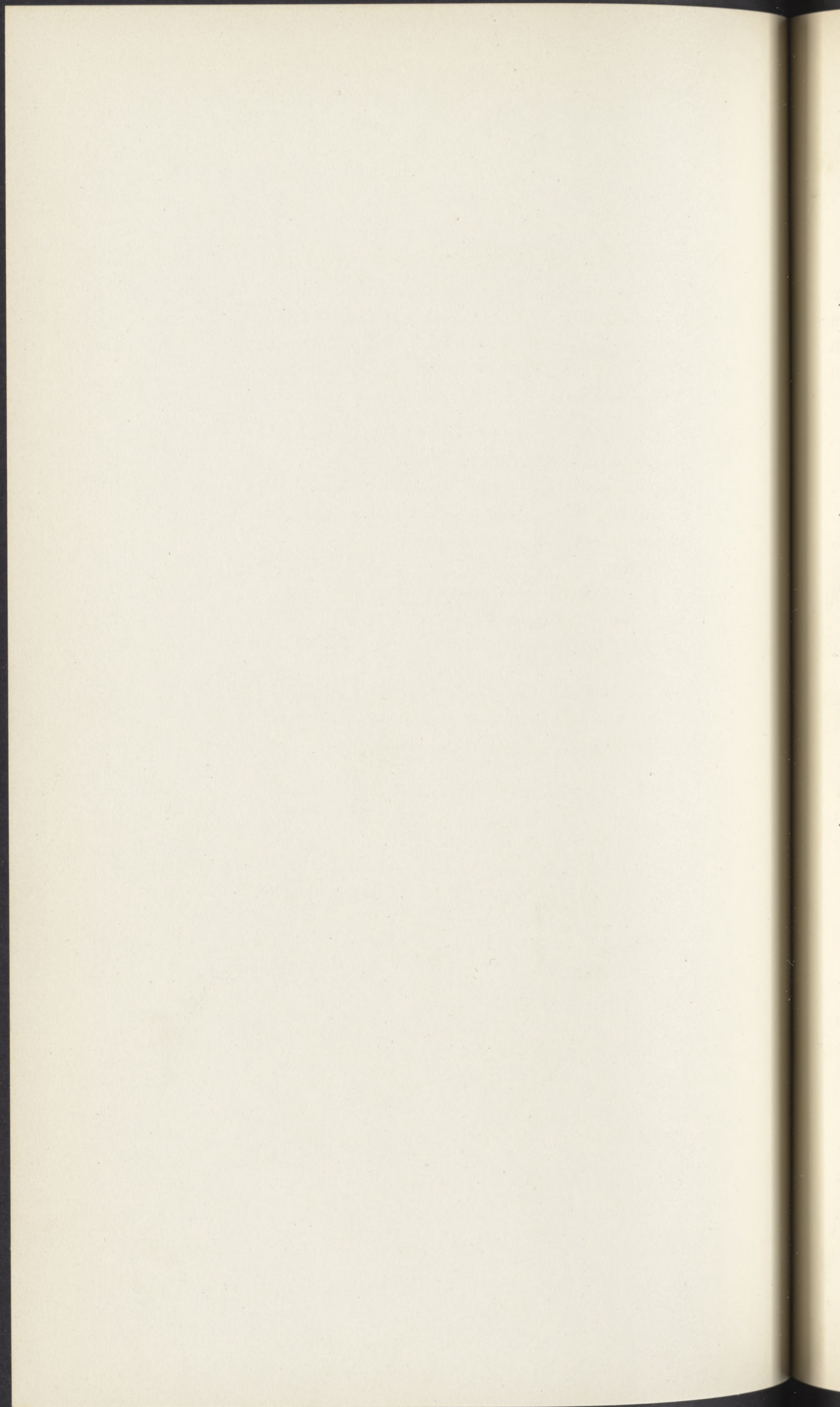
(1)	**Of the value of its leasehold,**	**$76,633.92**
(2)	**Of the value of its furniture and fixtures,**	**14,500.00**
(3)	**Of the value of its good will,**	**50,000.00**
(4)	**On the forced sale of its merchandise,**	**17,884.25**
(5)	**On the closing out sales for expenses additional to its normal overhead,**	**11,817.00**

Said decree should also be modified so as to provide for the payment to McDonald of counsel fees and costs.

Respectfully submitted,

BILDER & BILDER,
Solicitors for and of Counsel with the
Defendant-Appellant, R. E. McDonald, Inc.

David H. Bilder,
Samuel Kaufman,
Walter J. Bilder,
of Counsel.



New Jersey Court of Errors and Appeals

Between THE CITY OF NEWARK, *Petitioner,* *and* HUGH F. COOK, *et al.*, *Defendants-Appellants.*	*On Appeal from Chancery.*

10

ADDITION TO STATE OF CASE.

Extract from McEuen Exhibit 5, proceedings and testimony in ejectment suit.

September Term, 1870.

20

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

JAMES P. MCEUEN, CHARLES A. MCEUEN, GEORGE H. WHEELER and MARY L., his wife, *vs.* MARTIN BURNE.	*In Ejectment.*

30

Before the Honorable David A. Depue.

Hayes with whom General Runyon for plaintiffs.

Taylor with whom C. Parker for defendant.

40

Plaintiff's counsel opened case:

To recover one-third part of tract of land on the northwest corner of Market and Washington streets, City of Newark, forty-four feet on Market street and one hundred six feet seven inches on Washington street.

10 * * * * * * * * * *

Defendant's counsel opened defense.

The defense we shall rely upon as to the one equal undivided third part will consist of declaration of sale for non-payment of assessments to John R. Weeks, who assigned the declaration to Nehemiah Perry, and assigned by Perry to defendant.

Defendant's counsel offered in evidence declaration of sale, Mayor and Common Council of Newark to John R. Weeks, dated fifth of November 1857. 20

Assignment from Weeks to Perry and assignment from Perry to Burne.

"To show that only one-third of premises in dispute, defendant's counsel also offered in evidence"

The deeds set forth in the bill of particulars.

30 ABRAHAM H. SHERMAN, sworn.

Q Is this your signature? A Yes.

Q What was that check given for, and to whom was it given? A It was given for tax assessed against me by the City, and handed by me I think to Mr. Weeks. * * *

Q Was that check paid? A Yes. * * *

Q What was the amount of the tax, exactly $178 or whatever that is? A I believe $178.86;

40 I find it to be so by looking at the assessment.

Q Were the eighty-six cents paid? A Yes.

Q How? A In cash.

Q Why was it not paid in the check? A The only reason I can give is, I was in the habit of drawing my checks, without exception in even dollars, my bank book would show.

Q Do you remember when that money was paid, the check given? A Yes. 10

Q When was it? A At the date of it, 25th August 1857.

By the Court.

Q What is the deed dated? A 5th November, 1857.

Further examined.

Q Did you pay the check after the sale? A I think the day of the sale or the date after. 20

Plaintiff's Counsel: Do you make a question as to whether the tax assessed was against Mr. Sherman?

Defendant's Counsel: We admit that it is assessed against the property as owned by Mr. Sherman, that Mr. Sherman admitted he was owner. 30

Plaintiff's counsel offered check dated 25th August 1857 in evidence.

Q Were you in possession of the premises in 1857? A Yes.

Q And for how long before that? A 3rd August 1853.

Q Did you take the rents, issues and profits from that date? A Yes.

40

Q For how long a time did you continue after that, directly receiving them? A I received them directly until about July 1st, 1860.

---

10 Defendant's counsel put in evidence declaration of sale dated November 5, 1857.

Defendant's counsel referred to Act of 1869, page 1238, referring to tax title and sale.

Also to Act of 1864, Nixon Digest 864, Sec. 11.

Also supplement, City Charter 1849.

"It shall be lawful to cause sewers and drains, etc."

20 Also 4th Section, Act 1847.

JOHN R. WEEKS, sworn by the uplifted hand. After testifying that he held the declaration of sale given by the City.

Q I ask whether you did not get the money from Mr. (Abraham H.) Sherman? A I don't 30 remember, I presume I did; I had no personal interest in it and should not have been likely to have advanced my own funds.

Q The check is dated 28th August 1857? A Yes.

Q Do you recognize that? A I recognize my handwriting on the back. * * * I got the check; my presumption is Mr. Sherman handed me the check for this money for this purchase.

40 Q $178? A Yes.

Q Please state the arrangement in full? A I don't believe I can tell you any more than I have on that subject; I was to become purchaser at the assessment sale of that property and was to hold it * * * and my impression is it was to be assigned at the order of Mr. Sherman, or paid—redeemed by Mr. Sherman.

10

* * * * * * * * * *

Q You made the assignment to Mr. Perry? A Yes. * * *

Q By whose direction did you make it? A By the direction of Abraham H. Sherman.

20

30

40

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

New Jersey Court of Errors and Appeals

Between THE CITY OF NEWARK, *Petitioner,* *and* HUGH F. COOK, *et als.,* *Defendants.*	*On Appeal from Decree in Chancery Distributing Funds in Condemnation.* Backes, *V.-C.*

BRIEF OF SURETY REALTY COMPANY IN REPLY TO APPEAL OF HUGH F. COOK, ET AL., AND IN SUPPORT OF ITS OWN APPEAL.

(Unless otherwise indicated, italics are ours.)

Statement of Facts and Issues.

For many years prior to October 1, 1925, Martine Burne, and those holding under him, held title to property located at the northwest corner of Market and Washington streets, Newark, N. J., being a plot of 44 feet front on Market street by 106.58 feet on Washington street. On this tract was erected a four-story mercantile building occupied by various tenants.

On October 1, 1925, the City of Newark completed statutory proceedings for the widening of Washington street at its intersection with Market street, and thereupon entered into possession of a portion of the Burne property. The City took the entire building and one-half of the land and awarded as compensation therefor, including damages to the remaining lands, the sum of $479,550 (p. 214). The City's proceedings were taken pursuant to the provisions of the Home Rule Act (P. L. 1917, p. 319) and the

various acts amendatory thereof and supplemental thereto. (P. L. 917, p. 379-80; P. L. 1924, p. 503.)

At the time of the taking, the Surety Realty Company, through its various sub-tenants, was in possession of the entire premises under a lease made on February 1, 1910, and which would have terminated, according to its terms, on March 31, 1930. Various claims having been made by the owners of the fee, the Surety Realty Company, and its sub-tenants, the City, acting under the provisions of the statute, filed its petition in this cause and obtained leave to deposit the award in Court, there to be disbursed among the various parties as their rights might appear. Thereupon, each claimant filed a statement of its claim, and the matter came before Backes, *V.-C.*

Charles A. McEwen claimed to be entitled to an undivided interest in the fund by reason of an undivided interest in the fee. He was awarded $46.85 and has appealed.

The Surety Realty Company claimed to be entitled to the value of its lease as of October 1, 1925, the date of the taking by the City. It was awarded $93,065.93 and was denied costs and counsel fees out of the fund and has appealed.

Louis K. Liggett Co., a corporation, and R. E. McDonald, Inc., a corporation; John Hocter and William Heyer, trading as Ace Radio Shop, and John Harrington, all sub-tenants under the Surety Realty Company, claimed to be entitled to the value of their respective leasehold estates. No award was made to any of them. Only the Liggett and McDonald companies have appealed.

Hugh F. Cook, *et al.*, claimed to be the sole owners of the fee and, therefore, entitled to the entire award, *to the exclusion of any of the other defendants.* They were awarded the balance of the fund remaining after the award of $46.85 to McEwan and $93,065.93 to the Surety Realty Company. They have appealed.

The Cooks have appealed from the award to the Surety Realty Company because the award is too large. The Surety Realty Company has appealed because the award is too small and because payments of costs and counsel fees were denied.

This brief is directed only to the questions arising out of the Surety Realty Company award. It does not relate to any of the other appeals because, should any additional awards be made, they would be satisfied out of the balance of the fund, and hence would not affect the Surety Realty Company. As Vice-Chancellor Backes stated (p. 219), "the award (in condemnation) was for the value of the property as a whole; *what is left after satisfying the outstanding terms represents the value of the fee.*"

THE LAW.

Before discussing the facts it is desirable to point out the applicable rules of law.

The award of a taking body for property encumbered by leases and other liens, represents the value of the property taken, as if it were unencumbered. The value of the encumbrances must be determined and paid to the holders thereof, and the balance awarded to the owner of the fee.

The case of *Herr* v. *Board of Education,* 82 N. J. L. 610 (Appeals, 1911), was an appeal

from the Circuit Court in a condemnation matter. One of the questions raised was whether certain persons, who were parties to the condemnation petition, had sufficient interest to prosecute an appeal. It appeared that a Board of Education had condemned certain property for school purposes. The property was located in a neighborhood affected by neighborhood restrictions. The use, to which the Board contemplated putting the property, was in violation of the restrictions. Other property owners endeavored to obtain compensation for the damages which they claimed they would sustain as a result of the violation of the restrictions. The claims being denied, the question was whether they could prosecute an appeal. The Court said, at page 615:

> "The issue is the value of the land as a whole, and inasmuch as the amount to be finally received by the owners of the fee depends not only on the total amount, but also upon the amount to be deducted for the value of any special interest of others in the land taken, the former are vitally interested."

The Court held that such property owners were proper persons to maintain an appeal.

In *Follansbee* v. *Jersey City*, an opinion by Vice-Chancellor Bentley, not reported, but attached hereto (reversed in 128 Atl. 233 on different grounds), the Vice-Chancellor stated:

> "It must be apparent upon the slightest consideration that the demise of realty for a term cuts down the value of the fee to the owner thereof, during the period of the lease, and his estate is diminished, as measured by money, by the value of the lesser estate, which he has carved out thereof and granted to his tenant."

In the matter of *Delancy Street,* 120 App. Div. 700, Justice Ingraham said:

> "It is clear that both the owners and tenant had an interest in the property, their total interest being represented by the amount that has been ascertained as the actual value of the whole property. The owner of the fee owned the property and had granted an estate for years to the tenant. When the question of distributing the award as between the tenant and the owners of the fee arose, it is apparent that the first question was to ascertain what was the value of the tenant's interest in the property, for that having been granted by the landlord as owner of the fee, was the first claim out of the amount to be paid for the property as a whole."

In Lewis on Eminent Domain (3rd Edition, Section 719, it is stated:

> "Where the premises are subject to a lease, the better course would seem to be, as already pointed out, to ascertain the value of the property or damage thereto as an entirety, and then the value of the tenant's interest or damage thereto, and award the *balance* to the landlord."

In Fiero on "Particular Actions and Proceedings," page 448, the author states:

> "Ordinarily the award to the tenant will be deducted from the award of the landlord."

and at page 463, he states:

> "Whatever award is made to the tenant should be deducted from the value of the fee, and the balance awarded to the fee owner."

It was incumbent upon the Court to ascertain the value of the estate of each claimant, and, after direct payment thereof, to distribute the balance to the owners of the fee.

The Vice-Chancellor agreed with these conclusions. In his opinion (p. 219) he stated:

> "The award was for the value of the property as a whole; *what is left after satisfying the outstanding terms, represents the value of the fee.*"

A mortgage covering the fee having been satisfied out of the funds on deposit to the extent of $102,750.00, the only remaining encumbrances consisted of the lease held by the Surety Realty Company and the leases of its sub-lessees.

Before discussing these leases in particular, we will answer the argument made by appellants, Cooks, fee owners, that the lease terminated upon the taking of the property and the Surety Realty Company had no interest whatever in the fund.

The tenants' interest in the land became transferred to the fund upon the taking by the City.

The amount paid into Court was the value of all of the estates or interests in the property which in turn were transferred to the City as a result of the condemnation proceedings.

Bright v. *Platt,* 32 N. J. Eq. 362;
Crane v. *City of Elizabeth,* 36 N. J. Eq. 339-342;
Zimmerman v. *Hudson and Manhattan R. R. Co.,* 76 N. J. L. 251-253;
Penna. R. R. v. *Nat. Docks Co.,* 57 N. J. L. 86, 54 N. J. Eq. 142.

The owners of the fee take the position that the lease of the Surety Realty Company, and all those holding under it, was terminated by the destruction of the building, and, in support of this argument, urge upon the Court the provisions of the supplement to "the act concerning Landlord and Tenants," Volume 3, C. S., page 3078, Section 31, reading as follows:

> "That whenever any building or buildings erected *on leased premises* shall be injured by fire without the fault of the lessees, the landlord shall repair the same as speedily as possible, or in default thereof, the rent shall cease until such time as such building or buildings shall be put in complete repair; and in case of the total destruction of such building or buildings by fire *or otherwise,* the rent shall be paid up to the time of such destruction and then and from thenceforth the lease shall cease and come to an end; provided, always, *that this section shall not extend to or apply to cases where the parties have otherwise stipulated in their agreement of lease.*"

This act has no application to the facts at bar.

The statute particularly states it shall not apply to cases where the parties have otherwise stipulated and the parties herein have otherwise stipulated.

The lease between Burne and Kresge, Exhibit D-Surety-1, page 248, provides:

> "In case of the destruction of the buildings by fire prior to the expiration of the term hereby granted, if the said destruction of said buildings shall be of such a character and to such as extent that the said party of the second part, his executors, administrators or assigns, are totally unable to carry on the business or businesses carried on by them upon said premises or

to occupy the same, then and in such case the rent hereby agreed to be paid by the party of the second part for said premises shall from the time of such destruction be not due and payable as provided for in this lease until the said party of the first part, his heirs and assigns, shall rebuild the said premises, so that the same may be occupied by said party of the second part, or his assigns, and used by them as prior to the destruction of said buildings and in case of such total destruction of said buildings the party of the first part does for himself, his heirs, executors or administrators, agree to rebuild and restore said buildings as soon as practicable. In case of the partial destruction of said buildings or any part thereof, it is agreed by and between the parties hereto that until the partial destruction so caused by said fire shall be repaired by said party of the first part, his heirs or assigns, that the rent due and to become due by this indenture of lease shall abate proportionately as the rental value of that portion of the premises so partially destroyed by fire shall bear to the entire rental value of said premises."

Cook argues that, inasmuch as this provision relates to a destruction of the building *by fire* and does not refer to destruction *by other causes*, it cannot be held that the parties have "*otherwise stipulated,*" and that the statute must apply to a destruction of the building by any other means than fire.

We submit that the parties having "otherwise stipulated" affecting the *general subject matter* covered by the statute, they must be regarded as having agreed that their relationship with respect to the *general subject matter* should be governed by the terms of their lease and not by the terms of the statute, and this is particularly so when we bear in mind that a lease must

be construed most strictly against the landlord. 35 C. J. 1181.

Assuming that the statute, and not the lease, is controlling, the construction sought to be placed upon the statute by Cook is strained and unwarranted, and the statute has no application whatsoever to the facts at bar.

The statute relates to buildings on "leased premises" and makes provision as to how the lease shall be affected in the case of the destruction of *such* buildings. At the time this building was destroyed, *it was not standing on leased premises at all.* The City of Newark had acquired title to the entire building and to one-half of the land on which it stood. The City's title was free and clear of any interests whatsoever. It had, through its condemnation proceedings, acquired the interest of the landlord, and the interest of the tenant and the rights of these parties had ceased in the land and building and had passed to the fund. The City destroyed its *own* building standing on its *own* land. Consequently, it cannot be said that the building destroyed was standing on leased premises and the statute, therefore, cannot apply.

The Vice-Chancellor in his opinion stated that the object of the statute was to relieve tenants of the harsh rule of the common law, which required them to pay rent, even though their buildings had been destroyed. Feeling that this was remedial legislation and that the condition here present was within its mischief, the Vice-Chancellor concluded that the statute should be applied. He held that the *future* relationship of landlord and tenant ended upon condemnation but that did not deprive the tenant of the value of his lease which would be paid out of the award.

Whether or not the relationship ended, as to the remaining land, was not argued before him, nor is it argued here. Suffice it to say, that it has been held that, if a tenant remains in possession of premises, a portion of which have been taken by condemnation, he will be required to pay rent proportionate to the land not taken. *Gribbe* v. *Toms,* 70 N. J. L. 522.

The act being in derogation of the common law, its scope should not be extended beyond the plain import of the words used. *Booraem* v. *Morris,* 74 N. J. L. 95.

The Vice-Chancellor was correct when he stated that this statute did "not disturb the right of the tenants to recover compensation *from others* for the loss of their estates taken from them by condemnation."

A destruction by fire is one by the elements which cannot be controlled. There is nothing substituted by the destroying agent to take the place of the property destroyed. It is right and fair under such circumstances, that the subject matter of the lease being destroyed by the elements, the lease should cease. But, in condemnation, there is no *destruction* by the condemning body. There is a *taking* and a substitution of money for the property. It is *not* right or fair under such circumstances that the interest of the tenant cease. If that were so, it would permit the taking by the condemning body of property of the tenant without compensation. Assuming that there is included in the award the value of the fee freed of encumbrances, it would permit the landlord to appropriate to himself the tenant's property.

The words "or otherwise" must be given an ejusdem generis construction and not the construction contended for by Cook.

In Century Dictionary it is stated that the words "or otherwise" when used as a general phrase following an enumeration of particulars are commonly interpreted in a strict sense and as referring to such other matters as are kindred to the classes before mentioned.

A case on all fours with this phase of the inquiry is in *Re: Wilcox,* 165 App. Div. (N. Y.) 197, 151 N. Y. S. 141 (1914). There a lease contained the following clause:

> "But in case of the total destruction of the premises *by fire or otherwise* the landlord shall be paid up to the time of such destruction and from then and from thenceforth this lease shall cease and come to an end, &c."

The premises were taken under condemnation and a dispute arose between the landlord and tenant as to the distribution of the award. The landlord contended that the tenant was not entitled to any portion of the award because the lease had been terminated by the exercise of the power of eminent domain and that the words in the lease "or otherwise" contemplated the exercise of such right. This contention was overruled by the Court, which held that the words "or otherwise" should receive an *ejusdem generis* interpretation and that, within the contemplation of the lease, the premises had not been destroyed by fire *or otherwise,* but had been destroyed by eminent domain, an entirely different cause of destruction.

At page 143, the Court said:

> "The point of the landlord, that the tenant was not entitled to any compensation for the

lease, is not well made. The proposition is that the lease contained a fire clause, providing that if the same should be partially destroyed by fire there should be repair, etc. '*but in case of the total destruction of the premises, by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end,' etc.*, and that the words 'or otherwise' covered this exercise of the right of eminent domain. But I think that the words 'or otherwise' must receive an *ejusdem generis* interpretation."

"The lease, as between the lessor and lessee, was not destroyed 'by fire or otherwise.' "

We submit that the comments of the Court in this case are dispositive of the argument made by Cook; and that this statute does not deprive the tenant of its share in the award.

We respectfully submit that this statute does not deprive the tenant of its share in the award.

We now pass to the consideration of the authorities adjudicating the method of valuing a lease.

Method of Valuing an Unexpired Lease.

The latest case on the subject is that of *Holcombe* v. *Trenton White City Co.*, 80 N. J. E. 122 (affirmed on the opinion below in 82 N. J. E. 364). The opinion in the Court of Chancery was by the present Chancellor.

It appeared that the officers of a corporation had issued stock in payment of an assignment of lease. The corporation was subsequently adju-

dicated insolvent and the receiver instituted proceedings to assess the stockholders for unpaid stock subscriptions. It became necessary for the Court to ascertain whether or not the lease had been properly valued. In deciding that question this rule was laid down (at p. 135):

> "The true method of calculating the value of an unexpired lease is not by ascertaining the yearly rental value and then multiplying the figures by the number of years the lease has to run, but by calculating its value by the annuity tables, that is, by multiplying the annual value by the value of one dollar per year for the number of years in the unexpired term. This was expressly decided in West Jersey R. R. Co. *v.* Thomas, 23 N. J. E. 431 at 434."

In the West Jersey Railroad case (*supra*) this Court had before it the question of determining whether arbitrators, who had been appointed for the purpose of valuing an unexpired lease, had properly exercised their functions. The Court considered the testimony and valued the lease by applying the rule followed in the Trenton White City case.

In *Freeholders, etc.*, v. *Emmerich,* 57 N. J. E. 535, Vice-Chancellor Emery had before him a problem similar to that before the Court in the present case. He was required to distribute a fund arising from a condemnation award, a claim being made against the fund on behalf of a defendant who held a mortgage on a lease which covered the property taken. The Vice-Chancellor went into the fact and determined that, inasmuch as the tenant was paying the fair rental value of the property, he was not damaged by the termination of the lease, and, consequently, no award was made to the defendant who claimed a mortgage on the lease.

Let us apply this rule to the facts at bar.

Value of Surety Realty Company Lease.

The lease now held by the Surety Realty Company was made by Martin Burne on February 1, 1910, to Sebastian A. Kresge (Exhibit D, Surety 1, p. 245). It was for a term of twenty years from April 1, 1910, so that at the time of the taking herein, to wit, October 1, 1925, it had exactly four and a half years to run. The lease provided for a rental of $18,000 per year for the first ten years and $19,000 per year thereafter. The tenant was permitted an unlimited use of the building, being given permission to assign and sub-rent for any mercantile purpose, and to make any alterations or repairs desired. The only charge additional to the rent reserved imposed upon the tenant was the making of repairs, the payment of water rents and payment of any increase in insurance rates caused by the tenant's improvements. All other charges, including taxes, and assessments were to be paid by the landlord.

The lease in its earlier days was not an advantageous one for the tenant Kresge (p. 184), and it was transferred by him to a corporation, in which Louis Kamm was interested as a half owner, and thereafter assigned to the present holder, Surety Realty Company. The erection of the present Bamburger Department Store buildings on the opposite corner resulted in this portion of the city becoming a center in the retail business section of Newark and, because of that, the value of the building for rental purposes increased enormously, so that, although the net profit of the lessee in 1913 was only about $3,700 (p. 188), it was approximately $21,000 in 1925 (Exhibit Surety 4, p. 276). The latter figures include income from monthly tenants who were desirous of acquiring leases at

higher rates, but could not obtain them because of the contemplated condemnation proceedings (p. 76).

Value of Surety lease based on rentals actually received on October 1, 1925.

The testimony of Mr. Puder (Exhibit Surety 4, p. 275) discloses the actual rentals received and disbursements paid in connection with the operation of the building for the period prior to the taking. Summarizing, they are as follows:

RENTAL INCOME.

Louis K. Liggett Co. (leased to April 30, 1930)	$15,000
R. E. McDonald, Inc. (leased to April 30, 1930)	19,000
Billiard Parlor, third floor (monthly tenancy)	1,500
Billiard Parlor, fourth floor (monthly tenancy)	1,100
Radio Store (lease expired September 15, 1926)	2,100
Restaurant (monthly tenancy)	900
Roof (monthly tenancy)	1,200
Total Rental Income	$40,800

DISBURSEMENTS.

Rent to Burne Estate	$19,000.00	
Average carrying charges based upon charges for four years next preceding 1926	2,063.82	
Total carrying charges		$21,063.82
Net profit per year		$19,736.18

Mr. Salter, an actuary of the Prudential Insurance Company (at p. 174), established the present value of one dollar for a period of four and a half years on the basis of four, five and six per cent. At 4%, the present value was $4.04; at 5%, $3.94, and at 6%, $3.84.

Applying these figures to the above net profit we find that the present value of the lease (*i. e.*, October 1, 1925, the date of taking), assuming that no higher rent would be obtained for the balance of the term than that which was being collected at the time of the taking, would be:

At 4%	$19,736.18 × 4.04 =	$79,734.17
At 5%	19,736.18 × 3.94 =	77,760.55
At 6%	19,736.18 × 3.84 =	75,786.93

Value of the Surety lease based upon rental values which could have been obtained had Surety been in a position to effect leases with the monthly tenants for balance of its term.

It is contended by the Surety Realty Company that, in ascertaining the value of its lease, it should not be bound by the monthly rentals it was receiving from the various tenants who were in possession as *monthly tenants*. It contends that the value of the space occupied by such monthly tenants should be ascertained by determining the fair rental value thereof had it been permitted to negotiate leases for the balance of its term, to wit, four and one-half years.

Mr. Kamm, President of the Surety Realty Company, testified (p. 71) that, after he learned of the proposed taking of the property, he refrained from making any extended leases with tenants whose terms were expiring, and a new lease for one month was thereafter executed each

month with each of such tenants. As a result, he was compelled to satisfy himself with the low rentals he was collecting from those monthly tenants during the period when the City was considering the proposed taking.

The case of *Goodman Warehouse Company* v. *Jersey City,* 132 Atl. 503 (1926), affirmed on appeal (133 Atl. 919 (1926)), establishes that the time for the computation of damages is the date of the submission of the ordinance and the map to the assessment commission. The Surety Company was, therefore, definitely prevented from May 20, 1924, the date of the passing of the ordinance, from making any term leases. For such loss no award can be made at the present time, although the loss amounts to a considerable one.

At the hearing all parties computed their damages as of October 1, 1925, the date the City actually took possession.

The fact that monthly tenants will not pay as high a rent as those whose occupancy is assured for a definite term, is so apparent that argument is unnecessary.

On this point, the Vice-Chancellor stated (p. 220):

> "The correctness of these facts of income and that they represent the fair annual market value, is not disputed, nor is there any protest by the owners against measuring the value of the leaseholds based upon them; but large as they are, they deserve to be increased in respect to the third and fourth floors and the restaurant store, which were under monthly tenancies, and which, it appears, could have been let upon better terms on lease for the balance of the term, had it not been for the pending condemnation proceedings. *It is well recognized that as-*

surrance of a long terms commands a better price.''

Proof was therefore submitted, by all of the parties, as to the fair rental value of the property, upon the assumption that a four and a half year lease could have been negotiated. This testimony will now be referred to.

LOUIS K. LIGGETT CO. LEASE.

The Surety Realty Company lease to Louis K. Liggett Co. expires contemporaneously with the Surety Company lease with Burne. Consequently, the Surety Company, for its income from the space occupied by Liggett, is limited to the figures contained in the Liggett lease. If the rental value of the Liggett store is in excess of that which Liggett agreed to pay to Surety, that value belongs to Liggett. Whether or not, however, such a fact exists is a matter for determination as between the owner of the fee and the Liggett Company, the owner of the fee being the one who is called upon to satisfy the same out of the award, such claim being entirely independent and separate from the claim of the Surety Realty Company.

If Liggett is entitled to any monies it is because the rental value of its space is in excess of the rent paid to the Surety. But this means that Surety is not getting for this space as much as it could. But Surety is entitled to the fair rental value of the premises. If it desires to *take* less the landlord cannot complain. But what the landlord must allow to Surety is a sum based on a fair rental value. If the Liggett lease is worth anything, the difference between the rent reserved in the Surety lease to Liggett and the fair rental value of the space must be added to the rental value of the whole premises.

The result is that in the last analysis the landlord would pay the amount of the value of the Liggett lease.

It is not in dispute that the Liggett rental is $15,000 per year, plus 10% of all sales in excess of $150,000, a figure which had not been reached by Liggett up to the time of the taking. Nor is it disputed that this tenant was financially responsible for its lease.

For the purpose of these calculations, therefore, the rental value of the Liggett space to the Surety Realty Company is based at $15,000 per annum.

R. E. McDONALD, INC., LEASE.

The same situation exists with respect to the McDonald lease, as it exists with respect to the Liggett lease. The McDonald lease also expires on April 30, 1930. Its rental was $19,000 per annum, plus an additional percentage on sales over $300,000. No additional rent had become due under the lease at the time of the taking. Here, also, the tenant was financially responsible, and, in addition, the performance of the lease was personally guaranteed by Mr. Rosenbusch, a man of considerable means (p.).

For the purpose of these calculations, therefore, the rental value of the McDonald space to the Surety Realty Company is placed at $19,000.

SECOND AND THIRD FLOORS.

These floors were occupied by the defendant, Harrington, as a monthly tenant. He paid $1,500 per year for the third floor and $1,000 per year for the fourth floor. The floors have about 4,400 square feet. The testimony of the experts

respecting the fair rental value of this space is as follows:

(a) *John J. Berry,* produced on behalf of the Surety Realty Company (at p. 83), said that the third floor space had a rental value of 75 cents per square foot, or	$3,300
and the fourth floor had a rental value of 50 cents per square foot, or	2,200
making a total of	$5,500
(b) *Leslie Blau,* a witness for Harrington, testified (at p. 175) that in his opinion the third floor had a rental value of 75 cents a square foot, or	$3,840
and the fourth floor 50 cents a square foot, or	2,420
or making a total of	$5,860

(It should be noted that Blau assumed a plottage of 4,800 square feet, calculating the same at 44 ft. x 110 ft., Berry took only 4,400 feet, leaving off the hallway.)

(c) *David Houston,* a witness for the Burne estate, testified (at p. 190) that the fair rental of the third floor was 40 cents a square foot, or	$1,600
and the fourth floor was 30 cents a square foot, or	1,200
making a total of	$2,800

(Houston assumed a plottage of only 4,000 square feet in his calculations.)

Houston conceded that his figures represented only his opinion, because he had not rented any property in the vicinity at or about the time of the taking (p. 203).

Berry, on the other hand, justified his values by stating that the figures were similar to the amount which *he had obtained* by renting property immediately next door. Inasmuch as the Burne property was a corner property, and therefore had a frontage on two streets, it is apparent that Berry was very conservative in the figures which he gave.

But, as was said, "the proof of the pudding is in the eating of it." The defendant Harrington testified (p. 181(that he had *offered* Mr. Kamm $5,000 a year for a lease on the two floors and *that this sum was refusad.*

The Vice-Chancellor referred to the testimony of the experts and said (p. 221):

> "Making due allowance for the partisanship in expert testimony, the things reserved in the offer, and for the difference between expectation and realization, the amount is fixed at $4,000 * * *."

We submit that, inasmuch as it was established—not by the Surety witnesses, but through cross examination of the witness of another defendant—that an offer of *$5,000* had been made by the then tenant and refused, the Vice-Chancellor should have valued this space at at least the amount of the offer, namely, $5,000 per year.

RADIO STORE.

The radio store was occupied by the defendants, Hocter and Heyer, under a lease expiring September 15, 1925, at a rental of $2,100 per year. The store was very small, having a street frontage of 10 feet by a depth of 18 feet. The lease contained a clause by which it could be cancelled upon payment of $250 (Exhibit D, Surety 264).

The experts value this store as follows:

Mr. Berry (at p. 83),	$3,000 per year;
Mr. Blau (at p. 175),	3,000 per year;
Mr. Houston (at p. 190),	2,000 per year.

Here again it must be recalled that Mr. Houston admitted that he had not rented stores in this neighborhood (p. 203). *Blau was not cross examined at all with respect to this valuations* (pp. 176-177).

The Vice-Chancellor placed the rental value of this store at $2,100 (p. 221). We submit that the testimony of Blau and Berry outweighed that of Houston, and that value of $3,000 per year would have been fair. An average, however, between the testimony of the three experts would place a rental value of $2,666.67 a year on this store. We submit that at least this sum should have been found to represent the fair rental value.

FORMER RESTAURANT (OCCUPIED BY RADIO).

The last store on Washington street had dimensions of 15 feet front by 44 feet deep. It had been occupied as a restaurant at $175 per month on a monthly basis. The restaurant had, however, vacated and the radio store was temporarily occupying the same at $75 a month.

Berry valued this store (at p. 84) at	$5,250
Blau valued it (p. 175) at	5,250
Houston valued it (p. 191) at	3,750

The Vice-Chancellor values this store at $4,000 (p. 221).

Again applying the average of the three experts, we reach the figure of $4,750, which we submit should have been fixed as the fair rental value of this store.

ROOF.

The future value and the actual rental return of the roof are the same, $1,200 per year having been fixed by the only witness who testified on this subject, Mr. Berry. There can, therefore, be no dispute that this sum represents the fair rental value of the roof.

SUMMARY.

To summarize the foregoing, we find that the fair rental value which could have been realized by the Surety Realty Company, had it been in a position to effect leases for the balance of the term, is as follows:

		Vice-Chancellor Figures	Appellant Calculations
Liggett		$15,000.00	$15,000.00
McDonald		19,000.00	19,000.00
3rd floor, 4th floor } Harrington		4,000.00	5,000.00
Radio		2,100.00	2,666.67
Restaurant		4,000.00	4,750.00
Roof		1,200.00	1,200.00
		$45,300.00	$47,616.67
Carrying Charges:			
Rent to Burne Estate	$19,000.00		
Average carrying charges	2,063.82		
		21,063.82	21,063.82
Net annual profit		$24,236.18	$26,552.85

Present value of lease according to Vice-Chancellor's calculation—
$24,236.18×3.84= $93,065.93

Present value of lease according to appellant's calculation—
$26,552.85×3.84= $101,962.94

The foregoing calculations represent the value to the Surety Realty Company of its lease at the time of the taking, and the sum shown by appellant's calculation, we respectfully submit, should be paid to it out of the funds on deposit.

It will be observed that the present value is calculated on a 6% basis. Were it calculated on a 5% basis, which we submit is fairer, the amount to be paid to the Surety Company would be increased accordingly—the value of $1 at 5% being $3.94, as against $3.84 at 6%. Using the Vice-Chancellor's values, the value of the lease computed at 5% would be $95,490.55. Using appellant's values, the present value of the lease would be $104,658.23.

Reply to certain arguments of the owners of the fee.

Several arguments have been advanced by the owners of the fee as to why Surety Realty Company should not be paid the value of its lease based upon the foregoing calculations.

The owners of the fee contend that the Surety Realty Company being a corporation, the salary of its officer, Louis Kamm, should be deducted in measuring the Company's net profits. It is not disputed that the Company is merely a holding company for Mr. Kamm, who controls its entire capital stock. As the Vice-Chancellor stated (at p. 221):

> "The company belongs to Mr. Kamm and he is entitled to all its income, and whether he takes it by way of salary or income is immaterial."

It is argued that the value of this lease, with only four and a half years to run, is grossly disproportionate to the value of the entire fee as fixed by the City Commissioners together with the value of the remaining land, when it is borne in mind that the owners of the fee are entitled to the profits therefrom in perpetuity.

The foregoing values are calculated according to the rules laid down by this Court. The argument eliminates entirely the large rent enjoyed by the owner of the fee at the commencement of the term, a rental so large as that as successful a business man as Sebastian S. Kresge was desirous of disposing of the lease. During the lean years of the lease the owners of the fee did not object to receiving their large rent, and, therefore, there can be no complaint, when during the last years of the term, the tenant is in some way recompensed for the element of risk and trouble which it assumed in years gone by.

The Vice-Chancellor, in commenting on this point, stated (p. 222):

> "Upon first blush this seems disproportionate to the amount of the award and it is suggested by the owner that a more equitable solution would be to pay the tenant the interest on the award, as it accrues, during the four and a half years of its term, and the tenant seems not to look upon it with disfavor if the owner will add to that sum the value of half the lot remaining which, it was testified, is $265,000, but the owner fails to justify his proposed course upon principles or authority. *Though the allowance seems high, the rental value was no doubt an important factor in the award and is reflected in the enormous sum awarded.* The interest on the award plus the interest on the amount of the value of the remaining land exceed the net rental value of the property by a substantial sum."

In arriving at the foregoing conclusion, the Vice-Chancellor had the benefit of the calculations submitted in a memorandum and these calculations are submitted herewith.

Cook suggested before the Vice-Chancellor that the following award be made:

Fund in court,	$479,550.00
Interest on same at 6%,	28,773.00
Deduct from the foregoing the amount of Surety rent	19,000.00
Net amount per year to which Surety Realty Company is entitled,	$ 9,773.00
But if there is added to the foregoing 6% on $265,000, the testified value of the remaining land, there would be added to the net amount per year the sum of	15,900.00
Making the net amount per year which the Surety Realty Company is entitled, according to the method of calculation suggested by Cook,	$25,673.00

The present value of the lease on this basis at 6% amounts to $98,584.32, as against $93,065.93 found by the Vice-Chancellor and $101,962.94 suggested by us.

No possible argument can be made but that if the tenant's rights are to be computed upon an interest basis, the value of the *whole* property involved in the letting should be considered as the principal sum, otherwise the tenant is receiving compensation for but part of what has been taken from it. By what possible reasoning, however, can interest at 6% be substituted for the return which by reason of the agreements

between the landlord and tenant, the tenant was in fact receiving.

The Vice-Chancellor stated that it had been suggested that although the remaining land had been valued at $265,000, it had been sold pending the hearing for $300,000. Counsel for Cook did not offer to enlighten the parties as to the re-sale price of the remainder, but a new building is now being erected thereon.

It is, therefore, submitted, that, even if the method of calculation suggested by the owners of the fee is adopted, the results would be about the same, but, as the Vice-Chancellor stated, no principle or authority is shown to justify this course and we submit that the lease should be valued upon the basis heretofore submitted.

We, therefore, submit that the Surety Realty Company should be awarded out of the fund the sum of $104,658.23.

Costs and counsel fees should have been allowed to the Surety Realty Company.

Section 85 of the Chancery Act provides that except where it is otherwise directed, it shall be in the discretion of the Court to award costs or not.

Section 91 of the Act permits the Chancellor to make such allowances by way of counsel fee to the party or parties obtaining the order or decree as shall seem to him reasonable and proper, and shall direct which of the parties shall pay such allowances; *or, where such allowances are ordered to be paid out of the property or funds, shall specify and direct the property or funds liable therefor.*

We submit that in the instant case the Surety Realty Company should have been allowed its costs and counsel fees.

It was a successful party. Its participation in the fund had been denied, in toto, by the owners of the fee, but the Court concluded that an award should be made to it.

The funds were in the custody of the Court having been deposited there pursuant to the statute which directed that the Court should distribute the fund, "to the person or persons entitled thereto according to law." (P. L. 1917, p. 380, Article XX, Section 23.) The duty was thus imposed upon the Court to distribute the fund among the parties in interest.

In Kocher's Chancery Practice (Vol. 2, Sec. 1877), it is stated:

> "The Court has power to charge a fund, the ownership of which is disputed, or which has been realized from or is preserved by litigation, with the costs and expenses of such litigation."

The instant case was certainly one where the Court should have directed that the costs of the litigation be paid out of the fund. The case was one of novel impression. New rules of procedure were adopted by the Chancellor in this case in order to properly bring the parties before the Court. The questions of law raised upon the distribution of the fund had never been entirely adjudicated in this State.

We, therefore, submit that the Surety Realty Company should have been allowed its costs and a reasonable counsel fee.

It is, therefore, respectfully submitted that an award of $104,658.23 should have been made to the Surety Realty Company as the value of its

estate taken, and that in addition thereto its reasonable costs and counsel fees should have been paid out of the fund.

Respectfully submitted,

STEIN, STEIN & HANNOCH,
Solicitors of Surety Realty Company.

Merritt Lane, Spaulding Frazer
and Herbert J. Hannoch,
Of Counsel.

MEMORANDUM OF OPINION.

Filed Oct. 3, 1924, not reported

Referred to at page 4 of this brief.

IN CHANCERY OF NEW JERSEY.

Between

FRANK D. FOLLANSBEE,
Complainant,

and

THE MAYOR AND ALDERMEN OF JERSEY CITY and DARLING REALTY CORPORATION,
Defendants.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

FRANK D. FOLLANSBEE, *et al.,*
Defendants.

On Bill, Etc.

On Consolidated Cause.

Submitted Aug. 28, 1924. Decided Oct. 3, 1924.

Fisk & Fisk, by J. Fisher Anderson, Esq., for the complainant, Follansbee.

Thomas J. Brogan, Esq., and Frank J. Reardon, Esq., for the Mayor and Aldermen.

Benjamin Dowden, Esq., Benjamin J. Darling, Esq., for the Darling Realty Corporation.

Bentley, *V.-C.*

Being desirous of widening an existing street known as Bergen avenue, the defendant, the Mayor and Aldermen of Jersey City, adopted an ordinance, under "An Act Concerning Municipalities," approved March 27, 1917, and the amendments thereof to effectuate that purpose. At that time the defendant, Darling Realty Corporation, was the owner of certain lands and premises fronting on the said street, of which about 20 feet would be required for the improvement, running entirely along the width of the property. The complainant was then a tenant of the last-mentioned defendant in the particular premises, under a recorded lease which, at that time, had a number of years yet to run. Obviously recognizing a "right or interest" of the complainant in the land in question for which he should be compensated in advance of the destruction thereof, the City caused notice to be served upon him to come in before the Commissioners of Assessment and prove his damages. That he did. When those Commissioners, however, made up and filed their report they failed to make any mention of award to the complainant and made but one allowance for the property taken, so far as this suit is concerned, to the owner of the fee, following Bright *v.* Platt (32 N. J. Eq. 362), and the many cases of like import. The amount of award, instead of being deposited with the Clerk of this Court, was then tendered to and eventually accepted by the defendant company. Subsequently, notice was served upon the complainant by the municipality to quit the premises on a certain date, and he, thereupon, filed this bill praying an injunction and, in the alternative, that either the City or the Darling Realty Corporation be decreed to pay him the amount which might be found as adequate to compensate him for the property taken.

New Jersey State Library

Both before the Commissioners of Assessment and in the final hearing in this cause, the complainant introduced proofs of the value of his leasehold, and in the latter proceeding the City produced testimony to indicate that there was no value thereto. On the hearing before the Assessment Commissioners the defendant Realty Company produced witnesses, fixing the value of the entire property to be taken, both land and improvement, at the sum of $53,640. The award made by the City was, as I recall it, $53,000, or within $640 of the claim made by the owner. In view of the natural habit of the owner of the property to place a high figure thereon and seldom, if ever, especially in proceedings of this sort, to undervalue the same, it is clear to me that the defendant, Darling Realty Company, received full consideration for its property without any deductions for encumbrances or otherwise. Now, it must be apparent upon the slightest consideration that the demise of realty for a term cuts down the value of the fee to the owner thereof for the period of the lease, and his estate is diminished, as measured by money, by the value of the lesser estate which he has carved out thereof and granted to his tenant. Therefore, if the Darling Company accepted the full value of the entire property and knew, as it will not be heard to deny that it did know, that there had been no award to the tenant, it has in its possession money that, in all fairness and honesty the landlord should pay over to the one for whom it was intended. The complainant, guilty of no negligence or laches, must be compensated for his property, and that is flat. There can be no question about that, and none has, in fact, been raised. There is a question whether the complainant might have appealed (Herr *v.* Board of Education, 82 N. J. Law 610), or whether he

might have reviewed the award by certiorari; but, in view of the opinion in Folley *v.* Passaic (26 N. J. Eq. 216), he is not remediless in the eyes of the court, no matter in which way those questions might be resolved.

As between the two defendants, it is far more natural and just that the Darling Realty Corporation should compensate the complainant rather than compel the City to pay twice for the same thing. The jealousy with which courts have always viewed raids upon public funds is, of course, known to every practitioner, even going to the extent of reversing the rule on voluntary payments where the payer is some officer or employee of the State or one of its subdivisions.

> Wayne County *v.* Reynolds, 126 Mich. 231;
> Richmond County *v.* Ellis, 59 N. Y. 620;
> Fort Edward *v.* Fish, 156 N. Y. 363;
> Commonwealth *v.* Field, 84 Va. 26;
> Bayne *v.* United States, 93 U. S. 642.

and to the same effect is the opinion in Lodi *v.* VanBusson, 7 N. J. L. J. 42.

I do not purpose entering upon any extended discussion as to the right of the complainant to be paid for his lease, or of a comparison of the language of the 1922 amendment of the act of 1917 with the language of the original act, or the Eminent Domain Act of 1900, because I consider it too clear for argument that a leasehold is within the protection of the Constitution and is contemplated by the 1922 act under which this proceeding was conducted. However, as I have indicated, the complainant stands before the court without fault in seeking its protection from a violation of one of his most sacred fundamental rights; and since it cannot be doubted that the municipality is, to some extent, to blame for its present predicament, precaution must be taken

to insure the former's compensation by the City, in the event that from it, and it only, such compensation may be secured. In view of the public importance of the improvement of the kind involved herein, I will refuse an injunction, but only upon condition that the City enter into a bond in the sum of $7,500, conditioned for the payment to the complainant of the amount hereinafter specified, in the event of his failure to collect from the Darling Realty Corporation within a period which I will determine upon the settlement of the decree.

The proofs with regard to the value of the remaining term of the complainant's lease are highly conflicting. The complainant maintains that the annual value of the lease for the remaining four years and two months (because the complainant has not yet been disturbed by the condemning authority) is $1,800 while the defense maintains that it is worth nothing because the complainant, under his lease, is obliged to pay the full rental value thereof. Without entering into an analysis of my calculations, and applying the doctrine of Kohl *v.* U. S. (91 U. S. 367), I decide that the annual damage to the complainant is the sum of $1,200, totaling $5,000 for the remainder of the term, and that amortizing the value of the fixtures still remaining upon the premises he is entitled to an additional allowance of $1,120, or, in all, the sum of $6,120, which will be the amount to be contained in the defendant municipality's bond, the payment of this that instrument is to secure to the complainant, with interest and costs. Of course, in the event of the Darling Company appealing and the City refusing to furnish the bond mentioned, I will allow a perpetual injunction.

I will advise a decree in conformity with the foregoing upon two days' notice.

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

New Jersey Court of Errors and Appeals

Between The City of Newark, *Petitioner,* *and* Hugh F. Cook, *et als.,* *Defendants-Appellants.*	*On Appeal from Chancery.*

BRIEF FOR CHARLES A. McEUEN, ET UX., APPELLANTS AND RESPONDENTS.

Statement of Case.

For the purpose of widening Washington street the City of Newark condemned the two four-story stores at the northwest corner of Market and Washington streets, Newark, and paid the award into the court of chancery, $479,550. Both buildings were taken and razed, although only half the land was taken, that which lies southeasterly of a line extending from the northerly corner of the lot on Washington street to the westerly corner on Market street. Cook, *et als.*, are the owners in fee of a two-thirds undivided interest, and the holders of a tax title (called that for convenience) for the term of two hundred years, expiring in August, A. D. 2057; of the remaining one-third, the fee is in Charles A. McEuen. McEuen takes the position that the tax title is invalid for irregularities in the proceedings on which it is based, and for fraud in its procurement, and that the court of chancery in these proceedings may hold it to be of no effect.

The title in 1850 was in one Leavitt, who conveyed an undivided two-thirds interest to Charles

H. Sherman and a one-third to McEuen and his brothers and sister, by separate deeds, February 13, 1850. McEuen succeeded to his brothers' and sister's interest by inheritance. Title to the Sherman two-thirds interest passed to William H. Sherman and by mesne conveyances to Nehemiah Perry and from Perry to Martin Burne in 1866. About the same time Burne acquired the tax title. Burne remained in possession until his death in 1912, and Cook, *et als.,* hold by devise from him. On August 24, 1857, the property was sold by the City of Newark for an unpaid sewer assessment to John R. Weeks for two hundred years. He assigned to Perry and Perry to Burne. At the time of the assessment and sale the fee was in Abraham H. Sherman (who was also in possession) and the McEuen children, then infants. The assessment map designated Abraham H. Sherman as the owner of the lot; the McEuens were not parties to the proceedings. The deed to the McEuens did not come to their knowledge until 1869, and 1870 they brought an action in the Supreme Court against Burne to recover possession of their interest, and judgment was rendered against them. The "phonographer's" transcript of his notes of the trial at the September term, 1870, of the Essex Circuit is in evidence, without objection, and from it it appears that Abraham H. Sherman, the cotenant of the McEuens, furnished Weeks, the purchaser of the tax title, with the purchase price the day after the sale, and that Weeks, at the instance of Sherman, assigned the certificate of sale to Perry in 1861, who assigned it to Burne in 1866. Justice Depue, presiding, held the certificate of sale to be in due form and that the proceedings upon which it was founded could not be attacked collaterally, but only on review by certiorari, as provided by the then recent act

of 1869, now Section 15 of the Sale of Lands Act (C. S. 4679); that the question of fraud, because Sherman procured the tax sale of Weeks instead of paying the assessment, or of a resulting trust because the purchase price was paid by Weeks, the co-tenant, was cognizable only in equity, and left to the jury the single question whether the money was furnished by Sherman to Weeks to procure the certificate of sale or paid to him to satisfy and extinguish the tax title, and if the latter they must find for the plaintiff; and the jury found that it was not so paid. Nothing further was done until just before the award in these proceedings (1925) when McEuen applied to the Chief Justice for a writ of certiorari, and, being refused, applied to the Supreme Court, and upon denial on the ground of laches (*re.* McEuen, 4 A. R. 548), appealed to the Court of Appeals.

The court of chancery decreed that the clerk of that court pay to Charles A. McEuen or to his solicitor of record the sum of $46.85, together with any interest that might have accrued thereon from the date of the deposit of the fund with the clerk, which sum when so paid "shall be in full satisfaction and discharge of any and all interest which the said Charles A. McEuen may have in the fund on deposit."

The decree of the court of chancery denied the right of Charles A. McEuen to participate in the fund as the owner of an undivided one-third interest in the fee to the lands taken, and assigned to him only the sum of $46.85 as the present value of an estate in reversion in one-third of the lands condemned after the expiration of the term alleged to have been granted by the assessment sale certificate issued to John R. Weeks by the City of Newark.

The question involved is the jurisdiction of the court of chancery to examine the title or interest actually granted to John R. Weeks by the assessment sale certificate, although no review of the proceedings upon which the certificate is founded has been had in the Supreme Court, and to ascertain and decree the right of Charles A. McEuen to one-third of the fund in court.

The court of chancery held that jurisdiction to set aside the sale certificate is exclusively in the Supreme Court (case, p. 216, l. 17, &c.) and did not ascertain or determine the extent of the interest actually granted or conveyed to John R. Weeks by the sale certificate and the right of Charles A. McEuen to receive one-third of the fund, although from the proved facts in the case it is apparent that the City of Newark never had any power to convey, and in fact did not convey, to John R. Weeks more than an undivided two-thirds interest in the property, and that the remaining one-third interest is in Charles A. McEuen, free from any limitation at this time to repossess himself of that interest.

Grounds of Appeal.

Charles A. McEuen appeals because he believes that the statute under which the proceedings were had in the court of chancery confers complete jurisdiction upon that court to examine the proceedings upon which the sale certificate is founded to the same extent as the Supreme Court might review such proceedings by writ of certiorari.

That the court of chancery has such jurisdiction because the right of Charles A. McEuen to possession of the land condemned no longer exists because the City of Newark has taken ex-

clusive possession thereof, and the court of chancery must ascertain the actual title and interest in the fund, notwithstanding the sale certificate to John R. McEuen.

That the law is deficient in not making provision for ascertaining the actual title or interest of claimants to the land, when the law allowed the possession of the land to be taken exclusively by the City of Newark, thus rendering the right of action in ejectment of no avail to the claimant. The court of chancery then has jurisdiction of the whole matter.

Under the circumstances proven in this case the court of chancery should have decreed that Charles A. McEuen is entitled to one-third of the fund.

That the decree in this case is contrary to the established law of this state in that it deprives McEuen of his property without due process of law.

That the decree in this case is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives McEuen of his property without due process of law.

Charles A. McEuen is the owner of an undivided one-third interest in fee in the lands which were condemned by the City of Newark, the amount of the award having been brought into this court for distribution.

On January 14, 1925, before the award was finally agreed upon, Charles A. McEuen notified the City of his claim and signified his assent to the condemnation proceedings and such award as should be made; in his application filed in this proceeding he has again signified his assent

to the condemnation proceedings and tendered himself ready to execute any and all appearances and consents to be bound by the condemnation proceedings, reserving only his claim to one-third of the damages awarded in lieu of his estate in the lands. By an order made in this matter on the 6th day of October, 1925, he was ordered to file his application in writing indicating what claim or interest he had in the moneys deposited; having received notice of this order, McEuen and his wife have filed such application, attended the hearing and put in evidence and proofs of his claim, which arises as follows:

On February 13, 1850, David Leavitt, being the owner in fee of the premises in question, conveyed a two-thirds interest therein to Charles A. Sherman and on the same day conveyed a one-third interest to this applicant, Charles A. McEuen, his two brothers and sister; the brothers and sister of Charles A. McEuen having died intestate without issue and without leaving wives or husbands, Charles A. McEuen is now the owner of the entire undivided one-third interest conveyed by Leavitt to the McEuens.

At the time of these conveyances the McEuen grantees were all minors and under fifteen years of age. The McEuen deed was duly delivered according to its acknowledgment on February 19, 1850, but did not come to the knowledge of the McEuens until 1869. This deed was recorded January 14, 1870 (R. 14, 587).

The deed to Charles A. Sherman was recorded March 14, 1851. Charles A. Sherman on March 15, 1851, gave a mortgage on his two-thirds interest to one Lemassena; this mortgage was foreclosed and Charles A. Sherman's two-thirds interest was conveyed to Abraham H. Sherman at the foreclosure sale on November 26, 1852.

Abraham H. Sherman was a lawyer (case, p. 62). He had possession of the property and treated it as his own until 1860 (addition to printed case).

In 1856 Abraham H. Sherman gave a mortgage on his two-thirds interest, so described in the mortgage, to Mutual Benefit Life Insurance Co. (N. 3, 339).

On August 6, 1856, the City of Newark authorized the construction of a sewer passing the property and appointed Commissioners to assess the expense "upon the owners of the property benefited thereby." The Commissioners were directed to proceed in such assessment in the manner provided by the charter of the City of Newark.

On December 5, 1856, the Commissioners reported the assessment upon the owners of the property benefited and filed their report and map in the City Hall. This map shows the lot in question, designates it as Lot No. 259 with Abraham H. Sherman as the owner. No assessment was made upon any other person as an owner of the lot (case, p. 51, l. 30, &c.).

On June 5, 1857, the Common Council directed that the land be advertised and sold for the purpose of raising the amount so assessed upon the owner of the property. The sale was advertised, the property being described as Lot 259 on the map and the "reputed owner" as Abraham H. Sherman (case, p. 53, ll. 20, *et seq.*, and p. 54).

On August 24, 1857, the property was sold to John R. Weeks for $178.68 and a sale certificate issued to John R. Weeks dated November 5, 1857. On August 25, 1857, the day after the sale, Abraham H. Sherman gave his check to John R. Weeks for $178 and cash sixty-eight

cents, the money being paid to Weeks to hold the sale certificate for the benefit of Abraham H. Sherman (See Sherman's and Weeks' testimony in addition to state of the case). The sale certificate was not recorded until December 12, 1882 (Q. 21, 425).

On June 5, 1861, at the request of Abraham H. Sherman, Weeks assigned the sale certificate to Nehemiah Perry, and on May 9, 1866, Perry assigned the sale certificate to Martin Burne, who died in 1912, and under whose will Hugh F. Cook and others of his devisees now hold the property.

Perry, on May 29, 1860, at a sheriff's sale held by virtue of eight writs of execution aggregating $3,000, bought the interest of which Abraham H. Sherman was seized on August 15, 1859; October 10, 1859; October 19, 1859; October 20, 1859; November 2, 1859, and January 10, 1860, for $140. All that Perry took by that deed was the remainder in the two-thirds interest of Abraham H. Sherman after the expiration of the two hundred years for which Sherman's interest had been sold (addition to state of the case).

On April 23, 1861, the mortgage given by Abraham H. Sherman to the Mutual Benefit Life Insurance Co. was foreclosed and the sheriff conveyed Abraham H. Sherman's two-thirds interest to Perry for $10,650, and on May 10, 1866, Perry executed a deed purporting to convey the whole of the premises in question to Martin Burne for $17,600.

In 1869 Abraham H. Sherman produced the deed from Leavitt to the McEuen children, who recorded it January 14, 1870 (R. 14, 587), and in 1870 the McEuens then living instituted an ejectment suit in the New Jersey Supreme Court to recover possession of their one-third interest

against Martin Burne, which resulted in a judgment in favor of Burne solely because of the assessment sale of October 1, 1857, and the Act of 1869 forbidding any attack on such sales certificates except by writ of certiorari, which might be had at any time. The question of fraud or a resulting trust was ruled out at the trial as not being cognizable in a court of law (see case, p. 277, l. 30). The payment of $178.68 by Sherman to Weeks was confined to the question whether it was paid to redeem the property or to provide the money for its purchase at the assessment sale, and the jury found apparently that the money was paid to procure the purchase of the property at the assessment sale (case, p. 273, l. 20, &c.).

In 1868 the Fourteenth Amendment to the Constitution of the United States was adopted declaring that no one should be deprived of his property without due process of law.

In 1869 the act was passed depriving the McEuens of the right to attack the sale certificate in ejectment proceedings, and substituting therefor the right to review the proceedings by certiorari at any time. Burne interposed that act in his defense to the ejectment suit and obtained a judgment in his favor on that ground alone (case, p. 270, and addition to case).

The foregoing facts were proven at the ejectment suit, as will appear by a perusal of that record.

As to the assessment for the sewer in 1856, see the stipulation read into the evidence and a copy of the advertisement; also copy of tax certificate attached to the bill of particulars in the ejectment suit which has as part of the assignment from Weeks to Perry or from Perry to

Burne a certificate by the Treasurer of the City of Newark that he sold the lot in question to Weeks as the property of Abraham H. Sherman.

Note also that the assignment from Weeks to Perry and from Perry to Burne mentions that the property sold was the property of Abraham H. Sherman.

Before the award for these condemnation proceedings was completed and the money paid into court Charles A. McEuen applied to the Chief Justice in Newark for a writ of certiorari to review the sale for the assessment above mentioned. The Chief Justice denied the writ on the ground of gross laches. McEuen then filed his affidavit and reasons in the office of the clerk of the Supreme Court and applied to the Supreme Court *in banc* for a writ of certiorari to review the sale certificate. This application was heard by Part III of the Supreme Court on January 21, 1926. The devisees of Burne appeared on that application and filed a brief protesting against the allowance of the writ on the ground of the lapse of time, and on March 5, 1926, the Supreme Court filed an opinion mentioning that a number of reasons for granting the writ had been filed, but in the exercise of an inherent power and right the court denied the application on the ground of laches.

On motion of counsel for the Burne devisees judgment was entered denying the application for the writ on the ground of laches (case, p. 55) and an appeal has been taken to the Court of Errors and Appeals.

BRIEF OF ARGUMENT.

Right to Relief.

A writ of certiorari in aid of ejectment since 1869 is a writ of right and lapse of time will not cure the defect in the proceedings.

Baxter v. *Jersey City,* 7 Vroom 188:
Speer v. *Passaic,* 9 Vroom 168;
Evans v. *Jersey City,* 6 Vroom 381;
Graham v. *Paterson,* 8 Vroom 380;
Woodbridge v. *Allen,* 14 Vroom 263;
Lehigh Valley R. R. Co. v. *Newark,* 15 Vroom 323;
Brooks v. *Union,* 68 Law 133;
Walsh v. *Newark,* 78 Law 168;
Groel v. *Newark,* 78 Law 142;
Bozarth v. *Egg Harbŏr City,* 89 Atl. 920;
Mitsch v. *Riverside,* 92 Atl. 436.
See also *State* v. *Wood,* 23 L. 560.

Jurisdiction of the court of chancery.

Ejectment will not aid McEuen in this proceeding. He cannot now be put into possession of the land condemned, for that has been taken by the City, and neither the Burne devisees or McEuen can have possession under their old titles.

McEuen having in fact joined in and assented to the condemnation proceedings is now in this court seeking to gain possession of the money paid by the City for his property; that is, one-third of the award less the value of the building as later suggested.

As ejectment will not assist him, this court should apply the same principles that a court of law should apply upon an application for a writ of certiorari in aid of ejectment which McEuen can still have as to the part of the

property not taken by the City, in addition to such principles of equity as may be applied by this court.

As lapse of time would not bar the right to the writ at law, such lapse should not in equity bar his right to relief.

From the cases cited above it appears that the proper practice at law is to grant the writ, leaving the result of the lapse of time to be settled in the ejectment proceedings to follow.

Baxter v. *Jersey City, supra;*
Graham v. *Paterson, supra,* at p. 385;
Also *Speer* v. *Passaic, supra,* at p. 425.

The New Jersey cases only go to the extent of holding that delay in applying for a writ of certiorari in these cases will bar the prosecutor from attacking the proceedings prior to the assessment.

Mr. McEuen does not attack the assessment made upon Sherman nor the sale of Sherman's interest. He does not seek to set aside the sale certificate except in so far as it prevents him from regaining his property. The City has received the money for the assessment and the costs of the sale and received the money from Sherman. Weeks knew it, Perry knew it when it happened, or shortly after, and Martin Burne knew it at the trial of the ejectment suit, yet he interposed the Act of 1869 to keep out the McEuens.

In *Graham* v. *Paterson,* at page 384, the court says:

> "The language used by the framer of the act (1869), that the proceedings may be reviewed by certiorari at any time, indicate an intention not to deprive the citizen in any case of a remedy of right to remove from

> his way a conveyance which obstructs him in the enjoyment of his property, and which has only the form and not the substance of law to sustain it."

The assessment having been paid, the objection that a public work which has benefited the prosecutor of the writ may have to be paid for by a general levy is not present in this case.

As under the Act of 1869 and the decisions of the New Jersey courts from the passage of that act down to this time, mere lapse of time is not a bar to McEuen having the state's writ of certiorari. Is there anything in this aspect of the case which would render it just or equitable to dismiss his claim?

The Burne devisees are in possession of property belonging to McEuen. The McEuens were never assessed and therefore no sale of their property could lawfully be made. It is only for the *non-payment of an assessment upon the owners of the property benefited* that a sale can be made.

The assessment was made on Sherman alone when the McEuens were minors. The ejectment suit was tried in 1870, when all the parties to the transaction were alive and their testimony was taken.

In *Woodbridge* v. *Allen, supra,* at p. 270, the court says:

> "A purchaser at a tax sale is bound to inquire as to the proceedings anterior to the sale. It is a condition precedent to the passing of titles at such sales, that all the proceedings of the officers, who have anything to do with the assessment and collection of taxes or with the advertisement and sale of the property, shall be in compliance with the statute authorizing the sale.

> "The *onus probandi* is upon the purchaser, and he must show affirmatively that everything has been done which the statute makes essential to the due execution of the power."

Can anyone doubt that Sherman brought about the assessment sale; that Sherman's purpose was to shut off the McEuen children; that Perry knew of the arrangement between Sherman and Weeks and Burne also knew of it—else why the sheriff's deeds to Perry, which conveyed nothing but a remainder in Sherman's two-thirds after the expiration of the two hundred year term, and in turn the deeds from Perry to Burne, which conveyed nothing more?

Weeks did not record the sale certificate; it was not placed upon record in the county clerk's office until long after the ejectment suit.

Burne by invoking the Act of 1869 interposed only the form and not the substance of law against the McEuen claim.

Graham v. *Paterson, supra.*

Burne, however, produced this legal situation. By virtue of the judgment in ejectment he held the lands subject to the right of McEuen to examine his title by writ of certiorari *at any time* during the balance of his term of two hundred years.

He had solemnly declared and proven that he held only by virtue of his assessment sale certificate. Therefore he could never claim title by adverse possession.

Possession under a tax or assessment lease for a term of years is not adverse to the title of the owners in fee, but is in subordination thereto.

37 Cyc. 1471.

Miller v. *Warren,* 94 N. Y. App. Div. 192; 87 N. Y. Suppl. 1011 (affirmed in 182 N. Y. 539; 75 N. E. 1131).

Moreover, Burne held as a co-tenant of the McEuens, and the presumption is that he was keeping possession not only for himself but also for his co-tenants according to their respective rights.

> *Parker* v. *Merrimac River Locks,* 3 Met. (Mass.) 91.
>
> "The mere fact that the claimant has had possession of the lands for the statutory period will not suffice to satisfy the rule requiring the disseisor's possession to be hostile, as was said by C. J. Marshall, 'It would shock that sense of right which must be felt equally by legislators and by judges if a possession which was permissive and entirely consistent with the title of another should silently bar that title.' "
>
> *Kirk* v. *Smith,* 9 Wheat. (U. S.) 241.

In *Van Wickle* v. *Alpaugh,* 3 N. J. L. 44, 452, the court says:

> "It is unquestionably true that where one man possesses the land of another by his consent, and without any claim of right in himself, even for a hundred years, the statute of limitations will not bar a recovery; and the reason is obvious. The owners cannot have a cause of action against a man who possesses his land with his approbation and consent."

In the present case Martin Burne and his devisees have had possession of the property since the passage of the Act of 1869 and the judgment in the ejectment suit, by consent of the McEuen grantees, who could at any time, in the language of the statute, sue out a writ of certiorari for the purpose of setting aside the assessment sale certificate, so far as the one-third interest of the McEuens was concerned.

Possession, *per se,* evidences no more than the mere fact of present occupation by right, for law

will not presume a wrong; and that possession is just as consistent with a present interest, under a lease for years or for life, as in fee. From the very nature of the case, therefore, it must depend upon the collateral circumstances, which are the quality and extent of the interest claimed by the parties; and to that extent, and to that only, will the presumption of law go in his favor.

Ricard v. *Williams,* 7 Wheat. (U. S.) 59, 105.

The claim must be of title or ownership in fee and to be of any avail must be of the entire title, not simply a part of it. Accordingly, no right in the fee can be acquired by adverse possession under a claim of a term of years under a lease.

Bedell v. *Shaw,* 59 N. Y. 46;

Obermeyer v. *Behn,* 123 App. Div. 440; N. Y. S. 289 (affirmed 195 N. Y. 588; 89 N. E. 1106).

It should be borne in mind that the right to attack the assessment sale certificate in ejectment existed when the assessment and sale were made; that right continued from 1857, when the sale was made, until the Act of 1869 shut off that right and substituted the right to a writ of certiorari to review such sales; also that the Fourteenth Amendment to the Constitution of the United States was adopted in 1868 declaring that no one should be deprived of his property without due process of law; also that the law as it then existed was applied in the ejectment suit in 1870.

The judgment in the ejectment suit settled the law between the parties to that suit to the effect that the McEuens had no right to the possession of their one-third interest in the lands until the

proceedings which produced the sale certificate had been reviewed by a writ of certiorari, which might be had at any time. That judgment is in full force and effect today so far as it prevents the lapse of time from interfering with the McEuen rights.

The test to determine when a cause of action has accrued is to ascertain the time when the plaintiff could first maintain his action to a successful result. The fact that he might have previously brought a premature or groundless action is immaterial.

Culver v. *Culver*, 31 N. J. Eq. 448;
French v. *Higgins*, 66 L. 579;
Larason v. *Lambert*, 12 L. 247.

The statute under which these proceedings are being had in this court was not passed until long after the ejectment suit of 1870, and under that statute the City was empowered to take possession of the property condemned once the award had been made. (An act concerning municipalities, P. L. 1917, Ch. 152.)

This court must deal with the situation as it exists. Neither McEuen nor the Burne devisees have any right to the possession of the lands; no writ of execution in ejectment would enable the sheriff to put either of the parties in possession of the lands condemned.

In *Graham* v. *Paterson*, *supra*, at page 384, the court says:

> "The language used by the framer of the act * * * indicates an intention not to deprive the citizen in any case of a remedy of right to remove from his way a conveyance which obstructs him in the enjoyment of his property, and which has only the form and not the substance of the law to sustain it."

In *Baltimore & N. Y. R. R. Co.* v. *Bouvier*, 62 Atl. 868, the court says (p. 876):

> "I understood the defendant to place himself on the ground that all these equitable considerations are barred by the action and judgment of ejectment; that the relation between the railroad company and the original grantors, and himself as their successor, is entirely changed by the judgment in ejectment; and that that judgment gives Bouvier a new, independent, solidified and crystalized title, which in some mysterious way bars the exercise, or rather the application, of any equitable principles. I am unable to take that view, or to see the least force in the argument presented in its support. A proceeding in ejectment is simply one to obtain possession of land. In order to succeed, the plaintiff therein must show that *at the time he commenced* his suit he was entitled to such possession. He need show no more. Nothing else is put in issue. The character or extent of the title, whether in fee, or in pledge, or for a term of years, or for a single year, is not put in issue nor determined by the court, if it be in the plaintiff's favor. Nor is the character or quality of the right, whatever it may be, upon which the plaintiff recovered, in the least degree affected, increased, or strengthened, by a judgment in his favor. He obtains no new title, nor anything in the nature of a new title, but simply a declaration of the court to the effect that by virtue of the right which he had at the commencement of the suit he is entitled to take possession, etc. (reciting form of judgment). Clearly, then, we must look beyond the record for the real character of defendant's title. And when we do so we find that it rests on a forfeiture, and all that is conclusively settled by the judgment in ejectment is that the forfeiture has actually taken place, with all its legal consequences. * * * If the defendant has an equitable defense, it is undisturbed by the judgment in ejectment."

The Vice-Chancellor in that case ruled that the complainant was properly in court upon the principle that equity is correction of the law wherein by reason of its universality it is deficient. He cites Mr. Justice Storey, Sec. 1316, page 877:

> "It may well be said that the folly of one man cannot authorize gross oppression on the other side."

Citing Prof. Pomeroy, Sec. 451, page 878:

> "Although the agreement is not one measurable by a pecuniary compensation, still, if the party bound by it has been prevented from an exact fulfilment, so that a forfeiture is incurred, by unavoidable accident, by fraud, by surprise, or by ignorance, not wilful, a court of equity will interpose and relieve him from the forfeiture so caused."

He further cites Sec. 452, in effect that, even where the fault is without what may be termed "equitable excuse," relief may be granted. In the Bouvier case the court of chancery examined the title notwithstanding the judgment in ejectment and granted relief to the real owner.

Can it be said that McEuen has been wilfully negligent when the Act of 1869 gave him the right to review the sale certificate at any time, and the unbroken line of decisions from that time to the present day holds that the law court should grant the writ of certiorari no matter what time has elapsed?

Barter v. *Jersey City,* 7 Vr. 188, at p. 428.

I am aware that there must be some limit of time and I take it that that limit is the limit set by the purchaser himself at the sale for the unpaid assessment. The Legislature could not know for what term the purchaser would bid in the property, and, therefore, allowed a review

of the proceedings to the full extent of that term, by permitting the review to be had at any time.

A judicial decision changing the settled construction of a statute is equivalent to a change in the statute itself and is unconstitutional as an infringement upon the powers granted to the Legislature by the Constitution (12 C. J., p. 990).

A purchaser of real estate is chargeable with notice of such facts affecting the title as may be ascertained by reference to the chain of title of such property as set forth upon the public records.

In New Jersey, where titles to real estate are of record, it is the duty of a purchaser in the absence of any special agreement, to search the public records for himself and make a complete examination of such records for such information as they may contain regarding the validity of the title of the real estate he would purchase.

Bock v. *Koch,* 131 Atl. 891, E. A.;

Freedman v. *Kensiad Real Estate Co.,* 131 Atl. 917.

McEuen's rights have existed unimpaired until this condemnation proceeding; then he acted promptly. He notified the City of his claim; he applied for a writ of certiorari and gave notice to the Burne devisees; he has assented to the award.

There is no possible chance of the City of Newark losing the money it collected for the building of the sewer. Lapse of time is no obstacle.

There are no intervening parties nor innocent purchasers without notice.

The award in the condemnation proceedings allots so much for the land taken and damages

to the part left, and an additional sum for the value of the building (case, p. 47, l. 21). Applying the principles of equity laid down by this court in *Baltimore & N. Y. R. R. Co.* v. *Bouvier, supra,* McEuen might not be allowed to receive any part of the award for the value of the building, he not having contributed anything to the cost of its construction. If McEuen is not to be allowed any part of the award for the value of the building he should not be charged with any part of the distribution made to the lessees of that building.

As the Burne devisees have enjoyed McEuen's one-third interest in the property for all of these years, it is only proper that they should have paid the taxes and assessments thereon.

In *Welles* v. *Schaffer,* 129 Atl. 622, the court says:

> "The court will seize upon the slightest flaw of substance in tax sales to restore the property to the owners. The judicial attitude towards tax sales is reflected in the principle reiterated by Vice-Chancellor Lewis in Harrington *v.* Horster, 108 Atl. 150: 'The sale of land for non-payment of taxes is such an extreme interference with private property that the law guards the rights of the owners with the utmost care. The due performance of every step in the proceedings, even in the most minute particulars, is a condition precedent to the validity of the sale, and the deed to the purchaser must contain all the statutory requirements.' "

In *Woodbridge* v. *Allen, supra,* Justice Depue, speaking for the Court of Errors and Appeals, says at page 271:

> "The recital in the declaration of sale or conveyance that the sale was made pursuant to the statute, without setting forth the facts, is not a sufficient averment of compliance

with the statute. * * * a recital that he advertised or made sale according to law or pursuant to the statute has never been considered as showing compliance with the statute."

If there is any laches in this case it is on the part of Martin Burne and his devisees, for if anything occurred since the sale or the ejectment suit which gave them a better title than the sale certificate, they have been in possession of the property ever since, and could have instituted proceedings to quiet title if they had any rights to assert. I do not know of any such rights nor can I conceive of any.

The refusal of the Supreme Court to grant the writ of certiorari accomplishes nothing; it decides nothing. It leaves the question at issue free to be agitated in that court or a co-ordinate tribunal.

State v. *Wood,* 23 N. J. L. 560, p. 564.

The act of the Burne devisees in appearing in the Supreme Court upon the application for the writ of certiorari and filing a brief urging a denial of the writ on the ground of lapse of time, after having pleaded the Act of 1869 as an obstruction to McEuen's right to possession, is an inequitable act and gives jurisdiction to the court of chancery.

The deed from Perry to Burne referred to in the bill of particulars, which was made on May 10, 1866, while it in fact conveyed nothing more than Sherman's remainder in his two-thirds interest in the property after the lapse of the two hundred year term, on its face purports to convey the entire title and after sixty years might be successfully pleaded in bar of the McEuen rights under our statute of limitations, thus causing McEuen not only to lose his present

right to participate in this fund but also to lose his estate of one-third in remainder which McEuen still owns.

I can see no equity in favor of Martin Burne or his devisees. Their efforts have not increased the value of the land. It is located where it always has been. For the building erected by Burne the City has made a separate award, so that there is no difficulty as to paying Burne for the money expended by him in improvements.

On page 68 of Mr. McEuen's testimony (l. 30) he told the court that his brother had applied to Mr. Burne to give him something for the McEuen interest and Mr. Burne would not do it.

> Q (Mr. Egner): What did he say?
> A (Witness): He said he would hold the property and would not pay anything and my brother could not get a dollar out of him for this property.

This is clearly hearsay, the statement was not elicited by any question from counsel, the witness was eighty years old when on the stand and was evidently in an excited condition; on the previous page the witness had testified that he had never asked either Mr. Burne or any of his representatives or successors for any of the income of the property. Besides being hearsay, it is not competent to establish adverse possession because Burne was only claiming under his lease or sale certificate.

Besides claiming his estate and interest under the law of New Jersey, Mr. McEuen expressly contends that to deny him his one-third interest in this whole fund is in violation of the Constitution of the United States, because such denial would deprive Mr. McEuen of his property without due process of law.

The act (P. L. 1917, Ch. 152) under which these proceedings are had, provides for the making of an award for the land condemned; it permits the City to take possession of the land; it provides for the payment of the award into the court of chancery and by Section 23 it confers jurisdiction on the court of chancery to distribute that award according to law.

The possession of the land having been eliminated by that statute, the statute placed the fund representing the land in the court of chancery which has complete equity jurisdiction; in addition to its equity jurisdiction the statute expressly by the use of the phrase "according to law" conferred all the jurisdiction that any law court then had to deal with any question that might be raised as to the real right to the fund.

If not, the statute, and the action of the City having deprived all others of the right to possession, renders a suit in ejectment, of no avail—all the defendant need do is plead that he is not possessed, prove the possession of the City, and the plaintiff can proceed no further. If this be true, then the law is deficient in not providing a method of trying out the plaintiff's claim, and equity has jurisdiction.

But McEuen asserts that the act did provide for all contingencies and conferred plenary jurisdiction upon the court of chancery.

If the court of chancery has jurisdiction it will settle all questions, legal and equitable.

Bullock v. *Adams,* 20 N. J. E. 367;
Hecker v. *Caskey,* 1 N. J. E. 427;
Mosser v. *Pequest Mining Co.,* 26 N. J. E. 200;
Melick v. *Cross,* 62 Eq. 545.

Mr. McEuen is asking only for the restoration of his property, secured to him by the law of this State and the Constitution of the United States.

The McEuens did not ask for the allowance of counsel fees in the court of chancery, and do not appeal from that part of the decree denying counsel fees.

Respectfully submitted,

CECIL H. MacMAHON,
Solicitor for and of Counsel with
Mr. and Mrs. Charles A. McEuen.

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Filed after the Oral Argument by leave of Court.

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

New Jersey Court of Errors and Appeals

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THE CITY OF NEWARK,
Petitioner,

and

HUGH F. COOK, *et als.*,
Defendants-Appellants.

REPLY BRIEF ON BEHALF OF HUGH F. COOK, et als.

There are a few matters which we desire to suggest in answer to some of the arguments made in the briefs filed on behalf of the other appellants.

In arguing that the "destruction by fire or otherwise" provision of the landlord and tenant act does not apply to destruction of the leased building as the result of condemnation proceedings, counsel refer to the case of *In re Willcox*, 151 N. Y. Supp. 141. For reasons we have already suggested in our brief, as well as for the reasons suggested by the Vice-Chancellor in his opinion below, we submit it is obvious that the New York Court based its decision upon a premise that is not tenable, namely, that the words "or otherwise" must receive an *ejusdem generis* interpretation. We submit it needs no argument to demonstrate that the very broad words "or otherwise" are entitled to quite the contrary interpretation.

We believe that we have satisfactorily covered in our brief the point that the Court below erred in allowing a greater rental value to the restaurant store and the third and fourth floors

than the amount of rental which the Surety Realty Company was actually receiving therefrom. In view, however, of the apparent weight being given in the briefs to the alleged offer of $5,000 a year for the third and fourth floors, made by Harrington, it is well to refer to the testimony, which is alleged to support this statement. The only reference in the record to this alleged circumstance is found on page 181. Mr. Harrington there testified:

> "Q Did you ever have negotiations with Mr. Kamm as to the signing of a lease? A Well, I made Mr. Kamm an offer for the premises.
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> Q How much did you offer him? A $5,000.
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> Q Did he accept it? A No.
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> Q Give any reason for refusing it? A He walked away from me.
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> Q Say anything? A Nothing."

There is not another word in the record with respect to this alleged offer.

Here it is most significant to note that Mr. Kamm, although a witness himself, did not mention this supposed offer, although it is inconceivable that he would have overlooked it if made, in view of the attitude taken in his petition and by his counsel as to the alleged greater rental value of the leased premises. Furthermore, the suggestion that he merely walked away when made this offer, which was practically double the amount he was then receiving for the third and fourth floors, is unbelievable. Mr. Kamm would have run no risk in making a term lease with Mr. Harrington, and apparently the possible condemnation did not render Harrington unwilling to make this larger offer, if his testimony is to be believed. Furthermore, if Mr. Kamm knew that these condemnation pro-

ceedings were coming, why did he not do the very obvious thing of making a lease, which would have definitely established this higher rental value of the third and fourth floors? The only reasonable conclusion is that there was something in connection with this alleged offer which has not been brought out and that Mr. Kamm really never had the opportunity to rent for this larger sum the third and fourth floors in the condition which they were at the time of the condemnation proceedings.

In the brief filed on behalf of the Surety Realty Company, the statement is made several times that the value of the remaining lands was $265,000. The same statement is made in the opinion of the Vice-Chancellor.

As we pointed out in our main brief, however, this was the testimony of Mr. Berry as to the value of the lands at the time of the hearing. That took into account the benefit to the remaining portion, by reason of the establishment of the new line of Washington street and the consequent street frontage thereon of some 116 feet. For this improvement the owners of the remainder must still pay through an assessment for benefits which has not yet been made. The only proper inquiry is as to the value of that tract in the condition it was after the property was taken by the City and without regard to the improvement for which the landowners must still pay. As shown in our brief, the only testimony as to the value of this interior plot was that of Mr. Houston, who placed it at $130,000 (p. 195). We submit, therefore, that it is not fair to charge as against the owners an alleged value for the remainder, which takes into account the benefit conferred thereon by the establishment of the new street line.

We are quite confident, for the reasons shown in our brief, that neither McDonald Company, nor the Liggett Company were entitled to any award. For that reason, we did not argue in our brief the further question as to whom any possible award in their favor should be charged against. Should this question become important, we submit that any allowance to either the McDonald Company or the Liggett Company would necessarily have to come out of the award made to the Surety Realty Company. Neither the McDonald Company nor the Liggett Company were in any privity with the landowners, whose contract relations were confined to the Surety Realty Company alone. Neither the McDonald Company nor the Liggett Company's premises possessed any rental value beyond what they were paying—the Vice-Chancellor's opinion establishes that beyond any reasonable doubt.

As to their fixtures, as shown in our brief, they would have had to remove them anyway at the termination of their respective leases. There is no evidence that the value of the fixtures, or the injury thereto by reason of their removal, were taken into consideration by the condemnation commissioners, nor is there any evidence in the record as to the value of the use of these fixtures for the remaining four and one-half years of the respective leases. If either the McDonald Company or the Liggett Company were entitled to any allowance on account of this disturbance of their trade fixtures, it would necessarily have to be confined to their deprivation of the use of them for a period of four and one-half years, inasmuch as at the end of that time they would have had to remove them anyway. But there is no evidence in the record as to the value of that use.

A word may be said as to the argument made on behalf of the McDonald Company that its constitutional rights have been violated by reason of the failure to award it anything on account of this alleged damage to its fixtures and the alleged damage to the good will of its business and its loss of profits.

For the reasons given in the authorities cited in the Vice-Chancellor's opinion, we submit it is quite clear that whatever the law may be in other states, that under the Constitution and laws of this State, this argument must fail, and that the landowners have no constitutional rights as far as the taking of property for road purposes is concerned, other than the rights which may be accorded to them under the governing statute. And the Constitution of the United States does not affect the question when the taking of land for road purposes is involved. As early as 1818, the Supreme Court deemed it settled in this State that the provisions of the old road acts, which denied any compensation for lands taken for road purposes, were constitutional. This notwithstanding the fact that the Fifth Amendment to the Federal Constitution was urged against their validity. *State* v. *Potts*, 1 South. 347. Furthermore, counsel for the McDonald Company misapprehend their relief, even if it is to be assumed that the statute in question is unconstitutional as providing no compensation for damage to fixtures and loss of profits, etc. The allegation is that the Court below violated their constitutional rights, but that is not so. The Court below did nothing more than divide an award made pursuant to the statute, which expressly precludes any allowance on the ground of damage to fixtures, or loss of profits. If anything unconstitutional was

done, it was done by the City in taking the property without making any award because of damage to fixtures and loss of profits. But if the McDonald Company's property in these respects has been taken, its remedy is not to collect its bill from the landowners, but to collect its claim from the City of Newark, which has taken its property without paying for it. Under the statute, and in view of the construction of that statute invariably given not only in the Courts of first instance, but in this Court, the assessment commissioners had no right to and did not, in fact, take into consideration in fixing their award anything but the value of the land and the amount of damage to the remaining land. They could not, and we must presume that they did not, allow anything for damage to fixtures and loss of profits. They would have been acting contrary to the law, as laid down in this State, had they attempted to do so. Not having included anything for these items, the manifest injustice of taking anything from the landowners' award on their account is apparent. This seems too apparent for further discussion. The rights of the McDonald Company, if any rights they have on account of the unconstitutionality of the statute, are, therefore, not against the landowners, but against the City of Newark.

Respectfully submitted.

ARTHUR F. EGNER,
Of Counsel for Hugh F. Cook, *et als.*

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As we pointed out in our main brief, however, this was the testimony of Mr. Berry as to the value of the lands at the time of the hearing. That took into account the benefit to the remaining portion, by reason of the establishment of the new line of Washington street and the consequent street frontage thereon of some 116 feet. For this improvement the owners of the remainder must still pay through an assessment for benefits which has not yet been made. The only proper inquiry is as to the value of that tract in the condition it was after the property was taken by the City and without regard to the improvement for which the landowners must still pay. As shown in our brief, the only testimony as to the value of this interior plot was that of Mr. Houston, who placed it at $130,000 (p. 195). We submit, therefore, that it is not fair to charge as against the owners an alleged value for the remainder, which takes into account the benefit conferred thereon by the establishment of the new street line.

We are quite confident, for the reasons shown in our brief, that neither McDonald Company, nor the Liggett Company were entitled to any award. For that reason, we did not argue in our brief the further question as to whom any possible award in their favor should be charged against. Should this question become important, we submit that any allowance to either the McDonald Company or the Liggett Company would necessarily have to come out of the award made to the Surety Realty Company. Neither the McDonald Company nor the Liggett Company were in any privity with the landowners, whose contract relations were confined to the Surety Realty Company alone. Neither the McDonald Company nor the Liggett Company's premises possessed any rental value beyond what they were paying—the Vice-Chancellor's opinion establishes that beyond any reasonable doubt.

As to their fixtures, as shown in our brief, they would have had to remove them anyway at the termination of their respective leases. There is no evidence that the value of the fixtures, or the injury thereto by reason of their removal, were taken into consideration by the condemnation commissioners, nor is there any evidence in the record as to the value of the use of these fixtures for the remaining four and one-half years of the respective leases. If either the McDonald Company or the Liggett Company were entitled to any allowance on account of this disturbance of their trade fixtures, it would necessarily have to be confined to their deprivation of the use of them for a period of four and one-half years, inasmuch as at the end of that time they would have had to remove them anyway. But there is no evidence in the record as to the value of that use.

A word may be said as to the argument made on behalf of the McDonald Company that its constitutional rights have been violated by reason of the failure to award it anything on account of this alleged damage to its fixtures and the alleged damage to the good will of its business and its loss of profits.

For the reasons given in the authorities cited in the Vice-Chancellor's opinion, we submit it is quite clear that whatever the law may be in other states, that under the Constitution and laws of this State, this argument must fail, and that the landowners have no constitutional rights as far as the taking of property for road purposes is concerned, other than the rights which may be accorded to them under the governing statute. And the Constitution of the United States does not affect the question when the taking of land for road purposes is involved. As early as 1818, the Supreme Court deemed it settled in this State that the provisions of the old road acts, which denied any compensation for lands taken for road purposes, were constitutional. This notwithstanding the fact that the Fifth Amendment to the Federal Constitution was urged against their validity. *State* v. *Potts*, 1 South. 347. Furthermore, counsel for the McDonald Company misapprehend their relief, even if it is to be assumed that the statute in question is unconstitutional as providing no compensation for damage to fixtures and loss of profits, etc. The allegation is that the Court below violated their constitutional rights, but that is not so. The Court below did nothing more than divide an award made pursuant to the statute, which expressly precludes any allowance on the ground of damage to fixtures, or loss of profits. If anything unconstitutional was

done, it was done by the City in taking the property without making any award because of damage to fixtures and loss of profits. But if the McDonald Company's property in these respects has been taken, its remedy is not to collect its bill from the landowners, but to collect its claim from the City of Newark, which has taken its property without paying for it. Under the statute, and in view of the construction of that statute invariably given not only in the Courts of first instance, but in this Court, the assessment commissioners had no right to and did not, in fact, take into consideration in fixing their award anything but the value of the land and the amount of damage to the remaining land. They could not, and we must presume that they did not, allow anything for damage to fixtures and loss of profits. They would have been acting contrary to the law, as laid down in this State, had they attempted to do so. Not having included anything for these items, the manifest injustice of taking anything from the landowners' award on their account is apparent. This seems too apparent for further discussion. The rights of the McDonald Company, if any rights they have on account of the unconstitutionality of the statute, are, therefore, not against the landowners, but against the City of Newark.

Respectfully submitted.

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New Jersey Court of Errors and Appeals

Between THE CITY OF NEWARK, *Petitioner*, *and* HUGH F. COOK, *et al.*, *Defendants-Appellants.*	*On Bill.* *On Appeal from Chancery.*

REPLY BRIEF ON BEHALF OF SURETY REALTY COMPANY, TENANT.

(Unless otherwise indicated, italics are ours.)

I.

The suggestion that the effect of condemnation is to terminate all rights of the tenant.

No contention was made below, nor is made here, by the landlord, that the condemnation, by force of general law, terminated the lease so that the lessee is not entitled to compensation.

We know of no case in this, or any other jurisdiction, so holding.

It has always been considered that the lessee is entitled to damages by reason of the taking of the lease and that the lessor is entitled to damages by reason of the taking of the reversion.

20 *Corpus Juris*, title "Eminent Domain," Sec. 288, p. 850.

The right of a lessee has been recognized in the courts of this State.

See cases cited on pages 4, 5 and 6 of the original brief.

In *Daab* v. *Hudson County Park Commission*, 77 N. J. L. 36, the Supreme Court, speaking through Mr. Justice Swayze, in denying the right of a lessee to recover against the condemning body, in a separate action, said that the intent of the statute, there under review, was that a gross sum was to be awarded for all the interests, estates and shares in land and property, whether in possession, remainder or expectancy. The statute provided no means for distribution of the award. The court said on page 38:

> "The other language of the statute indicates that no such suit at law is necessary for the amount awarded is made enforceable as a lien upon the property taken; and in a suit in equity to enforce such a lien, which is substantially a vendor's lien, the other parties interested in the fund might be brought in, and the fund distributed. Such was the view taken by the English courts in Walker *v.* Ware, Hadham and Buntingford Railway Co., L. R. 1 Eq. Cas. 195."

The Daab case was cited by this court, with approval, in *Herr* v. *Board of Education*, 82 N. J. L. 610, at page 612, in which case this court held that adjoining property owners, who were interested in the land by reason of easements created by restrictive covenants, were entitled to compensation out of the fund awarded. And this court repeated what it had said in *Crane* v. *City of Elizabeth*, 36 N. J. E. 339, 343:

> "When, by the appraisement of the commissioners, the price of the thing is fixed, that price stands instead of the thing appropriated, and represents all interests acquired."

Again, this court in *Case* v. *Boonton*, 95 N. J. L. 440, 442, said:

> "In such a proceeding it is well settled that the assessment of damages involves the property as a *res*, regardless of the number of owners or the nature of their estates."

No suggestion, in the proceedings below, having been made that the effect of condemnation is to obliterate the lessee's rights so that it cannot obtain compensation, there was no opportunity below for the lessee to rely upon the provisions of the Federal Constitution.

The lessee now urges that a determination that, under general law, the effect of condemnation is to place the lessee in a position where it cannot obtain compensation for the value of its leasehold estate, or a construction of any statute of the State of New Jersey which would permit such an effect, would be to deprive the lessee of rights secured to it by the 14th Amendment to the Constitution of the United States in that it would be deprived of its property without due process of law and it would be denied the equal protection of the law.

If the effect of such a determination would be only to appropriate the value of the lessee's property to the public use, the lessee would be deprived of its property without due process of law, and it would be denied the equal protection of the law, the latter because the law gives the right of compensation to others who have interests in the land.

But such a determination would go much further than this. It would operate to appropriate the lessee's property *to the use of the landlord.* The amount to be paid by the condemning body is the value of the fee, *freed of the lease.* The landlord would get the award.

This would mean that the landlord would get the benefit of the lessee's interest in the land. It would be more than the taking of private property for *public* use without compensation. It would be an appropriation of property belonging to one to the *private* use of another without compensation.

There is a distinction between this class of cases and that class in which it has been held that the obligations of certain contracts are subject to being displaced by the operation of public utility laws (and no argument is made in support of those cases). The contracts held affected by public utilities laws were contracts which were made by public utilities with private individuals. As it has been held, public utilities were *always* subject to regulation in the interest of the public, and that, therefore, he who entered into a contract with a public utility did so with the knowledge that the State might intervene at any time in the interests of the public, and regulate the utility; and, if the regulation of the utility affected the contract, that person had no right to complain.

The effect of the holding in this class of cases that contract obligations are obliterated by the operation of the public utilities law is to appropriate the contract rights of the individual to the use of the *public* for, although, initially, the utility is freed of the obligation of the contract, it is only freed of it for the benefit of the public, the public having an interest in the utility. It is an appropriation of private property for *public purposes* without compensation.

The situation in condemnation of land is not at all analogous. The landlord and tenant are private persons contracting with respect to property in which the public has no interest. At some

future time, when it may be determined to take the property for public purposes, the public may obtain an interest, but its interest arises at the time that it determines to take the property. With respect to public utilities, the public always has an interest.

And, as we have stated before, the taking of the rights of the lessee in condemnation, without compensation to the lessee, would operate, not to the benefit of the public, but to the benefit of the landlord, for the landlord would be awarded the value of the fee, freed of the lease, and, inasmuch as the theory of all our cases is that the value of a fee subject to a lease is reduced by the present value of the difference between the rent reserved and the fair rental value of the premises, the effect would be to make a present of this value to the landlord.

II.

The suggestion that the award should be pro rated.

We know of no case in this, or any other jurisdiction, where such a suggestion has been adopted.

The moment that it is conceived that there must be a pro rating of the award that moment it must be admitted that the award, made by the condemning authorities, is inadequate and, therefore, erroneous, for the theory is, as indicated by the cases cited upon the main brief and *supra*, that the amount of the award represents *the value of all the interests in the property.* If the Court of Chancery should determine that the sum of the value of the respective interests is more than the amount of the award, the result is a review by that court of the award of the

commissioners—the theory in condemnation being that the sum of the value of each of the interests cannot exceed the value of the whole.

It has become universal practice, in distributing a gross award, to first fix the value of the lesser interests, the remainder being the value of the reversion.

See cases cited on pages 4, 5 and 6 of the original brief.

The theory is that the landlord has parted with interests in the property and that by parting with such interests he has reduced the value of the land to him by the value of the interests with which he has parted.

This is the only effective way by which the value of the reversion may be determined.

The legality and justness of this method of determination was not questioned below and is not questioned by the landlord here. See his brief, page 21, etc. His complaint upon this phase of the case is limited to a contention that the Vice-Chancellor erred in determining the *value* of the lessee's interest. He does not doubt that the law is that whatever the value of the lessee's interest is must be deducted from the amount of the award.

No testimony was taken below which would permit the application of any rule of pro rating.

The landlord *does* suggest that a fair method of determining the value of the lessee's interest would be to allow it the present value of the income upon the fund for the term of the unexpired lease but, as we pointed out in the original brief, pages 25, 26, if that were done and there be considered the value of the remaining

lands which the landlord retains *freed of the obligation of the lease,* the result would be an award to the tenant of $98,584.32 as against $93,065.93 found by the Vice-Chancellor and $101,962.94 suggested by us. The landlord apparently concedes the justness of including the value of the retained land, but says it is worth $130,000 instead of $265,000, the figures used by the tenant. The Vice-Chancellor deals with this suggestion of the landlord on page 222 of the record, and he finds the value of the land remaining to be $265,000, the figures used by the tenant, and he says: "The interest on the award plus the interest on the amount of the value of the remaining land exceed the net rental value of the property by a substantial sum."

The suggestion of the landlord with respect to valuing the tenant's rights has never been adopted in any case of which we have any knowledge. As the Vice-Chancellor says: "* * * the owner fails to justify his proposed course upon principle or authority."

Why should there be any difference in the method of valuation of a tenant's rights in a lease in condemnation and any other case where it is necessary to value a leasehold estate?

Following *West Jersey R. R. Co.* v. *Thomas,* 23 Eq. 431, affirmed in 24 Eq. 567, this court has held in *Holcombe* v. *Trenton White City Company,* 82 N. J. E. 364, affirming, on the opinion below, 80 N. J. E. 122, 153, that the true method for calculating the value of an unexpired lease is the method which was adopted in this case.

True, the valuation of the lease, there under discussion, was not for purposes of condemnation, but the question there was what is the value of the lease? and the question here is what is the

value of the lease? Upon principle, we submit, there can be no distinction in method of valuation for one purpose and for another where the question is precisely the same, although the proceeding may be different.

It was suggested that there was some duty on the tenant to see to it that an adequate award was made.

We insist that that duty did not rest upon the tenant, rather it rested upon the landlord. If any duty rested upon the tenant, it was to produce to the Condemnation Commissioners evidence of the fair rental value of the premises in aid of the landlord in obtaining an adequate award. It is not denied that the tenant performed that duty. Of course, if the tenant had appeared before the Condemnation Commissioners and attempted to prove a lesser rental value than it attempted to prove in Chancery upon a distribution of the fund, it might be estopped by its conduct before the Condemnation Commissioners. No contention that the tenant did this thing is suggested. The tenant's only concern before the Condemnation Commissioners was to see to it that there was a sufficient award in gross to pay out of it the amount the tenant claimed to be the value of its interest. The duty rested upon the landlord to see to it that the gross amount was sufficient to take care of all of the interests which he had carved out of the fee and of the reversion. Both the landlord and the tenant are supposed to know the law and the law, as settled at the time of this condemnation, was that, upon a distribution of the gross fund, the value of the interests carved out of the fee would be first determined and paid, and that the balance would go to the landlord as representing the value of the reversion.

See cases heretofore cited and also cases from other jurisdictions on pages 4 and 5 of the original brief.

The law being so settled, it was the concern of the tenant only to see to it that the amount of the gross award was sufficient to take care of its interest.

Inasmuch as, under the law, the Condemnation Commissioners were forbidden, in making their award, to split it, it was impossible for the tenant to determine whether, in making up their award, they had allowed, in the gross sum, the amount which it was contended was the value of the tenant's interest. If the gross award, therefore, was sufficient to pay what the tenant claimed to be its share, we doubt if the tenant would be permitted to appeal, for it would not be a person aggrieved. The tenant had no concern with the value of the whole. It was not its business to know the value of the reversion. To hold otherwise would mean that the tenant would be obliged to acquaint itself with not only the value of its own interest, but the value of every other interest which the *landlord* had carved out of the fee. No one knew or could know the interests carved out of the fee by the landlord, the value thereof or the value of the entire *res*. That was the concern of the landlord.

If the landlord was not satisfied with the gross amount awarded by the condemning body, as the value of all of the interests in the property, or the value of the entire *res*, it was the landlord's privilege to appeal and ask for a higher award for the whole.

Not having appealed, he must be held to have acquiesced in the justness of the award of the gross amount as representing the value of *all*

of the interests and he cannot complain if, after a determination by the court of the value of the interests which he has carved out of the fee and the payment thereof to those entitled thereto, there is left an amount which is unsatisfactory to him.

It is impossible to determine what figures were used by the condemning commissioners in arriving at their gross amount.

It must be presumed that they arrived at an amount which fairly represented the value of the entire *res.*

The court having determined the value of the lesser interest, it must be presumed that what is left represents the value of the reversion and that what is left was the figure which the commissioners used as the value of the reversion. *There is no evidence in this case that the amount remaining is not, in fact, the value of the reversion.*

It is impossible to know what elements were taken into consideration by the Commissioners in fixing the value of the whole. Many elements which might be taken into consideration would have no effect upon the value of the leasehold estate. The buildings may have about reached their limit of usefulness, and it might be necessary, at the end of four and a half years, or shortly thereafter, for the owner of the reversion to scrap the buildings. And yet the buildings may be of such a nature as that the fair rental value during the four and a half years yet to run before the Surety Company lease expires, may not, in any wise, be affected. What is certain is, if the opinion below be correct, that the owner of the fee *has parted with an interest in this land and created an estate which will net*

a profit to the holder of the estate, the lessee, the present value of which is in excess of $93,000. If the lease was not in existence the owner of the fee would have this profit for his own. *It is obvious that, the owner of the fee having parted to another with this right to receive this profit, the value of the fee is reduced by that amount.*

It may be that it was wisdom for the landlord not to attempt to have introduced evidence below to show the value of the reversion as a distinct and separate thing.

Again, in considering the amount awarded to the tenant, it should not be overlooked that the landlord retains lands freed of the lease of a value of $265,000.

Not only did counsel for the landlord not offer any evidence with respect to the value of the reversion but, when the Surety Realty Company attempted to offer evidence upon that subject, he objected, and upon his objection the evidence was excluded. (See p. 89 of the record.) The point was made perfectly clear as to what counsel for the Surety Realty Company was after as his statement made at that time indicates. It was as follows (p. 90):

> "Mr. Hannoch. May I make my point as to why I think it is important? I think it becomes important for this reason, it indicates what value the owners of the property thought this particular lease that we had on the property had, because the price at which they were willing to sell subject to our lease is an indication as to what they thought themselves our lease was worth at that time."

There must have been some good reason why the landowner refused to permit any testimony to be offered as to the value which would have a bearing upon his reversionary rights.

III.

The suggestion that whatever amounts may be allowed to McDonald and Liggett should be taken from the amount awarded to the Surety Realty Company.

The landlord did not contend below and does not here, so far as we can discover from his brief, that whatever amounts may properly be allowed to McDonald and Liggett in this proceeding are not proper charges against the fund *as such,* nor that they will reduce the amount properly payable to the landlord out of the fund.

True, there are no contractual relations between McDonald and Liggett and the landlord, but it is not through any contractual relations with the Surety Realty Company that McDonald and Liggett have any claim upon the fund. It is because the fund in court is supposed to represent the sum of the value of the interests of all parties taken by the city.

What the city has done has been to take *in invitum* the interest of the landlord, the interest of the Surety Realty Company and the interests of McDonald and Liggett. The value of these respective interests are included in the award.

Although the Surety Realty Company has a contract with the landlord, it is not because of any breach of the contract by the landlord or because of any tort of the landlord that it asserts its interest in the fund. Its interest in the fund is direct. Its right was against the City of Newark for taking its lease and its interest in the fund is because the City of Newark has substituted the fund in the place of the property. So with McDonald and Liggett. If they had any rights, their rights were not against the Surety

Realty Company, because that company has breached its contract with them or committed a tort. Their rights were against the City of Newark, and the City of Newark having substituted the fund for the property, their rights are direct against the fund.

But, if it be the fact that, initially, whatever amount McDonald and Liggett obtain is to be taken from the value of the leasehold of the Surety Realty Company, the only result is to increase the value of the leasehold of the Surety Realty Company by the amounts awarded to McDonald and Liggett.

The court below fixed the value of the lease of the Surety Realty Company by assuming that the fair rental value of the premises sublet to McDonald and Liggett were the amounts paid by McDonald and Liggett. If the fair rental value of the premises so sublet exceed the amounts paid by them, the fair rental value of the whole of the premises leased to the Surety Realty Company is increased by just those amounts, for the value of the leasehold of the Surety Realty Company *is the present value of the difference between the rent reserved and the fair rental value of the premises.*

The Surety Realty Company might, if it had desired, have let all of these premises at a grossly inadequate rent. If it had leased the premises for the full term, four and a half years, at a grossly inadequate rent, it would, of course, have barred *itself* from getting out of the fund more than the present value of the amount which it might make on the grossly inadequate rentals. But it would not bind itself to pay out of *this* amount the value of the subleases in cases where the rents were inadequate. *To permit that to*

be done would be to permit the landlord to appropriate to his own use the property of the Surety Realty Company, for what the landlord has parted with is a lease, the value of which is the present value of the difference between the rent reserved and the fair rental value. It is no concern of the landlord as to what particular person—be he the lessee or the sub-lessee—is entitled to this difference or portion thereof.

The Surety Realty Company has protected itself by appeal so that, if this court should feel that the Vice-Chancellor erred in holding that the rental value of those portions of the premises leased to McDonald and Liggett is the amount of the rent reserved, then it is obvious that the Vice-Chancellor erred, when he came to fix the value of the Surety Company lease, in assuming that the rental value of the premises leased to McDonald and Liggett is the same as the rent reserved, and the amount to be paid to the Surety Realty Company will have to be increased by the amount allowed to McDonald and Liggett, if the amount allowed to McDonald and Liggett is to be paid out of the award to the Surety Realty Company, and the matter is as broad as it is long.

We feel, however, that this discussion is more or less academic because we believe that the Vice-Chancellor was clearly right when he found that the fair rental value of those portions of the premises leased to McDonald and Liggett is the same as the rent reserved.

So far as the claim of McDonald and Liggett for damages to business and to fixtures is concerned we feel that they are not properly the subject matter of this suit. There can be no recovery against either the landlord or the Surety

Realty Company, for these items of damage, in contract or in tort, for neither the landlord nor the Surety Realty Company breached any contract or committed any tort. What was done was done by governmental authority *in invitum.*

The only theory upon which there could be recovery against the fund, as such, would be that the fund included in it damages to fixtures and to business, and therefore, was, in effect, money held to the use of McDonald and Liggett. But the law is that such damages cannot be included in an award in condemnation. It is presumed that the commissioners obeyed the law as it was settled at the time of the condemnation proceedings and that the award does not include such damages.

The remedy of McDonald and Liggett is against the City of Newark for the taking of property without making compensation.

IV.

THE REAL QUESTIONS HERE.

There are two questions properly presented by the record and we submit that the matter comes down to a discussion of those two matters.

(a) The application of the supplement to "An act concerning landlords and tenants," Vol. 3, Comp. Statutes, page 3078, Section 31, which we have considered in the original brief and about which we will say no more.

(b) The finding of fact by the Vice-Chancellor as to the value of the Surety Realty Company lease. We submit that the principles of law are settled and have not been attacked by the landlord. It is a mere matter of applying the law to the facts.

It is urged that the Vice-Chancellor, in determining the value of the Surety Company lease, erred in but three particulars: First, by not deducting from the annual rent $2,080 paid by the Surety Realty Company to Kamm, its president; second, for not deducting something for prospective improvements, and third, for not considering the fair rental value of those portions of the premises not under term leases as the amount which, at the time, was being received from monthly tenants.

With respect to the item of $2,080 paid by the Surety Realty Company to Kamm, its president, the Vice-Chancellor said (p. 221), and it is a fact, "The company belongs to Mr. Kamm and he is entitled to all its income, and whether he takes it by way of salary or income is immaterial." The company was Kamm, Inc.

There was no evidence that Kamm, as president, performed any services for which he received a salary of $2,080. There is no evidence that any personal service was necessary in looking after the property and in running the company, as counsel suggests on page 25.

On the contrary, it appears that the major part of the property was subleased until the termination of the Surety Realty Company lease. Kamm, of course, did not personally collect the rents and did not personally have anything to do with the carrying of this property. The carrying charges, including collection of rents, supervision, etc., are all included in the item of $2,063.82, which was subtracted from the total rental income in the calculations of the Vice-Chancellor (p. 220).

The only basis for the landlord's contention as to the second item was that in one year, *i. e.*,

1923, the Surety Realty Company did spend $962 for improvements (p. 108). But there was no evidence that, for the four and a half years yet to come, it would be necessary for the Surety Realty Company to repeat this expenditure—certainly no evidence that each year for the four and a half years it would be required to repeat it.

The leases from the Surety Realty Company to its sub-tenants provided that the sub-tenants should make the repairs.

Nothing was spent for improvements in 1921, 1922, 1924 or 1925.

The improvement for which $962 was spent in 1923 was the building of a wall by a contractor (p. 108).

There was no suggestion that the buildings were of such a nature as to need any improvements.

Certainly no suggestion that the Surety Realty Company would have to again build a wall.

The third matter to which the landlord objects is the fixation of the rental values of the third and fourth floors and of the restaurant at greater figures than actually received at the time of the condemnation by the Surety Realty Company.

Counsel on pages 22 and 23 of his brief treats this action on the part of the Vice-Chancellor as a penalizing of the owner. There is no penalty visited upon the owner, for the Vice-Chancellor has charged the owner only with what the fair rental value of the premises is. If he is charged with less than the fair rental value there is a penalty imposed upon the lessee.

The question, therefore, is simply—does the rent received from the monthly tenants represent the fair rental value of the premises?

On page 22 counsel, realizing that this is the test, states that—"It certainly is a fair presumption that he had rented the property at the top of the market." He says that (p. 23) the rental value (that fixed by the Vice-Chancellor) could not be realized by Kamm because of his *inability* to make leases for terms of years in view of the fact that the proposed condemnation of the property, in connection with the widening of Washington street, had been discussed for some years. He treats the condemnation proceedings as affecting the "Surety Company's *ability* to rent for larger amounts the third and fourth floors and the restaurant. * * *"

He misconceives, it seems to us, the testimony of Kamm. Kamm does *not* say that he *could not* have rented the third and fourth floors and the restaurant at larger rentals than he received from monthly tenants. On the contrary, on page 72 of the record, he says that he was able to rent them at higher rentals on a term basis. And the testimony of Harrington (p. 181) is that he offered $5,000 for the third and fourth floors, which was considerably more than could be obtained on a monthly renting.

What Kamm did was to deliberately refrain from renting these portions of the building, on other than a monthly basis, because he did not desire to be bound upon the covenants (pp. 71, 72).

And he did not take this position until the condemnation became an assured thing. He did not bind himself to rent the premises during the four and a half years on anything but a monthly rental.

If he had sublet the premises for four and a half years at less than fair rentals and so had

situated himself as that he could not get out of the premises their fair rental, he, of course, could not get the present value of the difference between the rent reserved and the fair rental value for he would have put it out of his power to have obtained the fair rental value. *But the landlord would not have profited by this for his sub-tenants would have been entitled to the present value of the difference between the rent reserved in the subleases and the fair rental value of the premises.*

If he had devoted the premises, for the full term of the lease, to charity and reserved no rent, he could not, himself, have obtained anything from the fund, but *the charity would have obtained that which he did not obtain, and the landlord would not have benefited.*

There can be *no penalizing of the landlord* unless the amount awarded out of the fund to lessees and sublessees is more than the present value of the difference between the rent reserved and the fair rental value.

If, by reason of any act on the part of the tenants or sub-tenants, they cannot take to themselves this difference and the landlord is permitted to retain it, the landlord secures a benefit, to which equitably he is not entitled, merely because there is no one in existence to take the amount which may represent the present value of the difference between the rent reserved and the fair rental value.

It is an axiom in condemnation proceedings that, in determining the value of land or interests therein, the fact that it is being condemned cannot be taken into consideration. The values are to be fixed as if there were no condemnation. Any other rule, would result either in the prop-

erty and interests therein becomng more valuable because of their value to the condemning body or less valuable because the condemning body had the absolute power to take and was going to use the premises for purposes such as recreation ground, which would have no market value.

Under the circumstances, are the amounts which the Surety Realty Company was receiving from the third and fourth floors and the restaurant from monthly tenants the true criterion of fair rental value?

If there were no testimony, the answer would obviously be *no* for, as the Vice-Chancellor says in his conclusions (p. 221), "It is well recognized that assurance of a long term commands a better price."

In this case, we do not have to depend upon the obvious answer because there is testimony of an expert nature with respect to the fair rental value, and there is the testimony of the tenant Harrington of the offer which he made of $5,000 a year for the third and fourth floors, which is not denied.

Counsel attempts to say that this testimony of Harrington was false upon its face for he says that it is impossible to conceive that the Surety Realty Company, if it had such an offer, would not have accepted it. He overlooks the fact that Kamm testified that he deliberately took the position that he would not enter into any long-term lease because he did not intend to be bound by the covenants at that time.

Counsel criticises the resort to expert testimony.

We cannot think of any case in condemnation—certainly no case where the value of leasehold interests are to be fixed—that does not require expert testimony. If the lessee has sublet all of the premises for the entire term and therefore has bound himself not to receive more than the amount reserved in the subleases, his sub-tenants under *their* leases are entitled to compensation for their rights and it will be necessary to resort to expert testimony to determine whether the rent reserved in their leases is equal to the fair rental value of the premises leased by them. If the tenant has not sublet any of the premises and is in possession himself it will be necessary to resort to expert testimony to determine whether there is any difference between the rent reserved and the fair rental value. Somewhere in every one of these cases, we will find a person in possession paying a certain rent, and the question as to whether the rent which he is paying is equal to the fair rental value of the premises will have to be determined by expert testimony. The value of the whole premises to the landlord was determined on expert testimony. So long as the rule is that the land owner is entitled to fair compensation for his property, and that the tenant is entitled to the present value of the difference between the rent reserved and the fair rental value of the premises for the unexpired term, it will be necessary to resort to expert testimony.

If the Vice-Chancellor erred in determining the fair rental value of the third and fourth floors and the restaurant he erred by placing that value too low upon the testimony which was before him.

We have considered this on pages 19, 20 and 21 of the original brief, and will only add that

we ask the court to read the testimony of John J. Berry, the expert called by the Surety Company (p. 78); Leslie Blau, the expert called by Harrington and Ace Radio Company (p. 174), and David Houston, the expert called by the land owner (p. 189), particularly his cross examination (p. 197), and we submit that, from the examination of these respective witnesses, it will appear that the greater credit is to be given to Blau and Berry.

Notwithstanding the fact that Berry testified that the fair rental value of the third and fourth floors was $5,500 (p. 83) and that Blau testified it was $5,860 (p. 175), and that there was an offer for these premises of $5,000, the Vice-Chancellor fixed $4,000 as the fair rental value (p. 221), $1,500 less than Berry and $1,860 less than Blau and but $1,200 more than Houston, although Houston assumed only 4,000 feet in his calculations, and it was recognized and conceded that he had never rented any property in the vicinity at or about the time of the taking (p. 203).

Notwithstanding the fact that both Berry (p. 84) and Blau (p. 175) testified that the fair rental value of the restaurant was $5,250, the Vice-Chancellor fixed its value at $4,000 (p. 221), $1,250 less than Berry and Blau and but $250 more than Houston, who had fixed it at $3,750 (p. 191).

So with the radio shop, with respect to the valuation of which the land owner does not seem to complain, Berry (p. 83) and Blau (p. 175) fixed the rental value at $3,000 per year, Houston at $2,000 per year (p. 190), although it was under lease for $2,100, not to expire until September 15, 1926. The Vice-Chancellor places the rental value at $2,100 (p. 221).

These rental values fixed by the Vice-Chancellor, so far under the estimates of Berry and Blau, who *had* had experience in renting property in the vicinity, while Houston had not, can only be justified by what the Vice-Chancellor said on page 221, *i. e.*, that he had made due allowance for the partisanship in expert testimony and for the *difference between expectation and realization* (p. 221).

The statement on page 24 of the landlord's brief that the Vice-Chancellor did not take into consideration the possibility of vacancy, lack of responsibility on the part of tenants, or any of the numerous incidents which so often make a landlord's return from his property, melt away, can hardly be justified in the face of the testimony as to the rental values and the amounts fixed by the Vice-Chancellor and his statement that he had taken into consideration "the difference between expectation and realization" (p. 221).

What the Vice-Chancellor did *not* take into consideration and which would have operated in favor of the tenant was the reasonable expectation of further increase in rental values during the four and a half years to come, rental values in the neighborhood being on the increase, as was known to everybody.

The error underlying the landlord's argument on pages 22 and 23 of his brief is his assumption that the Surety Company had found it impossible to rent these premises at more than was being received from the monthly tenants. This assertion is often repeated. There is no testimony to support it. Every word which goes to the point is to the effect *that it was possible* but that the Surety Company deliberately refrained

from so doing in view of the impending condemnation.

Conclusion.

There is no evidence in this case upon which an assumption can be based that the amount of the award paid into court does not fairly represent the value of all of the interests in the premises. There is no evidence upon which an assumption can be based that the amount which is left, after the payment to the Surety Company of $93,065.93, or $101,962.94, as we contend, does not fairly represent the value of the reversion to the landlord. In considering the amount left to the landlord, the value of the remaining property, $265,000, must be considered.

There is no evidence upon which an assumption can be based that, if the amount paid into court represents the fair value of all the interests and the landlord has parted with an interest which deprives him of deriving a profit from the lands of $93,065.93 (present value), during the four and a half years to come, the value to the landlord is not reduced by that amount, as of this time. There is no evidence which supports the statement of counsel that the landlord is being penalized for making an improvident lease. At the time the lease was made, and for many years thereafter, from the standpoint of the landlord, it was not improvident. The lessee took the risk. By its contract it is entitled to the profit. We are not advised as to what the fair value of these premises were at the time the lease was made. We do know from the testimony that values, including rental values,

shot up in this vicinity when Bamberger's store was built, about 1921 (pp. 186, 187).

Respectfully submitted,

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