NEW JERSEY COURT OF ERRORS AND APPEALS.

CAMDEN, ATLANTIC and VENTNOR LAND COMPANY, *Plaintiff, Respondent,* vs. WEST JERSEY and SEASHORE RAILROAD COMPANY, *et als.,* *Defendants, Appellants.*	ON APPEAL.

BRIEF OF BOURGEOIS & COULOMB, ATTORNEYS FOR DEFENDANTS.

This is an appeal from a judgment of eviction in favor of the plaintiff in an action of ejectment, rendered at the Atlantic County Circuit. The judgment was on a verdict of the jury directed by the trial Court.

The facts upon which the verdict was directed were stipulated and not in dispute.

FACTS.

The land in question was owned by the Camden and Atlantic Land Company. That company conveyed it to the Camden and Atlantic Railroad Company by deed of conveyance dated May 1, 1871 (Exhibit P5,

page 12). The Camden and Atlantic Railroad Company was incorporated in 1852 (P. L. 1852, page 263). By virtue of its charter it was provided, among other things, as follows:

> "Be it enacted, etc., that John W. Mickle, etc., and such other persons as may be hereafter associated with them, shall be and are hereby ordained, constituted and declared to be a body politic and corporate, in fact and in name, by the name of the Camden and Atlantic Railroad Company, and shall be capable of purchasing, holding and conveying any lands, tenements, goods and chattels whatsoever necessary or expedient for the objects of this incorporation."

The Camden and Atlantic Railroad Company entered upon the lands in question and constructed thereon a railroad track, and continued to occupy the same with its tracks until on or about the 1st day of April, 1916, when the tracks were removed (page 4, line 20). The West Jersey and Seashore Railroad Company, the defendant, succeeded to the rights of the Camden and Atlantic Railroad Company on the 28th day of February, 1896 (page 4, line 1). On the 19th day of April, 1916, the West Jersey & Seashore Railroad Company conveyed part of the premises in question to Armand T. Nichols, and part to Frank Ruffu (page 4, line 27), and has agreed to convey the balance to one Jackson (page 11, line 23), which land was actually conveyed after the bringing of this suit (page 11, line 27). The Camden, Atlantic and Ventnor Land Company, the plaintiff, succeeded to the rights of the Camden and Atlantic Land Company by deed of conveyance dated May 8, 1889 (page 7, line 20).

The reasons upon which the trial Court directed

the verdict in favor of the plaintiff are set forth on page 21, line 30, to page 22, line 25. The Court proceeded upon the theory that the Camden and Atlantic Land Company conveyed to the Camden and Atlantic Railroad Company a limited or base fee to the lands in question; that the land was to be used, according to the deed, for the purpose of a railroad, and during the continuance of the railroad and not necessarily during the lifetime of the railroad corporation, and that when it ceased to use the land for track purposes its title thereto ceased and reverted to the grantee of the Camden and Atlantic Land Company, namely, to the Camden, Atlantic and Ventnor Land Company.

REASONS.

Exceptions were taken to the failure of the Court to direct a verdict in favor of the defendant and also to the Court's action in directing a verdict in favor of the plaintiff (page 22, line 26). These exceptions make the basis of the appeal to this Court by grounds of appeal printed on page 28 in the state of the case. The following grounds are urged for reversal:

1. The Court erred in directing a verdict in favor of the plaintiff.

2. The Court should have directed a verdict in favor of the defendant.

3. There was no evidence before the Court to support the verdict in favor of the plaintiff.

4. Because the Court upon the agreed state of facts adjudged that in the law plaintiff was entitled to judgment in its favor, whereas under the law judgment should have been rendered for the defendant.

ARGUMENT.

THE CONVEYANCE IN QUESTION.

The deed of conveyance from the Camden & Atlantic Land Company to the Camden & Atlantic Railroad Company in question in this suit was made on the first day of May, 1871. It recites that the Legislature by an act entitled, "An Act to Incorporate the Camden & Atlantic Railroad Company," approved March 19, 1852, said company was authorized to survey, lay out and construct a railroad from the City of Camden, in Camden County, to the sea at or near Absecon Inlet, in Atlantic County, with powers necessary and expedient for this purpose.

It is further recited that the Camden & Atlantic Land Company has previously entered into an agreement with the Railroad Company for the conveyance of certain lands, and that the Railroad Company was then in possession thereof.

The granting clause is based on a consideration of $450.00, lawful money of the United States, the receipt of which was thereby acknowledged, thereupon the Camden & Atlantic Land Company did grant, bargain, sell and convey unto party of the second part, their successors and assigns the tract of land described therein, *together with all the rights, members, privileges and appurtenances to the same belonging or in any wise appertaining, and all the estate of the said party of the first part, to have and to hold unto the said party of the second part, their successors and assigns, for the purposes of said railroad, for and during the continuance of the said railroad, to their only use, benefit and behoof forever.*

Then follows a covenant by the Camden & Atlantic

Land Company, for themselves and their successors, running to the party of the second part, their successors and assigns, "*that they, the Camden & Atlantic Land Company, have not done or suffered to be done any act or thing to charge, alter or encumber the estate and interest hereby granted.*"

Then follows a special covenant as follows:

> "But that the same is hereby granted and conveyed as full, free and entire to the said party of the second part, their successors and assigns, as if it was vested in the said party of the first part, their successors and assigns."

This deed of conveyance must be read so that every part thereof will take effect, if possible.

The plaintiff's contention is that defendant is without authority to sell and convey the land; that immediately upon such sale and conveyance, the estate of the Railroad Company therein ceases and determines, and thereupon the plaintiff is entitled to recover the land from the Railroad Company, or its grantee, in a suit of ejectment.

The first obstacle to this contention that presents itself is the fact that the granting clause, the habendum, and the special covenant all run to the defendant, its successors and assigns. If the grantor did not intend the defendant to have the power to sell this land, why did the grantor make its conveyance to defendant, "its successors and assigns"?

A conveyance to one and his assigns surely carries with it the power of alienation, and the person thus conveying is estopped by his deed from denying that such grantee has not the power to sell.

Therefore, in determining the quantity or estate that the Camden & Atlantic Land Company intended to convey, it must not be overlooked that they made

the grant to the Railroad Company, *its successors and assigns*, and the habendum is likewise to the Railroad Company's successors and assigns. The covenant is also to their successors and assigns. The word *successors* was appropriate to indicate an intention to convey a fee simple absolute, but the word *assigns* had no relation to the quantity of the estate. The word *assigns* conclusively indicates that the Camden & Atlantic Land Company intended that the Railroad Company should be free to alienate the land.

> "The word *assign* in conveyancing means to transfer or assign property or some interest therein."
>
> 2 *Blackstone*, 326.

> "*Assigns* means those to whom property shall have been transferred. Now seldom used except in the phrase in deeds *heirs, administrators and assigns.*"
>
> 8 R. L. 36.

In the case of *Adams vs. Ross*, 30 N. J. L. 503, the Court of Errors and Appeals held that:

> "In the construction of a deed, the question is not what estate did the grantor intend to pass, but what estate did he pass by proper and apt words? No expression of intent, no amount of recital showing the intent will supply the omission."

RECITALS.

Plaintiffs claim that a base or determinable fee only was conveyed by the deed in question, pointing out that the deed recites that it is made in pursuance

of a previous agreement to be held by the company, their successors and assigns during the continuance of the said road.

The first question to be considered in this connection is: What force and effect do the recitals in a deed have upon its interpretation?

In the case of *Leggott vs. Barrett*, 15 Ch. Div. 306, at page 311, Lord Justice Brett said:

> "I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed, and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document or by the governing part of that document. If there is any doubt about the construction of the governing words of the document, the recitals may be looked at in order to determine what is the true construction, but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or the deed. If, therefore, there had been any difference here between what was called the preliminary contract and the deed, I should have thought that it must have been the deed which governed."

The case at hand is very similar to the foregoing case of *Leggott vs. Barrett*, and the deed of conveyance, being a more solemn agreement than the agree-

ment between the parties, and being the last agreement executed by them, is of greater force than the previous agreement, and it will be presumed in law that after the previous agreement had been made, the parties broadened its scope, as shown by the deed, even though the previous agreement formed the basis of the conveyance.

In the case of *Young vs. Smith,* 35 Beav. 87, at page 89, Sir John Romilly, Master of the Rolls, said:

> "It is important to keep the separate parts of a deed clear and distinct. The recitals and the operative parts ought to be carefully distinguished. Where they are at variance, the operative part is that which is officious, and the recital is ineffectual and produces no effect. A recital may explain an ambiguity in the operative part, but it cannot have the effect of introducing a covenant into it. The recitals in a deed are occasionally very loosely framed, but I adhere to what I said in Hammond vs. Hammond, 19 Beav. 29, to the effect that where the operative part of a deed is at variance with the recital, the proper mode of dealing with the case is to act on the operative part unless and until the deed has been reformed."

In the case of *Daws vs. Tredwell,* 18 Ch. Div. 354, at page 358, Jessel, Master of the Rolls, said:

> "This case, apart from the recital, is identical with Ramsden vs. Smith. Now the rule is that the recital does not control the operative part of a deed where the operative part is clear."

In the case of *Bailey vs. Lloyd,* 5 Russ. 330, at page 344, Sir John Leach, Master of Rolls, said:

> "If the operative part of a deed be doubtfully

expressed, there the recital may safely be referred to as a key to the intention of the parties, but where the operative part of the deed uses language which admits of no doubt, it cannot be controlled by the recital."

In the case of *Holliday vs. Overton*, 14 Beav. 467, at page 470, Sir John Romilly, Master of the Rolls, said:

"It is impossible by a recital to cut down the plain effect of the operative part of a deed."

In the case of *Abbott vs. Curran*, 98 N. Y. 665, 668, the New York Court of Appeals said:

"The lands mortgaged were granted by the state and in such grant it was recited that the grant was made for commercial purposes only, and for the benefit of commerce, but this language in the grant did not impose either a condition precedent or subsequent or any restriction upon the absolute title."

HABENDUM.

The essential part of the deed is the granting clause, in the case at hand, made to the Railroad Company, its successors and assigns, without qualification or limitation, by which an estate in fee was created by certain express words. It cannot be cut down by the habendum. It might be explained by the habendum, but there is in this case nothing to explain.

In the case of *Smith vs. Woodruff*, 12 N. J. L. J. 149, Mr. Justice VanSyckel said:

"The granting clause conveys the fee, and

therefore the fee passes unless the estate granted is cut down by the habendum. Where the premises do not mention the estate granted, the habendum becomes effective as a declaration of the grantor's intention, but it cannot divest or cut down the estate specifically granted by the granting clause, for it is void if it be repugnant to the granting clause," citing 2 *Wash. on Real Property,* 689; 4 *Greenl. Cruise,* 272; *Kent's Com., &c.*

In 4 *Kent's Comm.*, at page 468, the law of the habendum is stated as follows:

"This part of the deed was originally used to determine the interest granted or to lessen, enlarge, explain or qualify the premises, but it cannot perform the office of devesting the estate already vested by the deed, for it is void if it be repugnant to the estate granted. It has degenerated into a mere useless form, and the premises now contain the specification of the estate granted, and the deed becomes effectual without any habendum. If, however, the premises should be merely descriptive and no estate be mentioned, then the habendum becomes efficient to declare the intention, and it will rebut any implication arising from the silence of the premises."

In 2 *Blackstone Comm.* 298, the law is stated as follows:

"A deed in the premises to him and his heirs; habendum, to him for life, the habendum would be utterly void for an estate of inheritance is vested in him before the habendum comes, and shall not afterwards be taken away or destroyed by it."

In the case of *Dodwell vs. Gibbs,* 5 Barn. & Cres. 709, the premises were to A, his heirs and assigns, with a habendum for life. The Court of King's Bench held:

> "An habendum is not an essential part of a deed, and if it be repugnant to the granting clause, it must be rejected," stating the rule to be: "If an estate be granted in the premises, and that grant is express and certain, the habendum shall not vitiate it."

This rule of law is equally true with regard to the *whereas* in the premises. That not being an essential part of the deed, is utterly void if it is inconsistent with the plain, expressed terms of the granting clause, which is an essential part of the deed.

In the case of *Havens vs. Seashore Land Co.,* reported in 47 Eq., at page 365, at page 371, Vice-Chancellor VanFleet, discussing this subject, said:

> "When the granting clause of a deed is silent as to the estate intended to be conveyed, resort may be had to the habendum to ascertain the intention of the grantor in that regard. It cannot be used either to enlarge or diminish the estate specifically defined in the granting clause, for if it is repugnant to that clause, it is void, but if that clause is either silent or ambiguous, then the habendum becomes the standard by which the estate granted must be measured," citing the case of *Staffordville Gravel Co. vs. Newell.*

In the case of *Staffordville Gravel Co. vs. Newell,* 53 N. J. L. 412, at page 415, our Court of Errors and Appeals, speaking by Chief Justice Beasley, said:

> "Nor should it be overlooked that if the language of the granting clause of this indenture

> should be considered doubtful or ambiguous, then the language of the habendum becomes important, and the well settled rule is that if the granting part of the conveyance does not by clear and definite terms conclude the question, this clause, whose office is to define the extent of the ownership granted, may be resorted to. It may be used to explain but not to vary or control the premises."

In that case the granting part purported to convey only reversions and remainders, but the Court held that the deed conveyed an absolute ownership in the property.

In 1 *Devlin on Deeds,* Second Edition, Sec. 220, the law is stated:

> "While the habendum cannot abridge an estate, yet where the granting clause does not mention the estate conveyed, the habendum may have the effect of declaring the intention and may overcome any presumption that in its absence would properly arise from the defect in the preceding clause, but it is to be understood that the habendum, when irreconcilable with the granting clause, is to be rejected and is to affect the grant only when it can be construed as consistent with the premises."

An illustration of when it may be construed as consistent with the premises is found in 3 *Bacon's Abridgement* at page 434, as follows:

> "If land be given to A and his heirs; habendum, to him and the heirs of his body, this is but an estate tail, because the habendum expounds the general word *heirs* in the premises, for though it cannot change or alter them so as to

retract the gift in the premises, yet it may well construe and explain them while such construction is consistent with the premises and does not destroy the operation of the words mentioned in them but only explains in what sense they are to be taken and what heirs are comprehended."

In the case of *Riggins vs. Love*, 72 Ill. 533, at page 535, the Supreme Court said:

"We concede that the habendum cannot perform the office of divesting the estate already vested by the deed, and that it is void if it be repugnant to the estate granted, but where no estate is mentioned in the granting clause, then the habendum becomes efficient to declare the intention, and it will rebut any implication which would otherwise arise from the omission in this respect in the granting clause."

In the case of *Berry vs. Billings*, 44 Me. 416, at page 423, the Supreme Court said:

"The office of the habendum is to name the grantee and to limit the certainty of the estate. If the premises in the deed are merely descriptive and no particular estate is mentioned, then the habendum becomes efficient to declare the intention."

In the case of *Nightingale vs. Hidden*, 7 R. I. 115, at page 118, the Supreme Court said:

"The deed by the premises purports to grant, sell, and convey the Westminster Street property to the said Samuel G. Arnold, his heirs and assigns forever, giving him an absolute fee simple therein, and by the habendum, a use mere-

> ly, as the plaintiffs claim; a trust, as the defendants claim, is limited therein which is expressed in the deed by the words, 'and to and for the only proper use, benefit and behoof of the said Eliza Harriet Arnold, her heirs and assigns forever,' so that her estate as created by the deed, whether it be for a use or for a trust, is also in fee simple. The rule stated in the argument as to the office and effect upon the conveyance of the habendum in a deed are in their proper application undoubtedly true, though it cannot divest the grantee of the legal estate already granted to him in the premises, and where by the premises the estate is granted to one, it cannot by the habendum frustrate a grant complete before, or abridge or lessen the estate granted. All this is true of the legal estate."

The Court then proceeds to state that the deed did not profess to affect the legal estate already granted in the premises but only to create an equitable estate in the *cestui que trust.*

Plaintiffs contend that a conveyance to A, his heirs and assigns, in trust for B, is an illustration of where the habendum may limit the granting clause. Defendants deny this proposition, and say that in such a case the entire legal title is in the grantee, his heirs and assigns, and ejectment will not lie by the *cestui que trust* against the grantee for possession of the premises. The estate of the *cestui que trust* is an equitable estate and can be enforced only in a court of equity and has no place in a court of law.

In 1*st Jones on Real Property,* Secs. 563 and 564, the law is stated as follows:

> "The premises of a deed are often expressed

in general terms which admit of explanation, which is usually found in the habendum. The premises frequently do not describe or profess to describe the quantum or extent of the estate granted or intended to be granted. If no words of inheritance are used in the premises, the grantee of the premises takes by implication only a life estate at most. The habendum may then, by express limitation, define the estate granted as an estate for life in fee, or in fee tail, and the estate so expressly defined necessarily excludes the uncertain implication from the premises.

"Sec. 564. The habendum may confirm, qualify or limit the estate or fee declared in the premises, but so far as the habendum is inconsistent with the declaration in the premises it must be rejected."

In the case of *Hafner vs. Erwin,* 43 Am. Dec. 390-391, the Court said:

"The habendum part of a deed was originally used to determine the interest granted, or to lessen, enlarge, explain or qualify the premises, but it cannot perform the office of divesting an estate already vested by the deed, for it is void if it be repugnant to the estate granted in the premises. Chancellor Kent remarks that in modern conveyancing the habendum clause in deeds has degenerated into a mere useless form for the premises contains the names of the parties and the specification of the thing granted, and the deed becomes effectual without any habendum. In the case before us the whole interest in the property is granted and conveyed to the plaintiff in the premises of the deed. The same interest being afterwards limited in the habendum

to Currie makes that part of the deed repugnant to the premises and therefore void."

In the case of *Jackson vs. Ireland*, 3 Wend. 99, at page 102, the Court said:

"The habendum clause in the deed from the corporation of Albany to John, James and Sarah Ireland is not inconsistent with the premises or granting part. The deed recites the will and the object of all the parties was to give effect to it by means of this conveyance. The legal effect of the deed is the same as though the habendum clause instead of saying to have and to hold to the same parties in the same manner mentioned in the last will and testament of Thomas Ireland, deceased, had, without reference to the will, given the estate to the defendant during her widowhood and the remainder to the two sons in fee. There can be no question that the estate granted may be thus designated and made certain habendum. It enlarges and explains but is not inconsistent with the previous parts of the instrument," citing cases. "No doubt the premises in the deed must control when the habendum clause is inconsistent with it."

In the case of *Brown vs. Manter*, 53 Am. Dec. 223, at page 224, the Supreme Court of New Hampshire said:

"If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed except by implication and presumption of law, but if the habendum follows, the intention of the parties as to the estate to be conveyed will be found in the habendum and consequently no implication or presumption of law would be made, and if the intention so expressed be con-

trary to the rules of law, the intention cannot take effect and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shown and the deed may be effectual without any habendum, and if a habendum follow which is repugnant to the premises or contrary to the rules of law and incapable of a construction consistent with either, the habendum shall be rejected and the deed shall stand upon the premises."

In the case of *Budd vs. Brook*, 43 Am. Dec. 321-337, the Supreme Court of Maryland, in discussing the office of habendum, said:

"In our opinion the limitation contained in the habendum must be rejected and the estate given in the premises must prevail * * * Where there are two clauses in a deed, of which the later is contradictory to the former, the former shall stand, and where the habendum is repugnant and contrary to the premises, it is void and the grantee shall take the estate given in the premises. This is a consequence of the rule already stated that deeds shall be construed most strongly against the grantor. Therefore he shall not be allowed to contradict or retract by any subsequent part of the deed the gift made in the premises."

To the same effect are the cases of:

Pynchon vs. Sterns, 11 Metcalf, 316;
Adams vs. Dunklee, 19 Vt. 382;
Smith vs. Pollard, 19 Vt. 272;
Lamb vs. Medsker, 74 N. E. 10-12;
Chamberlin vs. Runkle, 63 N. E. 486-489;
Flagg vs. Eames, 40 Vt. 22;
Palmer vs. Cort, 42 N. E. 797.

It will not be overlooked that the habendum recites that the conveyance is for the purposes of the railroad, and that under the act of incorporation the railroad is empowered to take a fee simple title, and to buy and sell real estate.

The habendum does not limit the purposes, and therefore the conveyance must be construed as having been made to them for all and any purpose; for the purpose of sale as well as for the purpose of trackage use.

This brings us to the question:

What was the force and effect of the words in the habendum "to have and to hold for the purposes of the said railroad for and during the continuance of the said railroad, to their only use, benefit and behoof forever?"

The context of the deed shows that the grantor in using the words "the said railroad" really meant the grantee *Railroad Company.* The *railroad,* considered from the standpoint of the roadbed, can have no purposes, but if the word *railroad* be construed to mean the *Railroad Company,* then the clause is possible of rational interpretation, to wit, "for the purposes of the said *Railroad Company,* for and during the continuance of the said *Railroad Company,* to their only use, benefit and behoof forever."

Defendant's contention is that the habendum, to wit, "to have and to hold the same unto the said party of the second part, their successors and assigns, for the purposes of the said railroad (company), for and during the continuance of the said railroad (company), to their only use, benefit and behoof forever," is simply an expression by the grantor that the land, if retained by the Railroad Company during its continuance, was to be used for the purposes of the Railroad Company, and this contention is supported by the cases hereinafter cited.

It will be noticed that no particular purpose is mentioned, but only for the general purposes of the railroad. There is no apt word for the creating of a condition, nor any words of re-entry. Under these conditions, it is contended that the recital had no force or effect except to show that the grantee intended the lands to be transferred for whatever purpose the Railroad Company might lawfully make of it, whether such purpose be use, rental, sale or holding it.

The latter part of the habendum, to wit, "during the continuance of said railroad," is not in law a limitation because under the Act of Incorporation the charter of the Camden and Atlantic Railroad Company is unlimited. It continues forever; and the only distinction between an estate in fee simple and a lesser estate is that an estate in fee simple may last forever, whereas a lesser estate must sometime terminate.

A conveyance to a corporation aggregate does not require words of inheritance to create a fee simple, because the corporation aggregate is presumed to live forever. A conveyance to a corporation sale must contain the words "successors and assigns" to create a fee simple estate because it is certain that the person who constitutes the corporation sole cannot live forever, and therefore the words of inheritance, and inasmuch as the life of the Railroad Company by its charter is unlimited a conveyance to the Railroad Company during the continuance of the railroad constitutes an unlimited conveyance of a fee simple title; therefore these words applied to this railroad corporation do not create a limitation upon the estate either as to time or quantity.

In the case of *Brandell vs. German Reform Congregation,* 33 Pa. St. 415, there was a conveyance of

land to trustees for the benefit of its poor for a place to erect a church and burial ground, etc. The Court held that the designation of the uses for which land is granted does not limit the estate to the congregation but simply recognizes the uses for which by law they may hold the land.

In the course of the opinion the Court said:

> "The power of alienation when authorized by law, though in apparent contravention of the original grant was again fully recognized in Barr vs. Weld, 12 Harris, 84. Land given for the purpose of building a schoolhouse, it was there held, vested in law in the school directors and might be sold by them and the funds applied to the same purpose elsewhere. A conversion was not a diversion."

In the case of *Seabold vs. Shitler, et al.*, 34 Pa. St. 133, two lots of ground were conveyed to the commissioners of a county, and their successors in office, in fee simple for the purpose of erecting thereon a courthouse, jail, &c. The county was subsequently divided and the seat of justice removed. The trustees were appointed to sell the lots and public buildings and divide the proceeds between the two counties. Held that on the removal of the seat of justice and the discontinuance of the original uses for which the lots were conveyed, they did not revert back to the heirs of the original grantor.

In the case of *First Methodist Episcopal Church of Columbia vs. Old Columbia Public Grounds,* 103 Pa. St. Rep. 608, the Supreme Court of Pennsylvania held that:

> "Where words in a conveyance are relied upon as creating a condition subsequent so as to create a base or determinable fee (which is the conten-

> tion made by plaintiffs in this case), they must not only be such as would of themselves create a condition but must be so connected with the grant as to qualify or restrain it."

Since the recitals in a deed do not act as a condition, there is nothing in the deed in question which connects any condition to the grant. The grant is to defendant, *its successors and assigns.*

In the Pennsylvania case, an agreement in writing under seal was executed by John L. Wright and others on the 26th day of April, 1823, for the consideration therein mentioned, wherein he covenanted and agreed for himself, his heirs, executors and administrators, with Breneman, Martin and Mathiot, their heirs and assigns, that he would when thereunto required by them, their heirs or assigns, by such deed or deeds of conveyance as they or their counsel learned in the law should advise, well and truly grant, convey and assure to them, their heirs and assigns, in fee simple, clear of all encumbrance, in trust for the sole use of a company which might thereafter be formed for the purpose of bringing a supply of water into the Borough of Columbia, a certain piece of ground for a reservoir. In consideration thereof the grantees covenanted and agreed to give, grant and assure unto Wright, his heirs and assigns, that when the reservoir should be erected, the privilege of erecting a hydrant at said reservoir at his expense, and for his own use, and should have a supply of water therefrom sufficient to water his cattle or stock, etc.

At page 612, Chief Justice Mercur said:

> "The learned Judge held that under the agreement of the 26th of April, 1823, the grantees took a base or qualified fee only, and that when

they and their vendees ceased to use the land for a reservoir, it reverted to Wright or his heirs, and directed a verdict in favor of the defendants in error, who purchased from these heirs. On the point reserved, the Court entered judgment in favor of the plaintiffs below on the verdict. This presents the main cause of complaint. Did the writing create a conditional estate? It contained none of the technical words usually employed for that purpose, neither *sub conditione proviso* nor *ita quod*. It is true no one of these is essentially necessary to constitute a condition. Other words clearly equivalent thereto are sufficient, hence an estate conditioned for an English schoolhouse and no other, was held in Kirk vs. King, 3 Bar. 436, to revert to the grantors after the school therein had been discontinued for seven years, so long as to create a presumption of permanent abandonment. So in Sheets vs. Fitzwater, 5 Bar. 126, a conveyance of a mill dam or pond of water and mill race and a perch of land on each side thereof for the use and service of a certain mill with the land thereunto belonging, and for no other use whatever, the title was held to be a base fee, determinable on disuser as a pond. When, however, subsequent conditions are relied on to work a forfeiture, they must be created by express terms or clear implication, and are construed strictly. The policy of the law is to render the alienation and transfer of land as free as possible, and conditions are not favored in law. Therefore, whenever words can be construed as either a condition, reservation or a covenant, the tendency of the courts is to construe them as one of the latter rather than as the former. A mere recital

in a deed that it is made upon a certain consideration will not raise a condition. Where a deed set forth that the estate thereby conveyed was given to the commissioner of a county in consideration of a county seat having been located on the premises, it was held that no condition was thereby created; that the county seat should be kept there. In Cook vs. Trimble, 9 Watts, 15, it was held that the words *in consideration of* $160.00, *and a comfortable living to be given to the said grantor, his wife and his daughter during their natural lives* by the grantee might create a covenant but not a condition."

At page 614, the Court said:

"Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it."

In the case at hand it will be observed that there is no condition connected with the grant.

Continuing, on page 614, the Court said:

"We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money, or the doing of some act by the grantee on which the grant is clearly made to depend."

In the case of *Packard vs. Ames,* 82 Mass. 327, a deed of land had been made to a number of persons incorporated as a religious society. Habendum, to

them and their heirs and assigns, and to each and every person who may hereafter become lawful owners of proprietors of a pew in a meeting house to be built and erected thereon, and which may and shall afterwards be rebuilt thereon by the said proprietors and their successors. It was contended that this deed created a base fee. Chief Justice Bigelow, in disposing of the matter, at page 328 said:

> "The construction of the deed from Joseph Packard to Micha Packard and others, proprietors, was considered by this Court in 24 Pick. 304. It was there held that an estate in fee vested in the grantees to the use of the proprietors of pews therein designated, the use shifting to such as should thereafterward become pew holders. No intimation was there made that the conveyance was on a condition subsequent. Nor on careful consideration of the terms of the grant can we see any valid ground for holding that such is the true interpretation of the deed. There are no apt or proper words to create a condition. There is no clause of re-entry or forfeiture. The only words which bear any resemblance of an intent to restrict the title conveyed by the deed are found in the habendum. These are merely that the grantees, the proprietors of the pews, who held the estate for the purpose of erecting and maintaining thereon a house for public worship, but we know of no authority by which a grant declared to be for a special purpose, without other words, would be held to be on a condition. On the contrary it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money or the doing of some act by the grantee on which the grant is clearly made to

depend. Without such a clause a grant for a specific purpose can be held at most only to create a trust but not an estate on condition."

In the case of *Griffitts vs. Cope*, 17 Pa. St. p. 96, it was held that:

"A devise of land to be conveyed to certain persons, or such others as the monthly meeting of the Quakers of Philadelphia should nominate, in fee, there to build a meeting house upon, if the members of that meeting shall agree to build a meeting house there, but not else, was a devise in fee simple and not of a qualified estate, and that the trustees might sell and convey, applying the proceeds to the same uses as those on which the land was devised."

In the case at hand the land was conveyed by the Railroad Company for cash, the cash, of course, to be used for railroad purposes.

In the above case, at page 99, Lowry, Justice, said:

"Our law discourages the fettering of estates and putting them into mortmain, and therefore favors the construction which relieves from restraint upon alienation. It seems unreasonable to suppose that a devisor ever means that his heirs shall get back the land in such case except when he says so, or that amidst the rapidly changing opinions of society he means that his opinions shall be imbibed by others just as he left them, and shall forever withstand the changes necessarily incident to the progress of society, or that he means that no change in the property, circumstances and habits of the people shall ever justify any sort of conversion of the gift. It would seem contrary to public policy to

favor a construction that would give to a man who died a hundred or a thousand years ago the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied."

At page 100 he further says:

"The main question in this cause may then be stated thus: Where there is a devise of land in fee to a religious society to build a meeting house upon, is it implied as one of the terms of the devise that the doner shall not use it except for a place of meeting, and that they shall never sell it though they should convert the proceeds to the same religious use? Does a conversion amount to a diversion?"

Again on page 100 he says:

"These grants are, as between the grantor and grantees, fee simple; as between the trustees and the beneficiaries, they are trusts. If they are held in violation of the mortmain laws, the state may claim to forfeit them, but the grantors and their heirs have no title."

In the case of *Rawson vs. Inhabitants of the School District,* 7 Allen, 125, the Supreme Court of Massachusetts held that:

"A grant of land, which has been used as a burying place, to a town 'for a burying place forever,' in consideration of love and affection and divers other valuable considerations, is not a grant upon a condition subsequent."

Chief Justice Bigelow, at page 127, said:

"A deed will not be construed to create an es-

tate on condition unless language is used which, according to the rules of law, *ex proprio vigore,* import a condition or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions subsequent are not favored in the law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument."

On page 128 he further says:

"In grants from the Crown and in devises, a conditional estate may be created by the use of words which declare that it is to be given or devised for a certain purpose or with a particular intention or on payment of a certain sum, but this rule is applicable only to those grants or gifts which are purely voluntary, and where there is no other consideration moving to the grantor or doner besides the purpose for which the estate is declared to be created, but such words do not make a condition when used in deeds to private persons."

In the case at hand it was not a voluntary gift, but a conveyance for $450.00, which must have been full value for the land at the time the deed was dated. Besides, this conveyance was between private persons and not growing out of a devise nor from the Crown.

At page 130 the Chief Justice further says:

"If it be argued whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose, or to

accomplish a particular object, the answer is that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee."

In the case of *Board of Education vs. Trustees*, 63 Ill. 204, the Court held that in the construction of deeds, Courts will always incline to interpret the language as a covenant rather than a condition.

In the case of *Vanatta vs. Brewer*, 32 Eq. 268, Vice-Chancellor VanFleet said:

"The proper words to be used in creating a limitation are, *while, as long as, until* and *during.* * * * The authorities are agreed that to create a good condition a right of re-entry on breach must be reserved to the lessor. Thus Littleton says: 'The words *si contingat* will create a condition if a power of re-entry is added,' and therefore if A grant lands to B, to have and to hold to him and his heirs, and if or but if it happen that B do not pay to A ten pounds at Easter, without more words, this is not a good condition, but if these words be added, then it shall be lawful for A to re-enter; it will be a good condition (citing cases), and where it is doubtful whether a clause in a deed be a covenant or condition, the Court will incline against the latter construction (citing 4 Kent's Comm. 132). The words here are plain and simple words of covenant and nothing more. In respect to their legal significance there can be no dispute. No right of re-entry is reserved, and there are no words of forfeiture or cesser. The rule is settled that a breach of the covenants of a lease, in the absence of a stipulation that a breach shall have that effect, does not work a forfeiture or

> determine the term. Where a term is devised in clear and apt words, it can only be defeated by words as strong and express as those by which it is created."

This subject was reviewed in the United States Supreme Court in the case of *Stewart vs. Easton*, 170 U. S. 383, L. Ed. p. 1078. White, now Chief Justice, delivered the opinion. In that case the construction of a land patent was in question. At page 393, L. Ed. 1082, the Court said:

> "In the premises the grant is to the trustees by name, and their heirs, while the habendum is to the individuals thereof, referred to as the trustees, their heirs and assigns, forever, in trust nevertheless to and for the erection thereon of a courthouse for the public use and service of the county, and to have no other use, intent or purpose whatsoever."

It will be seen that in that case the language of the habendum is much stronger and more emphatic than in the case at hand. In that case, while the grant was in fee, the habendum stated that the land should be for a certain purpose, and for no other purpose. In the present case, in the deed to the Railroad Company there is no expression prohibiting the lands from being used for another purpose. The only expression is that during the continuance of the railroad they are to be held for the purposes of the railroad.

Justice White, at the page aforesaid, stated:

> "This last clause, it is claimed, qualifies the prior grant of an estate in fee and limits the duration of the estate in the land to the period while the land was used as a site of a courthouse."

The act of legislature authorized the City of Easton to take a grant in fee, and to build thereon a courthouse, prison, etc. At the bottom of page 393 the Court said:

> "The recital that the land was to be held in trust for the object stated may well be treated as having been inserted with the intent of showing that the grant related alone to one of the purposes covered by the law, the courthouse, and not to both therein expressed; that is, the prison and the courthouse. Be that as it may, however, under the facts disclosed by the records, the decisions of the Court of Pennsylvania leave no doubt that the clause in question cannot be construed as anything more than a recognition of the trust previously created by the Act of General Assembly, and that it amounted simply to conforming the grant to the legislative authority previously given, and that it cannot be deemed to have imported a limitation of the fee. Citing a number of Pennsylvania cases, in which the Judge asserts: 'The declared doctrine established by these cases to be that where a conveyance purporting to be a fee is made to public trustees or to commissioners, religious societies, etc., for the particular purpose for which the grantees could lawfully hold real estate, such declaration could not be construed as qualifying a prior grant of the fee.' Quoting as follows: 'Of course, the mere expression of a purpose will not of and by itself debase a fee,' " citing the case of *Kerlin vs. Campbell,* 15 Pa. 500.

At page 395, L. Ed. 1052, the Judge further says:

> "It is apparent in all the cases cited that the purposes for which the grants were made were

> really all the purposes for which the grantees could lawfully hold real estate. Unless, therefore, the absurd position be assumed that a corporation can in no event take a fee simple absolute because its power to hold land is limited to the uses for which it is authorized to acquire and employ it, a declaration in a grant that it is conveyed for those uses cannot be deemed to import a limitation of the fee. Such a declaration can amount to no more than an explicit assertion of the intended legality of the grant."

It is submitted that the habendum in the case at hand was inserted for that specific purpose and no other, to wit, an explicit assertion by the Land Company of the legality of its grant to the Railroad Company, to wit, for the purposes of said railroad (company), for and during the continuance of the said railroad (company).

It is true that the foregoing cases were not between individuals, and that fact is pointed out in the decisions, because a different rule of law is applied in conveyances from the Crown and to charitable uses where the gift is voluntary than is applied to grants between individuals upon a monetary consideration, and in the foregoing cases the Court was distinguishing between grants of a public character and showing that the cases at hand were not governed by the rule of law pertaining to voluntary gifts, but were governed by the rule of law concerning grants between individuals.

It is contended by defendants that the language in the habendum is an entirety, to wit, that the Railroad Company is to have and to hold the same, their successors and assigns, for the purpose of the said railroad (company) for and during the continuance of

the said railroad (company) to their only use, benefit and behoof forever. In other words, that the words "for and during the continuance of the said railroad (company)" are annexed to the words "for the purposes of the said railroad (company)" and that they all fall together, unless they be construed in the sense hereinabove contended, to wit, as showing an intent on the part of the grantor to make the grant as broad as the Railroad Company could accept, in which case they would be consistent with and not repugnant to the granting clause.

A deed by a Railroad Company for lands purchased by it in fee simple for a right of way is not void until so decreed in proceedings by the state, although the company had abandoned its purpose of using the lands for a railroad.

Chamberlain vs. N. E. Railroad, 25 L. R. A., page 139.

Where a Railroad Company is authorized to purchase real estate necessary for the construction of its road, it will be presumed that lands deeded to it are acquired for that purpose. When it acquires land by a deed purporting to convey a fee, and the land is no longer needed for its purposes, it may sell and convey it.

Yates vs. Vander Bogert, 56 N. Y. 526.

The Railroad Act provides as follows in Comp. St., page 4220, Sec. 3, paragraph 2:

> "Every railroad company shall have the general powers conferred by the act entitled 'An Act concerning corporations' * * * * and in addition thereto, shall have power: * * * * To acquire from time to time, and hold and use all such real estate and other property as may in

> the judgment of its directors be necessary for terminal purposes, and for the construction and maintenance of its railroad, and stations, branches, sidings, car-yards, engine-houses, repair shops and other accommodations necessary to accomplish the objects of its incorporation, and to sell land thus acquired when not necessary for such purposes and objects."

This provision also gives the Railroad Company the right to sell the land thus acquired when not necessary for such purposes and objects. The application of the Railroad Company to sell the lands in question was approved by the Public Utilities Board of New Jersey (page 6, line 38). We contend, therefore, that the deed to the Railroad Company, when it purported to convey the lands for the purposes of a railroad, no more restricted the rights of the railroad to convey the lands when they were unnecessary for the Railroad Company's use than did the law itself. Both the charter and the General Railroad Act as above quoted limits the Railroad Company in its acquisition of real estate to the purchase of such lands as may be necessary for railroad purposes, but both the charter and the General Railroad Act permits the Railroad Company to sell the land when no longer needed for those purposes.

In the case of *Currie vs. N. Y. Transit Co.*, N. J. Eq., page 313, Chief Justice Gummere speaking for the Court of Errors and Appeals says:

> "It is contended that, because the right of the company to enter and take possession of the land, after payment of the award, is given by the statute 'for the purposes aforesaid,' the landowner still retains such an interest in the land as will enable him to restrain an unauthorized

use of it by the company. But the words quoted do not operate to restrict the quantity of the interest which passes to the company by virtue of the condemnation proceeding, or to reserve to the landowner any rights in the lands taken. They merely limit the uses to which the lands may be put. And it is to be observed that this limitation is not confined to lands taken by the exercise of the power of eminent domain. The charter of the company (the General Railroad Law) imposes it equally upon lands acquired by conveyance from the owner. Whether the lands be acquired by the one method or the other, when the company enters upon and takes possession thereof it does so for the purpose of subjecting it to the uses which its charter authorizes.

"Nor does the fact that, while in possession and so using the land, the company subjects it to an additional and unauthorized use operate to divest it, to any extent, of the estate which it has acquired therein. McKelway vs. Seymour, 5 Dutch. 321.

"The complainants' bill therefore was properly dismissed, for, as the condemnation proceeding vested in the Bergen Neck Railroad Company the whole present estate was not divested by the act of its successor in subjecting the land to the additional and unauthorized use complained of, the complainants had no interest therein for the protection of which they were entitled to invoke the aid of a court of equity. Barnett vs. Johnson, 2 McCart. 481."

In the case of *Killgore vs. Cabell County Court,* 92 S. E. 562, it was held:

"A grant of a tract of land to a railway com-

pany by a deed which contains the following clause: 'For the construction of a double track of railway,' is not subject to be defeated in case said railway company should cease to use said land for the purpose mentioned in said deed. Such clause is declaratory of the purpose to which said land is to be applied, and does not create a condition subsequent, forfeiting the title of the Railroad Company for non-compliance therewith."

COVENANT.

"And the said Camden and Atlantic Land Company do, for themselves and their successors, covenant with the said party of the second part, their successors and assigns, that they, the said Camden and Atlantic Land Company, have not done or suffered to be done any act or thing to charge, alter or encumber the estate and interest hereby granted (then follows a special covenant), but that the same is hereby granted and conveyed as full, free and entire to the said party of the second part, their successors and assigns, as if it was vested in the said party of the first part, their successors and assigns."

In the recital it appears that the grantor was seized of a fee simple title. The stipulation admits that the grantors were seized of a fee simple title and specially covenanted that the same "is hereby granted and conveyed as full, free and entire to the said party of the second part, their successors and assigns as if it was vested in the said party of the first part, their successors and assigns."

This covenant estops the Camden and Atlantic Land Company and its successors, to wit, the plaintiff in this suit, from denying that all the estate possessed by the Camden and Atlantic Land Company was not conveyed to the Railroad Company. They having a fee simple estate in the land are now estopped from denying that they conveyed a fee simple.

The rule is laid down that if a man make a solemn deed with covenants of seizin and warranty, or for quiet enjoyment and further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken.

In the case of *Logan vs. Eaton,* 31 Atl. 13, wherein the grantor conveyed one-half of five undivided sixths parts of a tract of land, with covenants of warranty, and afterwards endeavored to partition the land, the Court said:

> "The plaintiff is estopped to deny the truth of the deed by which she undertook to convey five-twelfths of the land."

The case of *Shaw vs. Galbraith,* 7 Pa. St. Rep. 111, is a well-considered case and not dissimilar to the case at hand. It was an ejectment suit wherein the plaintiff showed a lease for life in himself from Galbraith, dated August 12, 1846, and the defendant showed a deed by Galbraith dated 1838, conveying the property in dispute. There were no words of inheritance in the granting clause nor in the habendum, but there was a clause of general warranty that the said Galbraith, for himself and his heirs, unto his grantee, his heirs and assigns, and against all and every person lawfully claiming or to claim the same or any part thereof, will warrant and forever defend.

The Supreme Court of Pennsylvania, in disposing of the question, said at page 112:

"Now, granting (that a warranty cannot enlarge an estate) that is, in this deed, a life estate only is granted, and that the subsequent warranty or covenant does not enlarge the estate, yet the question remains whether this covenant may not operate as an equitable rebutter, or, in other words, is Galbraith and Shaw, who claims under him, estopped from asserting a title to the land? In this case it matters but little whether the estoppel operates by the ordinary effect whereby all parties are debarred from denying the passage of the estate, or as a transfer of the estate."

At page 113 the Court said:

"By the habendum in consequence of the omission of the word 'heirs' a life estate only is conveyed to the grantee, but the deed contains a special warranty whereby the estate is warranted to the grantee, his heirs and assigns, against the claim of the grantor and his heirs, and every person claiming lawfully the same. Now, although a warranty in favor of the heirs may not enlarge the estate, yet it would be against every principle of construction to reject it as surplusage. In the construction of a deed or will, every word must have its own weight, and certainly a distinct covenant as here cannot be utterly disregarded. The deed contains a covenant that the grantor will not molest or disturb (that is its effect) either the grantee or his heirs, and if, contrary to his covenant, he recovers the land and dispossesses the grantee or his heirs, action accrues to recover its value from the grantor. The question then is whether to prevent circuity of action, the defendant may not plead an equit-

able rebuttal or estoppel as against the grantor and those claiming under him. Circuity of action is not favored in law. The principle is founded on this consideration, that it would be against equity to allow the grantor to recover the land, thereby breaking his covenant and exposing himself to an action to recover its value. The principle is recognized in several analogous cases. Thus in McCrackin vs. Wright, 14 Jones, 194, and in Jaskson vs. Bradford, 4 Wend. 622, it is ruled that in a deed of bargain and sale, no estate passes except what is *in esse* at the time of the grant, but where title is afterwards acquired and there is a warranty in the deed to avoid circuity of action, it operates as an estoppel. Where there is a warrant in the deed, the warranty will rebut and bar the grantor and his heirs of a future right. This is not as is there said, because the title ever passes by such grant, but the principle of avoiding circuity of action interposes and stops the grantor from embodying a title, to the soundness of which he must answer on his warranty. Without then undertaking to determine whether the fee simple is transferred, we are of the opinion that the grantor and Shaw, the plaintiff who claims under him, are estopped from denying the title, but the plaintiff contends that none but parties and privies can take advantage of an estoppel, and this in general is true, but it is extended yet further. The tenant by the courtesy, the tenant in dower, and the incumbent of a beneficiary shall be barred by and shall take advantage of an estoppel. In this it appears that a tenant in dower may take advantage of an estoppel, and although dower here has not been assigned to the widow, yet by our

> several intestate acts she has such an interest in the land as entitles her to defend her possession by way of equitable rebutter. The only question which remains is, Was the Court right in excluding the deed by Galbraith to Shaw? We think they were." Judgment affirmed.

In the case of *Long Island R. R. vs. Conklin*, 29 N. Y. 572, a conveyance was made for a certain piece or parcel of land in the deed described, and the following words:

> "Also in addition to which said sixty square rods the Long Island Railroad Company may be further entitled to an extra additional width of seventy feet on the south side of said railroad for the uses and purposes of the railroad for engine house, etc.,"

with the usual covenants for the quiet and peaceable possession of said premises. Ejectment was brought to recover the seventy foot strip above mentioned. The conveyance was upon the consideration of one dollar, and the deed was under seal. The Court, at page 586, said:

> "The entire deed being considered, the intention to convey the last described piece as effectually as the other parts is to me very plain, notwithstanding the difference in the language used in reference to the different pieces. * * * It is not necessary in order to maintain the plaintiff's title to resort to the covenants of the deed, but if there were in the instrument no words which could be held to operate as a direct conveyance, I entertain no doubt that the covenant for quiet enjoyment entered into by the ancestor of the defendant's grantor would be equally as effec-

tive as a direct conveyance from such ancestor would have been to bar the claim set up by the defendant. Such ancestor would not of himself have been allowed to assert a claim to the property in opposition to his covenant, nor can anyone claiming under him be allowed to do so." Citing the case of *Good Title vs. Bailey,* which was an act of ejectment, the Court said:

"The lessor of the plaintiff had executed a release of the premises claimed with a covenant for quiet enjoyment and further assurance. There was a doubt as to the sufficiency of the words of release to operate as a conveyance. Lord Mansfield, after stating the circumstances which created the doubt, says: 'One thing, however, is decisive. This is a fictitious action to recover the possession. In such an action, if a man has made a solemn deed covenanting that another shall enjoy the premises, and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken, no more than it shall be permitted to a mortgagor to dispute the title of his mortgage. No man shall be allowed to dispute his own solemn deed."

In the case of *Staffordville Gravel Co. vs. Newell,* 53 L. 412, at page 418, our Court of Errors and Appeals, by Chief Justice Beasley, said:

"It also seems to me that the covenant as to title contained in the deed just mentioned would of itself effectually prevent the original grantor and the defendant, as his privy by purchase, from contending that an absolute fee simple was not by force of such instrument vested in the grantees, and consequently in the defendant who

has their title. This covenant is special, and is in these words: 'And the said J. D., for himself, his heirs, executors, and administrators, doth covenant, grant and agree to and with the said party of the second part, their heirs and assigns, that the said J. D. hath not done or suffered to be done any act, matter or thing whereby the premises granted may in any way be charged or encumbered in title, charge or estate, and the same in the quiet and peaceable possession of the said party of the second part, their heirs and assigns, against the lawful claim and demand of all persons claiming under him by virtue of this survey, and in as full and ample a manner as the same was surveyed and returned to him, the said J. D., will warrant and forever defend.' ''

The covenant in the case at hand is more explicit and more positive as to the estate granted than that in the Staffordville case.

In the case of *Condit vs. Bigalow,* 64 Eq. 504, at page 513, Vice-Chancellor Emery said:

> "An estoppel by warranty is based on the fundamental principles of giving effect to the manifest intention of the grantors appearing in the deed as to the lands or estate to be conveyed, and of preventing the grantors derogating from or destroying his own grant by any subsequent act." Citing, among other cases, the Staffordville case.

To the same effect is the case of *Hannon vs. Christophe,* 34 Eq. 459.

To the same effect is the case of *Somers vs. Skinner,* 3 Pickering (Mass.), 51, at page 58, where the Court said:

> "It is laid down by Lord Holt that where an estoppel works on the interest of the land, it runs with it, into whose hands soever the land shall come, and that an ejectment is maintainable on a mere estoppel. * * * And as Lord Coke lays down the principle, that not only parties and privies in estate but *all these who come in in the post are bound by an estoppel,* perhaps the above position of Lord Holt that an ejectment may be maintained on an estoppel is correct and general in its application."

If ejectment may be maintained upon an estoppel growing out of warranty, surely the estoppel growing out of this warranty will prevent the plaintiff from maintaining ejectment in opposition thereto.

In the case of *Dudley vs. Caldwell,* 19 Conn. 218, wherein title was made through one Steele, who had inserted in his deed full covenants of warranty, the Court at page 226 said:

> "As Bacon has relinquished to Steele all title to the premises, and Steele by his covenants has estopped himself and all his privies in estate from claiming title, where is it unless it be in the plaintiff? It has never been conveyed to the defendant, and by whatever mode of conveyance a good and entire title is made in a purchaser this must be available against everybody."

In the case of *Kimbel vs. Blaisdell,* 22 Am. Dec. 476, the Supreme Court of New Hampshire held that if A convey land to B, and afterwards A conveys the same land to C, with warranty, and later B conveys the land back again to A, the last conveyance will inure to C, and a creditor levying an execution on the land as A's will be estopped by A's warranty. Of

course, this could not be so except upon the principle that A's warranty in the conveyance to C estops him from asserting that he gained any title to the land by the reconveyance to him by B.

In the case of *McManness vs. Paxson,* 37 Fed. Rep. 296, the United States Circuit Court held that a defendant mortgagor in foreclosure of a mortgage containing covenants of seizin and special warranty cannot set up a prior and paramount equitable title in himself.

At page 299 the Court said:

> "No matter whence comes his title, he convenanted with the mortgagee that he had title and the right to mortgage, and he is estopped to deny that whatever title he has passed to the mortgagee as security for the notes, subject to the conditions expressed in the mortgage."

In the case of *Squire vs. Harder,* 1 Paige, 484, the Court of Chancery of New York, by Walworth, Chancellor, held:

> "Where the grantor conveys in fee, with warranty, he is estopped from alleging that he had an interest in the purchase money which created a resulting trust in his favor."

The principle enunciated in that case is that where a grantor conveys in fee with warranty, he is estopped from alleging that he has an interest remaining in the premises.

In the case of *Kappa vs. Rutherford Park Assn.,* 60 Eq. 129, Vice-Chancellor Pitney recognizes the force of this rule of law in determining that a grantee of the Rutherford Association, which grantee had conveyed the land granted to him to a subsequent holder, and which title finally vested in Kappa, the com-

plainant, was prevented by his covenant and warranty of title from asserting a claim of title or interest afterwards acquired in the lands by foreclosure by the Rutherford Association.

In that case the grantee of the association did not regard his deed and the adverse title was alleged in the name of the association.

In the case of *Jenkins vs. Collard,* 145 U. S. 546, 36 L. Ed. 812, the Supreme Court, by Justice Field, held that:

> "Where one whose land was sold under the confiscation acts subsequently and before the proclamation of amnesty and pardon by the President, deeded the same with covenants of seizin and warranty, and afterwards received such pardon and amnesty, he and his heirs are estopped by such covenants from claiming title to the same as against such grantee and his heirs and assigns."

In the case of *Rathbun vs. Rathbun,* 6 Barb. 98, the Supreme Court of New York held that the grantor in a deed containing covenants of warranty is estopped from claiming a resulting trust in the premises conveyed for his own benefit, saying:

> "Even if he might so far explain his own deed as to show a non-payment of the purchase money, he cannot by parole evidence do away with his covenant of warranty."

In the case of *Eveleth vs. Crouch,* 15 Mass. 306, at 307 Chief Justice Parker said:

> "To admit the evidence offered by him would be to permit him directly to contradict his deed. In that he declares himself to be the owner of the land, and to have lawful right to convey it,

> and his express and unequivocal covenants would be defeated by verbal declarations contrary to the intentions of our statutes and the principles of the common law, which alike forbid the provisions of solemn instruments to be defeated or impaired by parole testimony."

In the case of *Cross vs. Robinson,* 21 Conn. 378, which was an ejectment suit, the Court at page 386 said:

> "The defendant, as already stated, conveyed the two-fifths to Wells to secure him against an endorsement which deed contains the usual covenants of seizin and warranty, without any exception, so that by virtue of Wells' deed to Cross, the debt, land and covenants became vested in him. Now, could not Wells, by virtue of his warranty deed from the defendant, have claimed the title and possession and at once have ejected the defendant, and if he could, his assignee, the grantee of said Cross, can do it now unless, indeed, the supposed or actual payment of the debt by the defendant affects the question, which we think it does not. The defendant is estopped by the covenants in his deed from denying the title of Cross in said two-fifths."

In the case at hand, the grantor covenanted that it had granted and conveyed the land in question as full, free and entire to the said party of the second part, their successors and assigns, as ever it was vested in the said party of the first part, their successors and assigns; thence, the grantor having been seized of an absolute fee simple title is, by virtue of this warranty, estopped from asserting that it conveyed less than an absolute fee simple title, and this

estoppel is operative against a subsequent grantee of the Camden & Atlantic Land Company to the same extent that it would be operative against the original grantor, if he were the party plaintiff.

The covenant, as will be noted, declares that the land "is hereby granted and conveyed as fully, freely and entirely to the said party of the second part, their successors and assigns, as though it was vested in the said party of the first part, their successors and assigns" (page 14, line 37). If the contention of the plaintiff is correct, namely, that the land reverted to it by virtue of the abandonment by the Railroad Company, then the lands vested in the plaintiff as the assignee of the Camden and Atlantic Land Company, the grantor mentioned in the deed of conveyance to the Railroad Company, but by the warranty in question the grantor in that deed, by specific words conveyed to the Railroad Company the lands in question as fully, freely and entirely as though it was vested in said grantor or in the assigns of the said grantor. In other words, by specific language, it warranted to convey the title as freely as it could possibly vest not only in itself, but in its successors or assigns. Therefore, there was nothing left to vest in the assigns and if there was nothing left to vest in the assigns that title by virtue of the warranty immediately vested in the Railroad Company.

In the case of *Tully vs. Taylor,* 84 N. J. Eq. 459, Chief Justice Gummere, speaking for the Court of Errors and Appeals, says:

> "This covenant, viz., the covenant for quiet enjoyment, is one of the principal covenants for title, and even in a deed gives the grantee the benefit of a title subsequently acquired by the grantor. In the case of Van Rensselaer vs. Kearney, 11 How. 297, 13 L. Ed. 703, it is said that the

principle deducible from the authorities is that, 'whatever may be the form or nature of the conveyance used to pass real property, * * * * if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies.''

EJECTMENT WILL NOT LIE.

If we were to assume the granting clause to be void, and the habendum to limit the use, and the words "for and during the continuance of the railroad" to be separated from the previous words, still this action of ejectment would not lie, for two reasons:

1. Because the railroad is still continuing.

2. Because in case of a determinable fee, there is nothing left in the original grantor but a possibility of reverter, which was not transferrable at the common law, and which is not transferrable under our law except by express and precise words.

In the case of *Nicholl vs. N. Y. & E. R. R. Co.*, 12 N. Y. 121, the New York Court of Appeals held:

"1. That a corporation created for a limited term may acquire title to lands in fee.

"2. The right of entry upon the breach of a condition subsequent is a mere possibility of a

reverter and is not an interest in land which may be assigned.

"3. Where a breach of the condition by the Railroad Company did not occur until after a conveyance of the land by the original grantor to a third person, the latter could not take advantage of the breach and divest the title of the grantee on condition."

At page 132 the Court said:

"Where a fee simple, without a reversion of rent, is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. It has been said that such possibilities were assignable in equity, but those were interests of a very different character," citing from 4 Kent's Comm. 370, the opinion continues:

"Kent says that the grant of an estate upon condition has only a possibility of reverter and no reversion, and in the note to page 11 in the same volume he says, there is only the possibility of reverter left in the grant and not an actual estate."

In the case of *People vs. Mauran,* 5 Denio, 387, the Court at page 398 said:

"Neither was the effect of the dissolution of the Turnpike Company such as was declared by the Circuit Judge. It was assumed that the company took an estate under the patent and conveyed the same to the defendants during their charter. It is unnecessary to inquire what would

have been the result if the company had been dissolved while holding the premises. The grant to the Richmond Turnpike Company was to them and their assigns, in fee, and whether they could have held it against proceedings by the state is of no consequence to the present litigation. They had at worst but defeasible estate in fee, and that they had the right to convey is a legal proposition that will not be disputed. Every corporation may convey whatever they have taken, whether able to hold it or not. The consequence is that the grantees of the company took such estate as they held, absolute or defeasible, as might be. Corporations have a fee simple for the purpose of alienation and a determinable fee for the sake of enjoyment, so that the grantees of a corporation in the present case may stand in a better, but not in a worse, condition than the grantors, hence the defendants, even if they held a defeasible estate, will continue to hold it as an alien grantee holds till office found." In other words, during the continuance of the Railroad Company.

In the case of *Bouvier vs. Baltimore & New York R. R. Co.*, 67 N. J. L. 281, at 288 our Court of Errors and Appeals by Justice Collins said:

"A distinction not always clearly made should, however, be borne in mind; before breach, as in case of any determinable fee, there is in the grantor only a possibility of reverter. After breach, there is a vested right. * * * * "

At page 289 the Court said:

"In the case at hand it will have been noticed that the right of entry for breach of condition was reserved to the assigns, but I do not regard

> that as essential. I think that in any case, wherever the English case against maintenance is not in force, a right of entry for condition broken should be held transferrable after breach of the condition. Before breach, I think transfer to be legal must be authorized by legislature."

In speaking of our statute on the subject, the Court, at page 290, said:

> "An attempt was made in the recent revision of some of our statutes to transfer the provisions of this one to the Act of 1898."

In conclusion, at page 294, the Court said:

> "I see no reason to deny efficacy at law to a conveyance, devise or other transfer of a vested right of entry. There seems to be no technical obstacle in the way of such a transfer, and there certainly is no other."

In the case at hand it will be recalled that the conveyance from the Camden & Atlantic Land Company to the Camden, Atlantic & Ventnor Land Company was dated 1889, recorded in 1891; that the alleged breach did not occur until 1916. At the time of the conveyance from the Camden & Atlantic Land Company to the Camden, Atlantic & Ventnor Land Company there had been no breach, and the Camden & Atlantic Land Company had no estate in the land to convey. The most they had was a possibility of reverter. It will further be noticed that there is no language in the conveyance from the Camden & Atlantic Land Company to the Camden, Atlantic & Ventnor Land Company which is appropriate to transfer this possibility of reverter. It will not pass under general words of reversion or reversions, because there was no reversion at the time the deed

was made, nor is it included in any of the general words of the conveyance nor could it ever be transferred except by a specific express assignment thereof.

The deed from Camden & Atlantic Land Company to Camden, Atlantic & Ventnor Land Company conveyed no estate or property except that which was held by the Camden & Atlantic Land Company at the time of the conveyance to the Camden, Atlantic & Ventnor Land Company, which was long prior to the time when the Camden, Atlantic & Ventnor Land Company claimed that their right to possession accrued.

Assuming that this were a base fee, the estate of the Railroad Company had not terminated at the time the Camden & Atlantic Land Company conveyed to the Camden, Atlantic & Ventnor Land Company. At that time the Camden & Atlantic Land Company had but a possibility of an estate. Such an estate could not be conveyed at all at the common law, and can be conveyed under our statute only by express, accurate words.

The case of *Wilkinson vs. Sherman*, 45 Eq. 413, illustrates the principle. At page 416 the Court said:

> "This being a mere possibility could not, otherwise than by estoppel at the common law, be assigned."

To the same effect is the case of *Admrs. of Akarman vs. Vreeland*, 14 Eq. 23-29.

These cases affirm the well-settled principle of law that a deed of conveyance takes effect *in presenti*, while a lease of lands or a will for lands made take effect *in futuro*.

At the time of the conveyance above stated, the Land Company had no interest in the land in ques-

tion which it could transfer *in presenti*, and the language of the deed nowhere conveys this possibility. The deed says:

> "Now, therefore, this indenture witnesseth, that the said Camden & Atlantic Land Company, in consideration of the premises, and for a valuable consideration to the said company paid by the said Camden, Atlantic & Ventnor Land Company, at and before the ensealing and delivery of these presents, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Camden, Atlantic & Ventnor Land Company, and to its successors and assigns, all its real and personal property and estate of every character and description, wheresoever situate, and all its property rights of every form and character, real, personal or mixed."

There are no words contained in that deed of conveyance that would be for one instant thought to cover this possibility unless it would be the words "property rights." A property right is a right in or to property, and this possibility was not a property right because at that time the Land Company had no right in or to the property in question. At that time it had, under the contention of plaintiff, only a possibility of sometime in the future, if the contingency occurred, to become seized of a property right. There are in that deed no words sufficient to transfer to the plaintiff the rights of the Camden & Atlantic Land Company which might accrue in the then future by the happening of a contingency, so that on defendant's theory this suit cannot be maintained because the plaintiff has no title, and it must recover, if at all, upon the strength of its own title and not upon the alleged weakness of the defendant's title.

In the case of *Richardson, et ux., vs. City of Cambridge,* 2 Allen, Mass., page 118, it was held that the deed and mortgage which conveyed all of the land and right or claim to the land which the grantor now has in the town of C does not include land therein to which he has only a possibility of reversion on the non-performance of a condition subsequent.

REPLY.

We take the liberty at this time of discussing some of the cases cited by the plaintiff in his brief in the trial court.

It is reiterated, notwithstanding the contrary contention of plaintiff, that the Camden & Atlantic Railroad Company under its charter as amended had full power and authority to buy, sell, hold and dispose of real estate in fee simple absolute. In addition thereto, the Steam Railroad Act of 1903, above referred to, enlarged the powers of all railroads in respect to the holding of property, and since its passage, which was subsequent to the decision in the Pipe Line case, there can be no question but that the Camden & Atlantic Railroad Company and its successor, the West Jersey & Seashore Railroad Company, has full power to hold and convey lands in fee simple absolute.

The case of *Pipe Line vs. D. L. & W. R. R.,* 62 *N.* J. L. 254, relied on so strenuously by plaintiff is not an authority against the defendant in this suit. That case arose under condemnation proceedings instituted by a Railroad Company whose authority to take land by condemnation only extended to a limited fee. If the lands in this suit had been taken in condemnation proceedings, the question would have then arisen whether more than a limited fee could be taken, as to which point no discussion is offered because that condition is not in this case.

That the Pipe Line case was determined by the limitation of power to take under condemnation proceedings is clearly shown by the opinion of Mr. Justice DePue at page 259 where, quoting from Sec. 7 of the company's charter, he says:

> "It is enacted that if the owners of the lands on which such railroad or railroads shall be made shall not be willing to give the same for such price, and the company and owners cannot agree upon the price to be paid, then the company may proceed by condemnation proceedings to have the price or value of said lands assessed by commissioners, and when such condemnation proceedings are consummated as provided by the act and the price assessed paid, then the company shall be deemed to be seized and possessed in fee simple of all such lands and real estate appraised as aforesaid."

He does not state that they became seized in fee simple absolute.

Further, on page 259, he says that by deed bearing date March 24, 1864, the lands were conveyed, the deed reciting that the tract of land so described was necessary to be taken by said company as part of the route of the extension of its road, and further, on page 260, he states:

> "This conveyance was made for the consideration of $1300, in consideration whereof the grantor, Stewart, did, for himself, his heirs, executors and administrators, and also for his assigns, future owners of the land of said Stewart adjoining the lands and premises hereby granted, exonerate and forever discharge the said Railroad Company and its successors and assigns from all claims for damages for separating said adjoining lands of said Stewart into two parts

by constructing a railroad on the premises granted."

At page 262 the Court said:

"The power of the Legislature to endow companies organized for public purposes with the capacity to acquire lands under the right of eminent domain is undisputed. Grants of this character, like all public grants, are to be strictly construed. What is not plainly given is withheld."

From this it clearly appears that the Court was dealing with this case upon the theory that the land had been acquired under condemnation or by eminent domain, and that the company's rights were limited by its charter to the estate that might be acquired by condemnation.

One cannot read the Pipe Line case without being compelled to realize that that case was determined upon the principles and theory of lands taken in condemnation proceedings, and, therefore, as above stated, it is no authority for the case at hand.

Plaintiff contends that the cases cited in the Pipe Line case should convince the Court that the title to the lands in question is in plaintiff. It is respectfully submitted, however, that the cases cited in the Pipe Line case are not in point, and are not authority for plaintiff's contention. The cases cited in the Pipe Line case are cases cited to support the limitation of the fee simple in instances where lands have been taken under eminent domain by corporations having power to condemn and take only a limited fee in real estate without mentioning what estate they might take by purchase.

At page 264 in the Pipe Line case the Court said:

"The title acquired by a Railroad Company

by condemnation under statutory powers similar to those contained in the charter of the Morris & Essex Road was elaborately discussed and decided in New York vs. Trimmer, 24 Vr. 1," which case cites another case along the same line, and again at page 265 the case cites the case of *Taylor vs. New York,* 9 Vr. 28, where Chief Justice Beasley delivered an opinion concerning condemnation proceedings.

The plaintiff particularly calls attention to the case of *State vs. Brown,* 27 L. 13, also cited in the Pipe Line case, which case arose as follows: A grant of lands had been made to the Morris Canal & Banking Company along the shore of New York Bay, after which the Board of Freeholders of Hudson County granted a wharf license to Brown. Under the act then in force, no one could procure a wharf license unless they were the owners of the abutting land.

The Court at page 16 said:

"The proceedings were instituted and the license granted under the provisions of an act entitled, 'An act to authorize the owners of lands upon tide waters to build wharves in front of the same.' "

The Court, on the same page, said:

"The only question presented for the consideration of the Court is whether Albert N. Brown to whom the license is granted is a shore owner, and as such authorized to receive the license under the provisions of the act."

The claim of Brown was that the deed to the Canal Company conveyed to them the land for canal purposes, and did not convey any water rights, therefore Brown still was the owner of the shore and entitled

to the wharf license. The prosecutor claimed that the deed to Morris Canal & Banking Company gave them an absolute title to the land, and that that title gave them the right to build docks and wharves and to exercise all other rights incident to shore ownership.

In disposing of the question, the Court in the course of the opinion, at page 20, recited the deed to the Canal Company as follows:

> "To have and to hold all and singular the above described tract or parcel of land and premises, with the appurtenances, unto the said party of the second part, their successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, their successors and assigns, as long as used for a canal." * * *
> "There is no reservation in the deed. It conveys all the right, title and interest of the grantors in the land and its appurtenances for a term specified in the grant, to wit, 'as long as used for a canal.' By the terms of the conveyance the grantees took a qualified fee liable to be defeated whenever they ceased to use the land for the purposes specified in the grant, yet while the estate continues and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as if it were a fee simple."

The Court, in disposing of the case, at page 22 said:

> "Without intending to intimate the least expression of opinion upon the question whether the Canal Company may exercise the right of building wharves in front of this land, I am clearly of opinion that the grant of license for this purpose by the Board of Freeholders to another person was not authorized by statute and must be set aside."

Two propositions therefore clearly appear:

1. That the Court did not determine what rights the Canal Company secured under that deed, because whether it was a limited or an absolute fee made no difference in that case at that time.

2. That the question of the extent of the rights under the deed was not before the court in that case.

In the opinion the Court refers as authority for its proposition concerning a qualified fee to 2 *Blackstone Comm.* 110, and a reference to that work is of interest in this case for the reason that it clarifies the creation of these qualified fees by showing that the qualification appeared in the granting clause and not simply in the habendum.

Blackstone said:

> "A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end, as in the case of a grant to A and his heirs, tenants of the manor of Dale. In this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated."

We do not deny but that if the qualification had been inserted in the granting clause (not the recitals) the estate would have been limited.

The case of *State vs. Brown* is further of interest in this case as a dictum that the plaintiff cannot succeed in this case in any event because the time mentioned in the deed for its alleged termination has not arrived. The Camden & Atlantic Railroad Company is still a Railroad Company.

At page 20 the Court said:

> "Yet while the estate continues and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over the estate as if it were a fee simple."

Another case cited in the Pipe Line case is that of *Southard vs. Central Railroad Company* (26 L. 13), which was an ejectment suit brought to recover possession of land on the ground of a breach of condition. It fairly appears from the report of the case, page 17, that the condition was a part of the grant. In that case the Court held that when conditions tend to the forfeiture of an estate or to defeat it, they are *stricti juris*, and should be construed strictly, and it was held that the limitation contended for by the plaintiff was not contained in the deed.

Another case cited in the Pipe Line case was *New York Cemetery Co. vs. Buckmaster*, wherein certain lots in a cemetery had been conveyed to the father of Clara Buckmaster for the uses of sepulchre only, and to and for no other use whatever, subject to the conditions and limitations, and with the privileges specified in the rules and regulations which at the date of the conveyance were made or which thereafter might be made and adopted by the managers of the cemetery.

The Cemetery Association, conceiving that the lots were not used for the purpose of sepulchre only, and therefore that Clara Buckmaster had no right to the possession thereof, took possession of them. A suit in ejectment was instituted to recover this possession. The Court at page 462 said:

> "The conveyances under which Miss Buckmaster claimed passed to her the fee in the property, and it is to her own use although that use is limited."

In other words, the Court determined that where it was conveyed for a particular use, even though it were not used for that purpose it did not terminate the fee but its use only was restricted.

The judgment went in favor of Miss Buckmaster, which judgment was affirmed in the Court of Errors and Appeals, in effect holding that the clause was but a covenant.

The other cases mentioned in the Pipe Line case were cases in which the power to hold was limited by reason of the various provisions of their respective charters.

Plaintiff cites from 21 *Cyc.*, at page 353, the definition of a habendum clause, and then says that the habendum may limit, restrain, lessen, enlarge, explain, vary or qualify.

Such may be the rule of law in other states of the Union, but is directly contrary to the statement of the law by Vice-Chancellor VanFleet in the case of *Havens vs. Seashore Land Company*, 47 Eq. 353, at 371, above cited, and also contrary to the rule of law stated by the Court of Errors and Appeals in the case of *Staffordville Gravel Co. vs. Newell*, 53 L. 412-415 above cited.

Plaintiff quotes from Blackstone's Commentaries as to the various parts of the deed. We have no comment to make on that quotation except to call the Court's attention to the fact that Chancellor Kent says that in this country the habendum has practically gone into disuse; in other words, the office of the habendum has become practically obsolete.

Plaintiff also cites the case of *Chicago Lumber Co. vs. Powell*, 78 N. W. 1022, which case admits that as a rule the granting clause prevails over the habendum where the limitations are inconsistent, but asserts that the habendum was to designate the extent of the estate granted, and that if it clearly appears

that it was the intention of the grantor to enlarge or restrict the granting clause by the habendum, the latter must control.

We have not the Northwestern Reporter at once. We do not know from what state this case comes. We do not know the rule of law in that state, but insist that the statement of the law contained in plaintiff's brief is not the law of our state.

The next case cited in plaintiff's brief is the case of *Berry vs. Billings*, 44 Me. 416, in which plaintiff claims that the habendum was held good and effectual to limit the estate. In that case the quantity of the estate was not described in the granting clause. The headnote to the case is as follows:

> "1. The word *premises* in a deed of conveyance means everything which precedes the habendum, and if the premises are descriptive merely and no particular estate is mentioned, the habendum becomes efficient to declare the intention.
>
> "2. A deed of land *to have and to hold to B, and his heirs* is good although the grantee is not named in the premises, and when the habendum is not repugnant to the premises, it is good and effectual."

Our only comment on this case is that evidently plaintiff's attorney did not read the case before citing it.

The next case mentioned by plaintiff is the case of *Mitchell vs. Wilson*, 17 Fed. Cases No. 9672, but inasmuch as this was a case of a deed for a negro and not a deed for lands, it is difficult to understand its application to our case. What the effect of a habendum in a bill of sale for personal property is has not, to our knowledge, been considered in our state.

Under the question of re-entry the plaintiff cites from 4 Kent's Comm., and other volumes, to the ef-

fect that it is usual to insert a right of re-entry for the breach of a condition, but the grantor or his heirs may enter and take advantage of the breach by ejectment if there be no clause of entry.

The difficulty of that argument is that there is no condition in the deed at hand. It is not a deed upon condition; it is either a fee simple absolute or a qualified fee. It contains none of the appropriate words for the creation of any condition in a deed, and therefore those citations are inapplicable.

The case of *Bray vs. Blanchard*, 8 Pick. 284, cited by the plaintiff was a case of a deed upon condition, having the appropriate words to create a condition, to wit, "provided, however, this conveyance is upon the condition, &c.," as are also the cases cited by plaintiff of *Papst vs. Hamilton; Adams vs. Orr;* 13 *Cyc.* 690; *Glocke vs. Glocke,* and *Thomas vs. Record.*

The plaintiff then drawing the conclusion that where the words of a deed creating an estate are sufficient in themselves to create a condition, qualification or limitation, it is not necessary to make an express provision for right of re-entry.

The fallacy of this conclusion lies in the fact that there is a vast difference between a condition and a limitation. To create a condition, one set of appropriate words must be used; to create a limitation, another set of words must be used, and in the case at hand, as above stated, no words are used that will create a condition.

In the case of *Butterhof vs. Butterhof,* 84 L. 285, a deed was made for certain lands upon consideration of the sum of $3,000, the deed containing this *proviso* or condition:

> "This conveyance is made upon the further condition which forms part of the consideration, that the said Joseph Butterhof shall provide reasonable support and maintenance for the said

John Butterhof during the term of his natural life."

The Court of Errors and Appeals at page 286 said:

"The deed contains no forfeiture clause or right of re-entry."

At page 288 the Court said:

"This brings us to the fundamental question whether in any event the appellant is entitled to succeed, which, for the purpose of this appeal, is presented by the question whether a verdict ought to have been directed at the trial upon the ground that ejectment would not lie, and that in turn depends upon whether the agreement of the defendant to support the plaintiff contained in the deed affected the fee thereby conveyed so as to render it conditional or base, or whether it was merely a part of the consideration of the deed and hence at most a covenant, for the breach of which an action for damages would lie. We are clearly of the opinion that it was of this latter character, not only because it is the plaintiff's deed and forfeitures are not favored by the law, but also because the deed itself states that the stipulated support is a part of the consideration."

As to the question of recitals, the plaintiff seems to have disposed of it upon the principle that deeds must be construed to carry into effect the intention of the parties, without citing any cases dealing with the question of recitals excepting from 13 *Cyc.* and cites from *Cyc.* supported by an Alabama case as authority for the proposition that the strictness of the ancient rule as to repugnancy in deeds is much relaxed, and the same case to support his proposition

that if clauses or parts are conflicting or repugnant, the intention is to be gathered from the whole instrument instead of from particular clauses.

He further cites from the case of *Kelly vs. Parsons,* to the effect that the deed to A and his children, with habendum to A and his heirs, conveys a fee simple. This is not denied, but admitted to be the law. The word "children" has no significance whatever in a deed of conveyance, and a deed to *A and his children* is precisely the same as though the deed were simply to A, and all the cases hold that where the granting clause is in general terms, that the habendum is given force.

He cites further another Southwestern Reporter case to the effect that the Court must harmonize the different clauses therein so as to give effect, if possible, to the language of each clause, and that the habendum is only to be rejected where it is repugnant to the estate granted. That is our contention also in this case. The granting clause conveys a fee. The habendum endeavors to lessen the estate, therefore it is repugnant.

He then cites from the case of *Parker vs. Mirch,* 64 Me. 54, which is a case dealing with a trust deed. In that case there was a trust deed, the granting part of which was unlimited in time, but the latter part of the deed limiting the general words first employed.

It is respectfully submitted that that case is of no value in the case at hand. That was a contest between the grantee, trustee and the guardian of one of the *cestui que trustents* mentioned in the deed, and the deed was given that construction which effectuated the intention of the grantor.

In conclusion the plaintiff insists that the only effect that can be given the covenant is to show that the grantor intended to convey all that he owned as long

as the estate continued under the qualifications annexed to the grant.

No case is referred to, and it is respectfully submitted that if the grantor had such intention, it would have been an easy matter for it to have inserted words qualifying the covenant. In the absence thereof the covenant stands as a general covenant of the grantor, and must be construed to have intended precisely what the language of his covenant imports, which is fully covered by the cases above cited by defendant.

It is respectfully submitted that the judgment of the Circuit Court should be reversed and judgment entered in favor of the defendants.

Respectfully submitted,
BOURGEOIS & COULOMB,
Attorneys of Defendants.

N. J. Court of Errors & Appeals

JUNE TERM, 1918.

CAMDEN, ATLANTIC & VENTNOR LAND COMPANY,
Plaintiff-Respondent,
vs.
WEST JERSEY & SEASHORE RAILROAD COMPANY, ET AL.,
Defendants-Appellants.

ON APPEAL FROM SUPREME COURT.

BRIEF
ON BEHALF OF PLAINTIFF-RESPONDENT.

STATEMENT OF CASE.

This is an appeal from a judgment entered in the Supreme Court, based upon a verdict in an ejectment proceeding directed for the plaintiff, against three defendants, who were in possession of lands situate in Atlantic City.

The issue in question involves the construction of a deed dated May 1, 1871, made by the Camden & Atlantic Land Company to the Camden & Atlantic Railroad Com-

pany, conveying a tract of land in Atlantic City for railroad purposes.

The learned Trial Judge held that upon the abandonment of the land by the West Jersey & Seashore Railroad Company, the successor in title of the grantee in such deed, the title to the *locus in quo* reverted to the plaintiff, as the successor in title of the grantor, and therefore directed a verdict in favor of the plaintiff.

FACTS.

The admitted facts in the case are:

1. The Camden & Atlantic Railroad Company was organized under Chapter 124 of the Laws of 1852, which provided that the corporation should be capable of purchasing, holding and conveying any lands, &c., necessary or expedient for the object of its incorporation.

2. It was given the right to construct a railroad from the city of Camden to the Atlantic Ocean, and the power was conferred to hold and use lands necessary to lay rails and do all other things which might be suitable and necessary for the completion and repair of the road.

3. Section 13 of the charter gave the company the right to purchase and hold real estate at the termini, at any intermediate depots along the line, not exceeding five acres in each place, and erect and build thereon houses, &c.

4. By deed dated May 1, 1871, the Camden & Atlantic Land Company conveyed to the Camden & Atlantic Railroad Company a tract of land for railroad purposes, of which the *locus in quo* is a part.

5. The land so conveyed was used as a spur from the corner of Atlantic and Arkansas avenues curving toward Missouri avenue, upon which tracks of a siding were laid, which ran from the main track on Atlantic avenue to the foot of Missouri avenue, where an excursion house was maintained.

6. The Camden & Atlantic Railroad Company was merged into the West Jersey & Seashore Railroad Company by agreement dated February 28, 1896, and the latter corporation thereby acquired all the rights of the former company in the *locus in quo*.

7. The Camden & Atlantic Railroad Company entered upon the *locus in quo* on or about May 1, 1871, and immediately thereafter constructed a railroad track over and along the same and continued to occupy the said lands, with its railroad tracks, until about April 1, 1916, when the latter were removed.

8. The land was never used for station purposes.

9. On April 19, 1916, the West Jersey & Seashore Railroad Company conveyed the easterly portion, described in the complaint, to the defendant, Frank Ruffo, and said Ruffo took possession thereof and was in possession when this suit was brought.

10. On April 19, 1916, the West Jersey & Seashore Railroad Company conveyed the westerly portion of the *locus in quo* to Armand T. Nichols and the latter entered in possession and was in possession at the time this suit was brought.

11. At the commencement of plaintiff's action the West Jersey & Seashore Railroad Company was the record owner and in possession of a portion of the *locus*

in quo, for which it defends, but it had entered into an agreement to sell the same to one Jackson, and after the commencement of the suit the Railroad Company conveyed the same to Jackson.

12. At the time of the commencement of the suit the West Jersey & Seashore Railroad Company was not actually using that portion of the *locus in quo*, for which it defends, for any purpose whatever.

13. The *locus in quo*, before it was sold to the Camden & Atlantic Railroad Company, was owned in fee simple by the Camden & Atlantic Land Company.

14. The plaintiff in this action succeeded to the rights of the Camden & Atlantic Land Company in the *locus in quo* by virtue of a deed dated May 8, 1889. (C., p. 7, l. 26.)

15. The conveyances made by the Railroad Company to Nichols and Ruffo were duly consented to by the Board of Public Utility Commissioners of New Jersey.

ARGUMENT.

What was the character of the estate created by the deed to the Railroad Company?

The contention of the plaintiff is that the Railroad Company, by the deed in question, did not obtain an absolutely indefeasible estate, but the title acquired was in the nature of a qualified or base fee of the character described and referred to in the case of *Pipe Line Company vs. D., L. & W., 62 L., 254.*

In the latter case this Court had occasion to construe a deed substantially similar to the one here involved, and held that the same conveyed a qualified fee and not an absolute fee. In such case the grantors conveyed to a railroad company, and its successors and assignes forever, the lands involved, with full power to make use of the same in all lawful ways for the purpose of extension of its railroad, and as part of the route thereof, with the following habendum:

> "To have and to hold the said above described "lands and premises, with the appurtenances, unto "the Morris & Essex Railroad Company, and its "successors and assigns forever, for all the purposes "mentioned in said act of incorporation and the sup- "plements thereto passed and to be passed."

This Court held that the qualifying words in the habendum clause amounted simply to a qualification of the fee that enured to the company by the operative words of grant, and that the estate acquired by the company was a qualified fee or a fee simple determinable. Also that the grantee, as owner of a qualified fee, had the same rights and privileges in the estate until the qualification upon which it is limited came to an end, as if it had held in fee simple, and, in the meantime, the whole estate vested in the grantee, subject only to a possibility of reverter to the grantor.

The habendum clause in the deed under consideration in the case at bar is as follows:

> "To have and to hold the same unto the said party "of the second part, their successors and assigns, for "the purposes of the said railroad for and during

"the continuance of the said railroad, to their only "use, benefit and behoof forever." (C., p. 14, l. 23.)

The recital contained in this deed is as follows:

"The said party of the second part have agreed "with the said Camden & Atlantic Land Company "for the purchase of so much of said land as is re- "quired for the construction of said road, to be held "by said company, their successors and assigns, dur- "ing the continuance of said road." (C., p. 12, l. 40.)

We, therefore, contend that as the Pipe Line case is the leading case upon this subject, the decision there reached is dispositive of the question here involved. Other authorities are cited in the Pipe Line case which support the construction for which we now contend.

In *State vs. Brown, 27 L., 13*, the Supreme Court construed a deed made to the grantee, their successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns, "as long as used for a canal," and held that the grantee took a qualified fee, liable to be defeated at the time the qualification, upon which it was limited, was at an end. The limitation in the Brown case, "as long as used for a canal," in effect, is identical with the limitation deed in this case, to wit: "for and during the continuance of said railroad."

Another case in which substantially the same question was involved is *Cemetery Company vs. Buckmaster, 49 L., 449*, where a deed in fee for a burial lot contained the following habendum clause:

"To have and to hold the granted premises to the "said, &c., his heirs and assigns, for the uses of "sepulture only, and to or for no other uses what- "ever, subject, however, to the conditions and limi- "tations and with the privileges specified in the rules "and regulations now made or that may hereafter "be made and adopted by the managers of the said "cemetery for the government of the lot-holders and "visitors of the same."

And it was there held that the effect of the conveyance was to pass to the grantee a fee with a limitation as to the use of the lands granted.

HABENDUM.

It may be claimed that resort to the habendum clause cannot be made to limit the use of land where the grantee, having power to take an indefeasible title by the granting cause of his deed, obtained such a title.

This raises the question as to the power of the Camden & Atlantic Railroad Company, by its charter, to acquire a title to lands in fee, regardless of the use to be made of the same.

The first section of the Act of March 19, 1852, P. L. 263, by which the Camden & Atlantic Railroad Company was incorporated, is as follows:

"Be it enacted, etc., that John W. Mickle, etc., "and such other persons as may be hereafter asso- "ciated with them, shall be and are hereby ordained, "constituted and declared to be a body politic and "corporate, in fact and in name, by the name of the "Camden & Atlantic Railroad Company, and shall

"be capable to purchasing, holding and conveying "any lands, tenements, goods and chattels whatso- "ever necessary or expedient for the object of this "incorporation."

Section 6 of said Act confers the power "to survey, lay out and construct a railroad from the city of Camden * * * to the sea, at or near Absecon Inlet, * * * and to enter upon, take possession of, hold, have, use, occupy and excavate any such lands and to erect embankments, bridges, ferries and all other works necessary, to lay rails and to do all other things which shall be suitable or necessary for the completion or repair of said road or roads, subject to such compensation as hereinafter provided."

Section 7 provides that in case of condemnation and payment of award, the company shall have the right "to have, hold, use, occupy, possess and enjoy said lands and materials."

Section 13 of the Act confers authority upon the company "to purchase, have and hold real estate at the termini of their railroad, or at any intermediate depots upon the line of the same, not exceeding five acres at each place, and erect thereon houses, warehouses, machine shops and other buildings and improvements."

Certainly, this Act does not confer the right upon the Camden & Atlantic Railroad Company, generally, to acquire lands in fee simple, not for railroad purposes.

It will be argued that Section 3 of the General Railroad Act, 3 Comp. Stat., p. 4220, confers this authority by giving to every railroad company the general powers conferred by "An Act Concerning Corporations," Revision of 1896.

It will be observed, however, that there is a special power conferred by the General Railroad Act to acquire from time to time and to hold and use all such real estate and other property as may, in the judgment of its directors, be necessary for terminal purposes and for the construction and maintenance of its railroad and stations, branches, sidings, car yards, engine houses, repair shops and other accommodations necessary to accomplish the objects of its incorporation and to sell land thus acquired when not necessary for such purposes and objects.

So far as I have been able to discover, the Camden & Atlantic Railroad Company did not possess any power to accept a title in fee simple in 1871, when the deed was made to it from the Land Company. The power to purchase in fee must be ascertained as of the time when the conveyance was made, and it is immaterial to determine what power was created by the Railroad Act of 1903.

As incidental to the discussion, relative to the form of the conveyance adopted, to pass title from the Land Company to the Railroad Company, we desire to refer to a form of a trust deed set out in Corbin's Forms, page 430, as to the appropriate method in which to prepare a conveyance where the estate granted is to be qualified by a particular use or other limitation. The form there given shows a grant in fee, with the habendum clause in the usual form, after which the following words are used: "Upon the trust, nevertheless."

We insist that in all conveyances where it is proposed to impose a qualification to a fee or limit the operation of a deed or prescribe certain use to the property conveyed, the usual and appropriate place in which to write the necessary words of limitation or qualifications is

after the habendum clause and is a part thereof. So far as our experience goes, this is the universal practice adopted in such cases.

In each of the three cases above referred to, to wit, the Pipe Line, the Brown and Buckmaster cases, what is commonly known as the granting clause conveyed to the grantees a title in fee, and in each the limitation, as to the use of the land, was incorporated in the habendum clause, and yet the estates created were held to be a base fee.

The habendum clause is defined as that portion of the deed which defines or limits the estate or thing granted. Literally, it means to have.

21 Cyc., 353.

Cyc. also says, "The habendum may limit, restrain, lessen, enlarge, explain, vary or qualify, but not totally contradict or be repugnant to the estate granted in the premises."

The second book of Blackstone, page 298, describes the component parts of a deed:

The first is the premises, which set forth the names of the parties, recitals, consideration, also the grantor, grantee and the thing granted. Then follows the habendum and tenendum, and it is stated therein that the office of the habendum properly is to determine what estate or interest is granted by the deed, although this may be performed, and sometimes is performed, in the premises, in which case the habendum may lessen, enlarge, explain or qualify, but not totally contradict or be repugnant to the estate granted in the premises. Thus, if a grant be made to A and the heirs of his body in the premises, with

habendum to him and his heirs forever, or vice versa, there A takes an estate-tail with a fee simple expectant thereon, but, if the premises had been to him and his heirs, with habendum to him for life, the habendum would be utterly void, for an estate of inheritance is vested in him before the habendum comes, and shall not afterwards be taken away or divested by it.

The object of this is manifest. Estates are those of inheritance and those of less than inheritance, and it seems to be perfectly proper to limit, qualify or explain the character of the estate granted in the habendum, as long as the effect of it is not to reduce the estate from one of inheritance to one not of inheritance.

Those instances which are cited in the Pipe Line case, page 267, seem to cover this situation. As in the case of a grant to A and his heirs, tenants of the Manor of Dale, it being held that whenever the heirs of A ceased to be tenants of that Manor, their estate ends.

With reference to a conveyance to a corporation, it is not necessary to use the words "successors and assigns," in order to vest a fee simple in the grantee.

The purport of the deed under consideration is a conveyance to the Railroad Company of the land described, to have and to hold the same as long as it is used for railroad purposes. It will be observed, when this language is analyzed, that there is no grant separate and distinct from the habendum clause, which limits the use. The deed must be construed as a whole, and the habendum clause, qualifying the use, is just as much an integral part of the deed as that portion which is incorporated in the premises or so called "granting clause." The fact that the description of the property is inserted

between the premises and the habendum clause does not in any way limit the effect of the provision as to the use connected with the conveyance of the property. In other words, we have here a conveyance to the grantee. There is nothing to indicate the character of the estate granted. The habendum clause is the means by which the parties define, limit or qualify the estate or thing granted.

All of the cases which I have been able to find, in which the general proposition is stated that the habendum clause cannot limit the estate granted in the premises, apply to those where an effort is made to so construe the habendum clause as to contradict the granting clause, as where there is an attempt to reduce an estate of inheritance to a life estate.

Land conveyed to a trustee for benefit of creditors. The granting clause was in the usual form. By the habendum clause the deed was made subject to all existing timber contracts. It was urged that inasmuch as the provision was contained in the habendum clause of the deed, its was not a limitation upon the estate. Held, this is not a case for the application of such a rule. As a rule, the granting clause prevails over the habendum clause, where their respective limitations are inconsistent; but it has always been held that the habendum was designated to denote the extent of the estate granted. If it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the habendum, the latter must control. Timber held excluded.

Chicago Lumber Co. vs. Powell, 78 N. W., 1022.

A conveyance of a right of flowage on a certain lot. The habendum provided that the water should not flow higher than the present mill dam. Held habendum good and effectual.

Berry vs. Billings, 44 Me., 416.

For a case of a conveyance of personal property, a slave, where the habendum clause qualifies the grant, see

Mitchell vs. Wilson, 17 Fed. Cas. No. 9672.

It may be suggested that the opinion of Mr. Justice Van Syckle, in *Smith vs. Woodruff, 12 N. J. L. J., 149,* controls the question here involved.

We submit that this latter case can be clearly differentiated. It was argued there that a limitation inserted in the habendum clause could not qualify the estate granted. It was attempted there to reduce the estate granted to the life estate from a fee, which was clearly created by the instrument itself. This is not the same situation in the case confronting us.

THE RECITAL.

Irrespective of the habendum, which we claim creates a qualified or base fee, we further insist that the deed in its entirety shows that the parties intended to limit the duration of the estate to such time as the lands might be used for railroad purposes.

The recital in the first part of the deed is to the effect that the grantor is seized of certain lands, particularly described in the route of the railroad, and the Railroad Company has agreed with the Land Company for the

purpose of so much of said lands, as is required for the construction of said road, "to be held by said company, their successors and assigns, during the continuance of said road."

It is manifest from this language that the lands were to be held by the Railroad Company during the continuance of the use of the same for railroad purposes.

It may be argued that the language of the habendum clause, "for and during the continuance of said railroad," is evidence of an intention to confer such right as long as the corporation grantee continued in existence, irrespective of the occupation of the land itself.

We insist, however, that the use of the word "road" in the recital, and the use of the word "railroad" in the habendum clause, clearly indicates that it was the intention of the parties to limit the estate created by the conveyance during the time the land was physically used for railroad purposes and not during the life of the grantee as a corporation.

We, therefore, contend that this Court is justified in having resort to the recital, for the purpose of determining the character and extent of the grant.

It is well settled that deeds must be construed so as to effectuate, if possible, the intention of the parties, especially that of the grantor.

13 Cyc., 601.

In support of this general proposition is *Huyler vs. Atwood, 26 Eq., 504*, affirmed *1 Stewart, 275*.

The intent must primarily be gathered from a fair consideration of the entire instrument, and the language em-

ployed therein, and should be consistent with the terms of the deed, including its scope and subject matter. This last stated rule should also be applied so as to give effect and meaning to every part of the deed, each clause being considered separately, and being governed by the intent deducible from the entire instrument, separate parts being viewed in the light of other parts, if the same can be done consistently with the rules of law.

13 Cyc., 605.

A granting portion of a deed, passing all the estate, cannot be diminished by mere recital in the description, nor can a general recital control the plain words of the granting part, although the general terms in a grant may be limited and restrained by a recital stating the object of the grant. A recital in the premises may also be referred to in ascertaining the motives and reasons upon which the deed is founded.

13 Cyc., 621.

The strictness of the ancient rule as to repugnancies in deeds is much relaxed, so that in this, as in all other cases of construction, if clauses or parts are conflicting or repugnant, the intention is gathered from the whole instrument instead of from particular clauses, and if it is the clear intent of the grantor that apparently inconsistent provisions shall all stand, it will be given that effect, is possible. A clause should not be construed as repugnant to the grant, and, therefore, void, so as to defeat the manifest intention of the parties.

13 Cyc., 618.

The granting clause of a deed read to the party of the second part "and his children." The habendum read "unto the party of the second part, his heirs," &c. Held, the grantee acquired the fee simple. Where the granting and habendum clauses of a deed are irreconcilable, and the other parts thereof do not make it apparent which the grantor intended should control, the granting clause prevails; but, where both parts of a deed may stand together, consistent with the rules of law, they will be construed to have that effect.

Kelly vs. Parsons, 128 S. W., 792.

The grant in fee simple and restrictions in the habendum. Held, the Court, in construing a deed, must harmonize the different clauses therein, so to give effect, if possible, to the language of each clause. The office of the habendum clause of a deed is to define the extent of the grant, and it is rejected only where there is a clear and irreconcilable repugnance between the estate granted and that limited in the habendum.

McDill vs. Meyer, 127 S. W., 364.

Where there is a grant by deed, in general terms, those terms may be limited and restrained by a recital, stating the object of the grant.

Woods vs. Nashua Mfg. Co., 5 N. H., 467.

The whole of an instrument declaring a trust must be considered in determining the nature and terms of the trust; and where, in the granting part of a deed, a trust unlimited in time is declared, but there is a qualification inserted at the close of the description of the premises, limiting the duration of the trust, the latter clause must

be construed as a limitation of the general words first employed.

Parker vs. Murch, 64 Me., 54.

THE COVENANT.

It may also be argued that the covenant in the latter part of the deed was an indication of the purpose, on the part of the grantor, to convey an absolutely unqualified title in fee simple. A careful reading of this covenant will demonstrate that it was merely a warranty against any acts done by the grantor by which the estate and interest granted was encumbered. Undoubtedly, this covenant confirmed the granting of a fee simple grant as long as the grantee made use of the property, as expressly limited in the grant.

It is unnecessary to cite authorities to support the proposition that a warranty can never enlarge an estate granted by a conveyance, in which a covenant of warranty appears. The rule upon this subject is stated in Section 1019 of Reeves on Real Property, as follows:

> "Estoppels growing out of covenants of warranty "are never any broader than the warranty itself. "When, for example, the warrantor purports to con- "vey more than an undivided interest in a piece of "land or only a mortgagee's lien thereon, the estop- "pel affects himself and his privies no farther than "the extent of such lien or interest."

Of necessity, the same rule applies where the warrantor purports to convey merely a qualified fee and the estoppel, therefore, would only affect the grantor so far as that character of an estate is concerned.

Manifestly, the effect of the covenant is that the grantor intended to convey all he owned as long as the estate continued under the qualification annexed to the grant.

EJECTMENT WILL LIE IN FAVOR OF THE PLAINTIFF.

The contention of the defendants, as we understand it, is that the only right which the Camden & Atlantic Land Company retained, after the execution to the Railroad Company of the deed, the construction of which is the subject matter of dispute, was a mere possibility of reverter, and that the conveyance from the Camden & Atlantic Land Company to the plaintiff did not vest in the plaintiff the right of re-entry, which might be taken advantage of upon the breach of the condition reserved in the original deed to the Railroad Company, or enforced against the Railroad Company if it discontinued the use of the real estate in the manner as prescribed in such deed.

For the purpose of the discussion, we may concede that the Camden & Atlantic Land Company retained a mere possibility of reverter when it made and delivered the conveyance to the Railroad Company. We also concede that for the purposes of this action, as set forth in the complaint, and the facts agreed upon, that the right of re-entry did not arise until after the conveyance was made by the Camden & Atlantic Land Company to the plaintiff.

We contend, however, that since 1851, the possibility of a reverter is transferable in New Jersey under the pro-

visions of the Act of March 14, 1851, P. L., page 282, 2 Comp. Stat., p. 1539, Sec. 19.

The expression "possibility of reverter" has been used in a variety of senses. Its history and meaning are explained in Butler's Note to Fearne, Cont. Rem., p. 381, as follows:

> "It is generally understood that lands were granted originally for the life only of the grantee, then to him and to his lineal heirs, and then to him and his lineal and collateral heirs, and that on every such grant, whether for life or in fee, a right remained in the grantor to the services of the grantee during the continuance of his estate, and to a return of the land at its expiration. Whether this right of the grantor depended on an estate for life in fee, it was of the same nature and indifferently called his revertor or escheat; but, from the remote probability of the return, when the fee was granted, it became customary to call it after the grant of the fee his possibility of reverter. By degrees that expression was applied to those cases only where a limited fee had been granted, and the word was applied to those where the grant had conferred an absolute estate in fee simple. A grant to a man and his heirs of his body was at common law a limited fee, and, therefore, after such a grant, a possibility of reverter was said to remain in the grantor. When the statute of *de bonis* converted such fees into estates tail, the return of the land was secured by it to the donor, and was called his reverter. In all these cases the words 'reverter' and 'reversions' are synonymous."

Grey on Perpetuities, Section 13, has the following to say with reference to possibilities of reverter:

"Some estates are terminable by special or col-
"lateral limitations. For instance, an estate to A
"until B returned from Rome, or an estate to A
"and his heirs until they ceased to be tenants of the
"Manor of Dale. On the happening of the con-
"tingency, the feoffor was in of his old estate with-
"out entry. The estate was not cut short as it would
"have been by entry for breach of condition, but ex-
"pired by the terms of its original limitation. After
"a life estate of this kind, a remainder could be lim-
"ited. After such a fee it has commonly been sup-
"posed that there could be no remainder, but there
"was a so-called possibility of reverter to the feoffor
"and his heirs which was not alienable."

At common law, the possibility of a reverter after a fee on condition could not be aliened or devised.

Section 722 of Reeves on Real Property contains the following comment upon the possibility of reverter and its transferability:

"The grantor of an estate in fee on condition,
"having no right or interest left in the property
"other than the mere chance of regaining it because
"of a breach, cannot in any way alien such mere
"chance or right except in the few jurisdictions in
"which the power to do so is given by local statute,
"but must either release it to the owner of the prop-
"erty, or, upon his own death, let it pass to his
"heirs. These two things he can do with it, and,
"with the exception of the additional rights arising
"from local statutes, they are the only two disposi-
"tions of it which he can make. This mere right or
"chance of regaining by forfeiture an estate which
"one has transferred in fee on condition, is said by
"high authority to be not an estate, interest or re-
"version, nor, properly speaking, a possibility of re-

"verter. The most exact designation of it is the "possibility of forfeiture. If it be not released to "the owner of the land, it passes to the heirs of the "grantor, not by way of descent, but by representa- "tion. It is to be carefully noted as the one remain- "ing right or instance connected with real property "of to-day which, by the prevailing rule, cannot be "sold or given away, or otherwise aliened."

The common law rule regarding this situation has been changed in New Jersey by virtue of the Act of 1851, above referred to, which provides as follows:

"From and after March fourteenth, one thousand "eight hundred and fifty-one, any person may devise "or may convey, assign or charge, by any deed, any "such contingent or executory interest, right of en- "try for condition broken or other future estate or "interest in expectancy, as he may have been or "shall hereafter be entitled to, or presumptively en- "titled to, in any lands, tenements or hereditaments, "or any part of such right, estate or interest, re- "spectively, although the contingency on which such "right, estate or interest are to vest may not have "happened; and every person to whom any such in- "terest, right or estate shall have been or be devised, "conveyed or assigned, his heirs and assigns shall, "on the happening of such contingency, be entitled "to stand in the place of the person by whom the "same shall have been or be devised, conveyed or "assigned, his heirs or assigns, and to have the "same interest, right or estate, or such part thereof, "as shall have been or be devised, conveyed or as- "signed to him, and the same actions, suits and reme- "dies therefor as the person originally entitled there- "to or his heirs would then have been entitled to "if no conveyance, devise, assignment or other dis- "position thereof had been made; provided, that no

"person shall have been or be empowered by this act "to dispose of any expectancy which he may have had "or have as heir of a living person, or any contingent "estate or expectancy where the contingency is as "to the person in whom, or in whose heirs, the same "may vest, or any estate, right or interest to which "he may have become entitled under any deed to be "thereafter executed, or under the will of any liv- "ing person; and provided, also, that no chose in "action shall by this act be made assignable at law, "and that nothing in this act contained shall render "any contingent estate or other estate or expectancy "therein mentioned liable to be levied upon and sold "by virtue of an execution."

The Supreme Court of this State, in *Cornelius vs. Ivins, 26 Law, 376,* held that the statute above referred to altered the rule at common law, and authorized the transfer of the right of entry for condition broken or other future estate or interest in expectancy by will executed after the Act went into effect. This case also held that where the right to re-enter for condition broken existed, an actual entry was not necessary in order to maintain a suit in ejectment.

The following is a quotation from the opinion of Chief Justice Green.

"As a general rule, it is not necessary to make an "actual entry on land in order to maintain an action "of ejectment. The right to re-enter not an actual "entry is requisite to sustain the action. * * * "and, even where, upon strict common law princi- "ples, an entry is necessary, as in case of a forfeiture "of an estate upon condition, to complete the title, "an actual entry is not necessary to maintain eject- "ment."

The latest and most important authority in New Jersey upon this question is the case of *Bouvier vs. Railroad Company, 67 Law, 281,* in which Mr. Justice Collins wrote the opinion for the Court of Errors. This opinion contains a complete historical review of the right to maintain an action of ejectment, based upon a condition broken, where the plaintiff in such action was not the same person in which the possibility of reverter was originally vested. After admitting that the right to alien the mere possibility of reverter before a condition broken did not exist at common law, Mr. Justice Collins, in commenting upon the Act of 1851, above referred to, uses this language (p. 290):

> "This language does not appear in 7 & 8 Vict., "and it seems to me that its effect must be to limit "the authority of a transfer so far as rights of entry "for condition broken are concerned to a transfer "before breach of the condition, and that is the con- "tention of the plaintiff in error. It is suggested "also that the proviso in the Act, that no chose in "action shall thereby be made assignable at law, ex- "cepts rights of entry after breach from its opera- "tion, but I do not take this view. Some Judges "have spoken of the right after breach as a mere "chose in action, but the designation is inaccurate. "A right of entry is an interest in land. A chose "in action is perhaps not definable with exactness, "but it certainly is not that. It does not extend, "even under modern legislation, beyond a right to "recover debt or damages or some interest in per- "sonalty. The Victorian statute included personal "property, and the proviso was appropriate. It "probably was retained in our Act through inad- "vertence, unless its application was intended to be "to hereditaments having some characteristics of "personalty."

The conclusion reached by the Court was that the statute of 1851 was sufficient to permit the alienation of a possibility of reverter.

The Bouvier case is annotated in *60 L. R. A., 750*, and the footnotes to the opinion are quite voluminous, and contain a number of authorities in other jurisdictions which support the proposition that such interest in land before breach is assignable under similar statutes.

There can be no doubt, therefore, that the right of the Camden & Atlantic Land Company to re-enter the premises in question, should the Railroad Company discontinue the use as designated in the deed, which constituted a possibility of reverter, was transferable, and if the deed from the Camden & Atlantic Land Company is sufficient for that purpose, the right of re-entry became vested in the plaintiff.

We contend further that the deed above referred to (C., p. 7, l. 20), was sufficient to vest in the plaintiff the right to maintain an action of ejectment against the defendant. This question, therefore, is to be decided upon the inquiry of whether or not the terms of such deed are sufficiently broad to transmit to the plaintiff such right of re-entry before condition broken.

There seems to be a line of cases which hold that the possibility of reverter is not a reversion, and it may be that such right would not pass under the general language usually incorporated in conveyances covering reversion and reversions, &c.

The deed from the Camden & Atlantic Land Company to the plaintiff is not an ordinary deed of bargain and sale. It is apparent, from the language of the deed itself, and the purposes for which it was made, as shown

by such language, that the selling corporation intended to transfer to the purchasing corporation all of its rights, property and assets of every sort, kind and description.

The recital therein is as follows:

"Whereas, the stockholders of the Camden and "Atlantic Land Company have caused to be organ- "ized under the General Corporation Act of the "State of New Jersey a new corporation under the "name of the Camden, Atlantic and Ventnor Land "Company, in order to do a more general real estate "business than is allowed under the charter of the "Camden and Atlantic Land Company, and have "taken shares in the Camden, Atlantic and Ventnor "Land Company, in lieu of their shares and prop- "erty rights in the Camden and Atlantic Land Com- "pany, upon the understanding and agreement be- "tween all parties concerned that all the property of "every description of the Camden and Atlantic Land "Company should be transferred to the Camden, "Atlantic and Ventnor Land Company; Now "therefore be it resolved, that the President and Sec- "retary of the said Camden and Atlantic Land Com- "pany be and they are hereby directed and required "to prepare and execute, under the seal of the com- "pany, one or more deeds transferring in due form "of law to the said Camden, Atlantic and Ventnor "Land Company all estate, rights and interest, both "real and personal of every description, now owned "by the said Camden and Atlantic Land Company, "which they shall deliver to the said Camden, At- "lantic and Ventnor Land Company, and thereafter "the books of the said Camden and Atlantic Land "Company shall be closed and no further business "transacted in its name."

The vendor, by said conveyance, did

> "grant, bargain, sell, release and confirm unto the "Camden, Atlantic and Ventnor Land Company, "and its successors and assigns, all of its real and "personal property and estate of every character and "description whatsoever, and all its property rights "of every form and character, real, personal or "mixed."

It is difficult to conceive of a more complete and comprehensive transfer of property and property rights than included within the description of this deed. The very purpose of the deed, as shown by the recital and the granting clause, was to pass to the plaintiff all property of every form and character which, at the time of the execution of the deed, was vested in or owned by the grantor.

Whether the possibility of reverter be defined as an interest in real estate or in personal property, it certainly passed under the sweeping definition of the property transferred by this conveyance.

It is true that at the time the conveyance was made no breach had occurred, and there was no vested estate in the land to convey. It was unnecessary to specifically describe the land, out of which there might possibly arise a right of re-entry thereafter, because the deed, by general terms, covered any rights which might exist in or arise out of such premises.

We have not been able to find any authority which holds that it is necessary, in the transfer of a possibility of reverter, to refer to the same by a specific and express assignment thereof.

It seems to us that general rules, with relation to the interpretation to be put upon the property and property rights transferred by a deed should control the construction to be accorded this conveyance.

> "Conveyance of all the grantor's right, title and "interest in and to certain described property will be "construed as a conveyance of all his estate in such "property, and the whole estate will vest in the "grantee."
>
> *13 Cyc., 655.*

No property or rights of any sort, kind or description remained in the grantor corporation after the execution and delivery of such deed. It was the purpose of the parties to divest the grantor of all property in order that it might go out of active operation, and thereafter the business, for which it had been originally incorporated, was to be conducted by the grantee.

The language of the deed would certainly be sufficient to result in the assignment or transfer of a chose in action.

A very exhaustive examination of authorities has failed to disclose any specific case where the courts have been required to interpret language similar to that incorporated in the deed in question here.

It seems to us that the proper interpretation to be put upon the general language of this deed is that it transferred to the grantee all its property rights of every form and character, real, personal or mixed, which, by law, were capable of alienation.

This construction is supported by the opinion of Chief Justice Green, in *Sutherd vs. Central Railroad Company, 2 Dutch., 14-22,* where the Court had occasion to con-

strue the words "all rights of any kind," contained in the first section of the supplement in the Act Concerning Wills, Nixon Dig., 877, and the interpretation put upon the language was that it meant:

> "All rights of any kind, which, by law, were de-
> "visable."

The general words of transfer contained in this conveyance, together with the following language of the above mentioned Act of 1851, to wit:

> "And every person to whom any such interest,
> "right or estate shall have been or be devised, con-
> "veyed or assigned, his heirs and assigns, shall, on
> "the happening of such contingency, be entitled to
> "stand in the place of the person by whom the same
> "shall have been or be devised, conveyed or assign-
> "ed, his heirs and assigns, and to have the same in-
> "terest, right or estate, or such part thereof, as shall
> "have been or be devised, conveyed or assigned to
> "him, and the same actions, suits and remedies there-
> "for as the person originally thereto, or his heirs,
> "would then have been entitled to, if no conveyance,
> "devise or assignment, or other disposition thereof
> "had been made,"

was sufficient to vest in the plaintiff in this case a status to maintain an action of ejectment based upon the breach of condition after an estate became vested by reason of such breach.

It may also be argued that the plaintiff cannot maintain ejectment because no right of entry was reserved in the deed from the Land Company to the Railroad Company.

We contend, however, upon the authority of the cases in New Jersey, above cited, that the estate conferred by the deed is qualified and conditional, and the following language of Mr. Justice Depew, found in *62 L., p. 268*, in the decision of the Pipe Line case, is dispositive of this question:

> "So long as the qualified fee remains, the grantor "or his heirs had no right of entering upon the "lands. If the estate granted was terminated by "breach of the condition, then the whole estate was "gone, and there could be no partial forfeiture. He "who enters for breach of condition regularly shall "have the land of his first estate."

In *Vannatta vs. Brewer, 32 Eq., 270*, it was held that the proper words to use in creating a limitation are, "while, so long as, until, enduring."

Blackstone, Book 2, page 154, says:

> "And when an estate is so expressly confined and "limited by the words of its creation that it cannot "endure for any longer time than until the con- "tingency happens, upon which the estate is to fail, "this is to denominate a limitation, as when land is "granted to a man so long as he is parson of Dale, "or while he continues unmarried, or until out of "the rents and profits he shall have made five hun- "dred pounds and the like. In such case the estate "determines, as soon as the contingency happens, "and the next subsequent estate, which depends up- "on such determination, becomes immediately vest- "ed, without any act to be done by him who is next "in expectancy, but when an estate is, strictly speak- "ing, upon condition in deed, as if granted express- "ly upon condition, to be void upon the payment of

"forty pounds by the grantor, or so that the gran-
"tee continues unmarried, or provided he go to
"York, &c., the law permits it to endure beyond the
"time when such contingency happens, unless the
"grantor, or his heirs and assigns, take advantage
"of the breach of the condition and make either an
"entry or a claim in order to avoid the estate."

It is usual in the grant to reserve, in express terms to the grantor and his heirs, a right of entry for the breach of the condition; but the grantor or his heirs may enter, and take advantage of the breach, by ejectment, though there be no clause of entry.

4 Kent Com., 123, citing.
Wigg vs. Wigg, 1 Atk., 383;
Doe vs. Watt, 1 Mann & Pyl, 694.

A clause reserving the right of re-entry is not necessary to the validity of a condition.

13 Cyc., 685, citing
Papst vs. Hamilton, Cal., 66 Pac., 10;
Gray vs. Blanchard, 8 Pick., 284;
Jackson vs. Allen, 2 Cow., 220.

The last point made in the argument for the tenant is, that there being no clause of re-entry for breach of condition in the deed, the provision is not strictly a condition going to the forfeiture of the estate, but may, for this reason, be construed into a covenant. But the law seems to be the other way. A clause of re-entry is not necessary to make a condition. Proviso, *ita quod, sub conditione,* make the estate conditional. Other words, such

as *si, si contingat,* do not make a condition, which will work a forfeiture, without clause of re-entry.

Bray vs. Blanchard, 8 Pick., 284.

Where land is conveyed as condition that it shall be used solely for the erection and maintaining thereon of a school and residences for teachers and students thereof, and for no other purpose, the estate conveyed is conditional, and, on the land being abandoned for such purpose, all rights thereto revert to the grantor, and a clause of re-entry is not necessary.

Papst vs. Hamilton, Cal., 66 Pac., 10.

Where there are express words in a deed, which of themselves make a condition subsequent, there is no use of a clause reserving a right of re-entry for breach thereof, in order to enable the grantor to avail himself of a forfeiture.

Adams vs. Ore Knob Copper Co., 7 Fed., 634; 4 Hughes, 589.

It is not necessary that there be any express power in the writings to make re-entry for condition broken.

13 Cyc., 690, citing
Glocke vs. Glocke, Wis., 89 N. W., 118;
Thomas vs. Record, 47 M. E., 500.

It is not essential to a condition subsequent in a conveyance of property that it be created by express words, or that there be any express power in the writings to make re-entry for condition broken, or to do anything equivalent thereto.

Glocke vs. Glocke, Wis., 89 N. W., 118.

In a deed of warranty, immediately following the description of the land conveyed, the grantor inserted a provision, "I give the said S. T. R. (grantee), this deed on the following conditions, to wit, the said S. T. R. shall maintain myself and my wife for and during the term of our natural lives," &c. Held, such a provision constituted a deed on condition. For the breach of the condition, the grantor or his heirs may enter and take advantage of the breach, though there be in the deed no right of entry expressly reserved.

Thomas vs. Record, 47 M. E., 500.

The effect of these authorities is that where the words of a deed creating an estate are sufficient in themselves to create a condition, qualification or limitation, it is not necessary to make an express provision for right of re-entry.

It may also be argued that the decision in *Butterhoff vs. Butterhoff, 84 L., 285,* will prevent a recovery by plaintiff, because no right of re-entry is expressly reserved to the Land Company. In the Butterhoff case, the conveyance under consideration was made in fee simple, with the following provision:

> "This conveyance is made upon the further con-
> "dition which forms part of the consideration, that
> "the said Joseph Butterhoff shall provide reasonable
> "support and maintenance for said John Butterhoff
> "during his natural life."

It will, at once, be observed that such a condition had no reference whatever to the character of the estate conveyed. It was a collateral condition with no express right of re-entry or forfeiture. In the case, *sub judice,*

however, the grant of the land was during the continuance of the use of the land which was conveyed, an entirely different situation.

HAS THE USE, AS QUALIFIED BY THE DEED, TERMINATED?

We understand that the Railroad Company, one of the defendants in the above cause, contends that the estate conveyed to the Camden & Atlantic Railroad Company by the Camden & Atlantic Land Company, under the deed in question in this case, has not terminated, because, by the thirteenth section of the charter of the Railroad Company, as amended by the Act of February 19, 1873, P. L., p. 968, such defendant, Railroad Company, may have the right to occupy and use the *locus in quo* for station purposes.

One of the facts stipulated in this case is that no part of the *locus in quo* was ever used for station purposes. All the premises, until the abandonment by removing the same, had been exclusively used to maintain the tracks of a siding thereon, which extended from Atlantic avenue to Missouri avenue, and thence down the latter to the Excursion House, at the foot of Missouri avenue.

In these circumstances, therefore, we contend that there is no merit in the claim that the Railroad Company is entitled to retain possession of this tract of land, upon the claim that it possessed the right to use the same for station purposes.

Furthermore, it appears by the stipulation that the Railroad Company, in April, 1916, sold to Frank Ruffo the easterly portion of the lands described in plaintiff's

complaint; the westerly boundary of the Ruffo tract is thirty feet westerly from Arkansas avenue; and that said Ruffo went into possession of the land purchased by him immediately after the execution of the deed.

It also appears by the stipulation that at the same time the Railroad Company sold to the defendant, T. Nichols, the westerly portion of the land described in the plaintiff's complaint, the easterly boundary of which is eighty-five feet westerly from Arkansas avenue, and that said Nichols went into possession thereof immediately after the execution of the conveyance.

It also appears from the stipulation that the Railroad Company, at the time suit was begun, was in possession of a tract fifty-five feet in width, described in the plaintiff's complaint, lying between the lands conveyed to Ruffo and Nichols, which has since been conveyed to one Jackson.

It is apparent, therefore, that it is not possible for the Railroad Company to make use of the portion of the *locus in quo,* in respect to which it defends, for station or other railroad purposes. Neither do we understand that the Railroad Company has ever signified its intention to devote the said land to such use. So far as the lands conveyed to Ruffo and Nichols are concerned, it is manifest that the Railroad Company has abandoned the use thereof to the purposes for which they were conveyed under the deed in question, and they can never again be put to that use. The same situation exists respecting the portion for which it defends.

We furthermore contend that it is manifest, from the language employed in the deed from the Land Company to the Railroad Company, that the premises conveyed were to be used as a right of way over which tracks might

be laid, and not for use by the Railroad Company for station purposes. The use being thus limited, when the Railroad Company discontinued such use and conveyed the property to third persons, its rights in the same came to an end.

It is submited that the judgment appealed from should be affirmed.

JOHN S. WESCOTT,
Attorney of Plaintiff.

LEWIS STARR,
Of Counsel.

INDEX

EXHIBITS

New Jersey Court of Errors and Appeals

Testimony

NEW JERSEY SUPREME COURT

ATLANTIC COUNTY

CAMDEN, ATLANTIC AND VENTOR LAND COMPANY,
Plaintiff,
vs.
WEST JERSEY AND SEASHORE COMPANY and others,
Defendants.

Mays Landing, N. J., October 19, 1917.

Before HON. HOWARD CARROW, Judge, and Jury.

Appearances:
For the plaintiff, Hon. Lewis Starr.
For the defendants, Hon. C. L. Cole, for Messrs. Bourgeois & Coulomb.

Mr. Starr: I offer in evidence the map of the *locus in quo* which was offered in evidence at the last trial and ask it be marked as an exhibit.

Map admitted in evidence and marked Exhibit P-1.

I offer in evidence the charter of the Camden and Atlantic Railroad Company, an act approved the nineteenth of February, 1873, found in Pamphlet Laws of that year, page 968.

I offer in evidence a stipulation signed by counsel in the case which was marked P-1 at the trial before and ask that be marked as an exhibit.

Stipulation admitted in evidence and marked Exhibit P-2.

I also offer in evidence a supplemental stipulation signed by counsel interested in the case and ask that be marked as an exhibit.

Admitted in evidence and marked Exhibit P-3.

I also offer in evidence stipulation marked an additional stipulation, signed by counsel in the case, and ask it be marked as an exhibit.

Admitted in evidence and marked Exhibit P-4.

I offer in evidence a certified copy of the deed from the Camden and Atlantic Land Company to the Camden and Atlantic Railroad Company, dated May 1st, 1871, recorded in Book 40 of deeds, page ten, in the clerk's office of Atlantic County, which was marked P-2 at the former trial.

Admitted in evidence and marked Exhibit P-5.

The Court: From which you claim there was a possibility of reverter?

Mr. Starr: Yes, we claim there was a reverter because of the failure to comply with the provisions of the deed. There was certain admissions made at the trial before which are contained in a stipulation, and I offer that in evidence as the admissions of this trial.

Admitted in evidence and marked Exhibit P-6.

Exhibit P-2

NEW JERSEY SUPREME COURT

ATLANTIC COUNTY

CAMDEN, ATLANTIC AND VENTOR LAND COMPANY, Plaintiff, vs. WEST JERSEY AND SEASHORE RAILROAD COMPANY, ARMAND T. NICHOLS and FRANK RUFFU, Defendants.	In Ejectment Stipulation.

IT IS HEREBY STIPULATED AND AGREED between John S. Wescott, Attorney of Plaintiff, and Bourgeois and Coulomb and Thompson & Smathers, Attorneys of Defendants, as follows:

1. That the lands and premises described in plaintiff's complaint were conveyed by Camden and Atlantic Land Company to Camden and Atlantic Railroad Company, a railroad corporation of the State of New Jersey, by deed bearing date the first day of May, 1871, recorded in the Clerk's Office of Atlantic County at May's Landing on the 13th day of May, 1871, in Book 40 of Deeds, folio 10 &c.

2. That Camden, Atlantic and Ventnor Land Company, plaintiff, succeeded to the rights of the Camden and Atlantic Land Company after the execution and delivery of the deed of conveyance aforesaid.

Exhibit P-2

3. That the Camden and Atlantic Railroad Company was merged into the West Jersey and Seashore Railroad Company, one of the defendants, by agreements dated the 28th day of February, 1896, filed in the office of the Secretary of State at the State House, Trenton, on the 4th day of May, 1896, which thereby acquired all of the rights of the Camden and Atlantic Railroad Company in the lands in dispute after the execution and delivery of the deed of conveyance hereinabove mentioned.

4. That Camden and Atlantic Railroad Company entered upon the lands described in plaintiff's complaint on or about the first day of May, 1871, and immediately thereafter, to wit, during the year 1871, constructed a railroad track over and along the lands described in plaintiff's complaint, and continued to occupy said lands with its railroad tracks until on or about the first day of April, 1916, at which date its tracks were removed therefrom.

5. That on the 19th day of April, 1916, West Jersey and Seashore Railroad Company conveyed the Easterly portion of the lands described in plaintiff's complaint to Frank Ruffu, defendant, whose Westerly boundary is thirty feet Westerly from Arkansas Avenue, who went into immediate possession thereof, by deed of conveyance recorded in the Clerk's office of Atlantic County at May's Landing on the 14th day of June, 1916, in Book 556 of Deeds, folio 138.

6. That on the 19th day of April, 1916, West Jersey and Seashore Railroad Company conveyed the Westerly portion of the lands described in

Exhibit P-2

plaintiff's complaint to Armand T. Nichols, whose Easterly boundary is eighty-five feet Westerly from Arkansas Avenue, who went into immediate possession thereof, by deed of conveyance recorded in the Clerk's Office of Atlantic County at May's Landing on th 16th day of June, 1916, in Book of Deeds No. 557, folio 173 &c.

7. That West Jersey and Seashore Railroad Company is still the owner of the lands fifty-five feet in width described in plaintiff's complaint, lying between the lands conveyed to Ruffu and Nichols aforesaid.

8. That defendant Frank Ruffu is in the actual several possession of that portion of the lands described in plaintiff's complaint lying Eastwardly of a line parallel with Arkansas Avenue and distant thirty feet Westerly therefrom.

9. That Armand T. Nichols is in the actual several possession of that portion of the lands described in plaintiff's complaint lying Westerly of a line drawn parallel with Arkansas Avenue and distant eighty-five feet Westerly therefrom.

10. That West Jersey and Seashore Railroad company is in the actual several possession of that portion of the lands described in plaintiff's complaint lying between a line parallel with Arkansas Avenue and distant thirty feet Westerly therefrom, and a line drawn parallel with said Avenue and distant eighty-five feet Westerly therefrom.

J. D. WESTCOTT,
Atty. for Plff.

BOURGEOIS & COULOMB,
Attys. for W. J. & S. R. R.
and Frank Ruffu.
Attys. for A. T. Nichols.

Exhibit P-3

NEW JERSEY SUPREME COURT

CAMDEN, ATLANTIC AND VENTOR LAND COMPANY, Plaintiff, vs. WEST JERSEY AND SEASHORE RAILROAD COMPANY, *et al.*, Defendants.	Stipulation. Supplemental

IT IS FURTHER STIPULATED AND AGREED between the attorneys of the respective parties plaintiff and defendant as follows:

1. That the *locus in quo* was owned in fee simple by the Camden & Atlantic Land Company at the time the deed was made to Camden & Atlantic Railroad Company in 1871, and that this particular piece of land was never used by the Railroad Company for station purposes, and that it had been used prior to the time the tracks were removed for use by the railroad which ran from Atlantic Avenue into Missouri Avenue, and then down Missouri Avenue to the Excursion House at the foot of Missouri Avenue, and that the deed from the Camden & Atlantic Land Company to Camden & Atlantic Railroad Company bears date the first day of May, 1871, and was recorded in the County Clerk's Office of Atlantic County in Book 40 of Deeds, page 10 on the 13th day of May, 1871.

2. That the sale of the two pieces of property, to wit, one to Armand T. Nichols and the other to Frank Ruffu, were duly consented to by the Utili-

Exhibit P-3

ties Commissions of the State of New Jersey; that Camden, Atlantic & Ventnor Land Company secured its title by deed of conveyance from Camden & Atlantic Land Company dated the 8th day of May, 1889, acknowledged the 19th day of November 20, 1891, in Book 160, page 1, a copy of which is annexed to this stipulation.

J. D. WESCOTT,
Attorney of Plaintiff.
THOMPSON & SMATHERS,
Attorney of Armand T. Nichols.
BOURGEOIS & COULOMB,
Attorneys of Defendants, West Jersey, & Seashore Railroad Co. and Frank Ruffu.

THE CAMDEN & ATLANTIC LAND Co.,
to
THE CAMDEN, ATLANTIC & VENTNOR LAND CO.
} Deed.

This indenture made this Eighth day of May in the year of our Lord one thousand eight hundred and eighty nine, Between The Camden and Atlantic Land Company, a corporation under the laws of the State of New Jersey, of the first part, and the Camden Atlantic and Ventnor Land Company, a corporation under the laws of the State of New Jersey, of the other part. Whereas the said Board of Directors of the said Camden and Atlantic Land Company on the eighth day of May, A. D. 1889, duly passed the following Resolution. Whereas the Stockholders of the Camden and Atlantic Land Company have caused

Exhibit P-3

to be organized under the General Corporation Act of the State of New Jersey, a new corporation under the name of the Camden Atlantic and Ventnor Land Company, in order to do a more general real estate business than is allowed under the Charter of the Camden and Atlantic Land Company, and have taken shares in the Camden Atlantic and Ventnor Land Company, in lieu of their shares and property rights in the Camden and Atlantic Land Company upon the understanding and agreement between all parties concerned that all the property of every description of the Camden and Atlantic Land Company should be transferred to the Camden Atlantic and Ventnor Land Company. Now therefore be it resolved that the President and Secretary of the said Camden and Atlantic Land Company be and they are hereby directed and required to prepare and execute under the seal of the Company one or more deeds transferring in due form of law to the said Camden Atlantic and Ventnor Land Company all Estate Rights and Interest both real and personal of every description now owned by the said Camden and Atlantic Land Company, which they shall deliver to the said Camden Atlantic and Ventnor Land Company, and thereafter the books of the said Camden and Atlantic Land Company shall be closed and no further business transacted in its name. Now therefore this Indenture Witnesseth, that the said Camden and Atlantic Land Company, in consideration of the premises and for a valuable consideration to the said Company paid by the said Camden Atlantic and Ventnor Land Company, at and before the ensealing and delivery of these presents have granted, bargained, sold, re-

Exhibit P-3

leased and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Camden Atlantic and Ventnor Land Company and to its successors and assigns All its real and personal property and estate of every character and description wheresoever and all its property rights of every form and character real personal or mixed. To have and to hold the said estate and premises hereby granted with the appurtenances unto the said Camden Atlantic and Ventnor Land Company its successors and assigns forever. In witness whereof the said Camden Atlantic *and Ventnor* Land Company have pursuant to a resolution of said Company caused its common seal to be hereunto affixed the day and year aforesaid.

SAMUEL RICHARDS,
President.

(corporate seal of the C & Atl. L. Co.)
Sealed and delivered
in the presence of
S. Bartram Richards,
Secretary and Treasurer.

Pennsylvania,
Philadelphia County, } ss:

Before me a Commissioner of deeds for the State of New Jersey residing in Philadelphia and duly commissioned and qualified came S. Bartram Richards personally known to me, who being duly sworn saith that Samuel Richards is the President of the Camden and Atlantic Land Company, a corporation and body politic in the State of New Jersey— and this deponent is Secretary and

Exhibit P-3

Treasurer of the same and knows the common seal of the said Company; and that the seal affixed to the foregoing deed of conveyance is the common seal of the said Company; and was affixed by the direction of the said President of the said Company; and that the said deed was executed and delivered as and for the deed of the said Corporation for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of the said Company; and this deponent at the execution thereof subscribed his name as a witness thereto.

S. BARTRAM RICHARDS,
Secretary and Treasurer.

Sworn and Subscribed before me
at Philadelphia this nineteenth,
day of November, A. D., 1891,
Wm. Jenks Fell (Seal)
Commissioner for New Jersey,
in Pennsylvania.

Recd. & Recorded Nov. 20nd, A. D., 1891.
Lewis Evans Clk.
Book 160 of Deeds, p. 1.

Exhibit P-4

NEW JERSEY SUPREME COURT

CAMDEN, ATLANTIC AND VENTOR LAND COMPANY, Plaintiff, v WEST JERSEY AND SEASHORE RAILROAD COMPANY, *et al.*, Defendants.	Additional Stipulation

IT IS STIPULDATED AND AGREED between the parties hereto that:

1. At the time of the commencement of this suit the defendant Railroad Company was not actually using the *locus in quo,* for which it defends, for any purpose.

2. At the time of the commencement of this suit the Railroad Company had entered into an agreement to sell its title to the *locus in quo,* for which it defends, to one Jackson.

3. That after the commencement of this suit the defendant company conveyed the *locus in quo* to one Jackson.

J. D. WESTCOTT,
Attorneys of Plaintiff.
BOURGEOIS & COULOMB,
Attorneys of Defendants.

Exhibit P-5

THIS INDENTURE made the First day of May, in the year of our Lord One thousand eight hundred and seventy-one (1871). BETWEEN

"THE CAMDEN AND ATLANTIC LAND COMPANY,"

a corporation and body politic, incorporated by the Legislature of the State of New Jersey, en- of the first part, AND

"THE CAMDEN AND ATLANTIC RAILROAD COMPANY,"

party of the second part. WHEREAS, by an act of the Legislature of the State of New Jersey, entitled "An act to incorporate the Camden and Atlantic Rail Road Company," approved March 19, 1852, the said Company are authorized to survey, lay out and construct a railroad from the City of Camden, in the County of Camden or from some point within one mile of said city, to be determined on by the said Company, to run through the counties of Camden and Atlantic, to the sea, at or near Absecom Inlet in the County of Atlantic, with all the powers necessary and expedient for this purpose, and more particularly with power to have, hold, occupy, excavate, use and possess any land necessary for the said road, and to agree with the owner or owners of such land for the use and purchase thereof

AND WHEREAS the said "THE CAMDEN AND ATLANTIC LAND COMPANY," party of the first part, are seised and possessed in fee simple, of certain lands and premises, situate on Absecom Beach, and County of Atlantic aforesaid, including the premises hereinafter particularly described, on the route of the said railroad, and the said party

Exhibit P-5

of the second part have agreed with the said "THE CAMDEN AND ATLANTIC LAND COMPANY," for the purchase of so much of the said land, as is required for the construction of the said road, to be held by the said Company, their successors and assigns, during the continuance of the said road: NOW THIS INDENTURE WITNESSETH that the said party of the first part, for and in consideration of the premises and of the sum of Four hundred and fifty dollars, lawful money of the United States of America, well and truly paid by the said party of the second part, to the said party of the first part, the receipt whereof is hereby acknowledged, have, and by these presents, do grant, bargain, sell and convey, unto the said party of the second part, their successors and assigns, all the following described Lot or strip of land, situate in Atlantic City aforesaid, bounded as follows: BEGINNING at a point in the centre line of said railroad, and in the boundary line of a certain Lot or Piece of Land this day conveyed in fee simple, by the said party of the first part, to the said party of the second part, at a distance of Eighty-seven and a half feet westwardly from the westerly edge of Arkansas Avenue, which said boundary line is parallel with, and forty feet distant from the southerly edge of Atlantic Avenue, thence along said centre line, following the middle of the track as now laid, and curving to the east, a distance of three hundred and twenty-four feet to a point in the easterly edge of Missouri Avenue (distant two hundred and thirty-one feet southwardly from the southeasterly corner of Atlantic and Missouri Avenues aforesaid, which said Missouri Avenue is

at right angles with the said Atlantic Avenue) and having a parallel width on each side of said centre line of twenty-five feet. Containing thirty-seven hundredths of an acre of land, be the same more or less. Being a lot or strip of land of the length of three hundred and twenty-four feet, by an entire width between parallel lines of fifty feet. And is a part of the same premises conveyed to the said "The Camden and Atlantic Land Company," by Isaac S. Waterman and Mary W., his wife, by deed bearing date September 28, A. D. 1854, and recorded in the Clerk's Office of the said County of Atlantic, in Book F of Deeds, page 234, &c. Together with all the rights, members, privileges and appurtenances to the same belonging, or in any wise appertaining, and all the estate of the said party of the first part, of, in and to the same.

To have and to hold the same unto the said party of the second part, their successors and assigns, for the purposes of the said Rail Road, for and during the continuance of the said Rail Road, to their only use, benefit and behoof forever. And the said "The Camden and Atlantic Land Company" do for themselves and their successors, covenant with the said party of the second part, their successors and assigns, that they, the said "The Camden and Atlantic Land Company" have not done or suffered to be done any act or thing to charge, alter or encumber the estate and interest, hereby granted, but that the same is hereby granted and conveyed, as full, free and entire to the said party of the second part, their successors and assigns, as ever it was vested in the said party of the first part, their successors and assigns.

Exhibit P-5

In witness whereof the said "The Camden and Atlantic Land Company" have, pursuant to a resolution of said Company, caused their common seal to be hereunto affixed, the day and year first above written.

Signed, sealed and delivered
in the presence of

The word "presents" in the third line from the top of the second page and the letter "W" in the 29th line from the top of said second page, were both interlined before signing and sealing.

(Seal of Camden and Atlantic Land Company.)

(Signed) W. A. Rhodes, Prest.

(Signed) Isaac Lloyd.

(*50c. Int. Rev. Stamp*)

State of New Jersey, }
Camden County, } ss:

Isaac Lloyd, alleging himself to be conscientiously scrupulous of taking an oath, on his solemn affirmation saith, that William A. Rhodes is President of "The Camden and Atlantic Land Company," a corporation and body politic in the State of New Jersey; that he, this deponent, is the secretary and treasurer thereof, and knows the common seal of the said Company; that the

seal affixed to the foregoing deed or conveyance is the common seal of the said Company, and was affixed in the presence and by the direction of the said William A. Rhodes President as aforesaid; that the said deed was executed and delivered as and for the act and deed of the said Corporation, for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of the said Company, and this deponent, at the execution thereof, subscribed his name as a witness thereto.

(Signed) ISAAC LLOYD.

Affirmed and subscribed before me at Philadelphia this second day of May, A. D. 1871.

(Signed) J. L. Rowand.
One of the Masters in the Court of Chancery of the State of New Jersey.

Exhibit P-6

STIPULATIONS

Mr. Starr: We have agreed upon certain facts in connection with this matter, a stipulation, which I offer.

Exhibit P-6

(Stipulation marked P1.)

Mr. Starr: We have also agreed that the *locus in quo* was owned in fee by the Camden and Atlantic Land Company at the time the deed was made in 1871, and that this particular piece of land was never used by the Railroad Company for station purposes, and that it had been used, prior to the time the tracks were removed and before the railroad could sell a portion of the land, for use by the railroad which ran from Atlantic Avenue into Missouri Avenue and then down Missouri Avenue to the Excursion House at the foot of Missouri Avenue.

I also offer in evidence the deed, which is dated the first day of May, 1871, recorded in the County Clerk's Office of this county in book 40 of Deeds, page 10, on the thirteenth day of May, 1871, certified under the hand and seal of Lewis Evans, Clerk.

(Deed marked Exhibit P2.)

Plaintiff rests.

Mr. Bourgeois: The map on the easel is offered in evidence for the purpose of illustration.

(Map marked Exhibit D1.)

Mr. Bourgeois moved for a direction in favor of the defendant, which was argued and the case adjourned to Monday, October 16th, 1916.

Motion to Direct Verdict

Mays Landing, N. J., October 16th, 1916

Hearing resumed at 10 a. m.

Mr. Bourgeois: Stipulated that the sale of these two properties by the railroad company was consented to by the Utilities Commission, that is, to Ruffu and Nichols.

Adjournment taken until October 23, 1916, at 10:15 a. m.

Mays Landing, N. J., October 23rd, 1916.

Hearing resumed at 10:15 a. m.

Mr. Bourgeois: In the case of Camden, Atlantic and Ventnor Land Company, Judge Starr and I have stipulated that the Camden, Atlantic and Ventnor Land Company secured its title by deed of conveyance from the Camden and Atlantic Land Company, recorded in book , page .

The Court: The Court will deal with the question before it some time, and counsel will be notified and the jury will be called back.

Testimony closed.

Mr. Starr: On behalf of the plaintiff I make the motion that the Court direct a verdict in behalf of the plaintiff upon the ground that there was a reversion of the title by reason of the failure to adopt the conditions contained in the deed which

has been introduced in evidence as a result of which the title to the property reverted to the present plaintiff.

The Court: You claim that that company had a possibility of reverter in the *locus in quo?*

Mr. Starr: Yes, and that same is now in the present plaintiff and that we are entitled to have the verdict because of the—

The Court: Because of a breach?

Mr. Starr: Because of a breach of the condition of that deed.

The Court: Please state the full grounds of your motion.

Mr. Starr: The ground of the motion, if your Honor please is that—

The Court: This is a motion for a direction against the defendant?

Mr. Starr: This is a motion for a direction against the defendants upon the ground there has been a breach of the condition contained in the deed under which the land was conveyed by the Camden and Atlantic Land Company to the Camden and Atlantic Railroad Company as the result of which the title reverted to the persons who succeed to the rights in that land of the Camden and Atlantic Land Company.

The Court: Under deed of conveyance?

Mr. Starr: Under deed of conveyance which has been introduced in evidence.

Mr. Cole: On behalf of Mr. Bourgeois, attorney for the defendant, I move for a direction for the defendant on the following grounds: There is no evidence to show that the plaintiff has a legal title to the land described in the complaint or declaration or any part thereof.

Second: The evidence shows conclusively that the title to the land in question was vested in the Camden and Atlantic Railroad Company by a deed of conveyance recorded and offered in evidence; that the West Jersey and Seashore Railroad Company has succeeded to all the rights of the Camden and Atlantic Railroad Company in that land, and that the other defendants, and the West Jersey and Seashore Railroad Company have title by virtue of a good and sufficient deed from the West Jersey and Seashore Railroad Company.

Third: That there is nothing in this case that would warrant a direction in behalf of the plaintiff or would warrant the jury in finding for the plaintiff upon the theory that the title to this land had passed out of the Camden and Atlantic Railroad Company by reason of any breach in the condition in the deed and that, even though there had been a breach in that condition, it would not result in law in passing the title, so that the title still remains in the Camden and Atlantic Railroad Company and its successors in title on the record.

The Court: Do you not think that you are required to show that the Land Company was in possession of this land?

Mr. Starr: No, I don't believe we are entitled to show the Land Company was—

The Court: Is that admitted?

Mr. Starr: It is admitted, owned in fee simple, it is admitted.

The Court: That is admitted that they were in possession?

Mr. Starr: That the *locus in quo* was owned

in fee simple by the Camden and Atlantic Land Company at the time the deed was made to the Railroad Company; that is in the stipulation.

The Court: Was the Land Company in possession?

Mr. Starr: Wouldn't make any difference whether they were in possession or not, if it was admitted they were the owners in fee simple, that carries with it the right to possession. No question about the title prior to the time the deed was made to the railroad company.

The Court: Is that so, Judge Cole?

Mr. Cole: Why, I wouldn't want to say that, although I really think it is so. You see I had no occasion to investigate this question—

The Court: The reason I called his attention to it, I thought that was one of the grounds of your motion, but you both take title from the same source.

Mr. Cole: No doubt we get title from the Camden and Atlantic Land Company.

The Court: Yes, there must be an admission.

Mr. Starr: It is expressly admitted, if your Honor please, in the stipulation.

Carrow, J.: The estate which the Camden and Atlantic Railroad Company took in the *locus in quo* under its deed from the Camden and Atlantic Land Company was that of a qualified or base fee because the use of the land was limited. The land was to be used, according to the deed, for the purpose of a railroad, and during the continuance of the railroad and not necessarily during the life time of the railroad corporation. The railroad company was in no position, under its charter, to take any greater estate than that which

I have indicated. Now when the railroad removed its track from the land and abandoned its railroad and conveyed parcels one and three to outside individuals, there was a breach of the limitation or condition subsequent and that would be so even if the land could have been used for station purposes, for there cannot be a station without a railroad. The Camden and Atlantic Land Company had a possibility of reverter, a contingent interest in the land. This interest or property right was conveyed to plaintiff under section nineteen of the Conveyancing Act, Compiled Statutes, volume two, page 1539. The deed did not have to mention said possibility of reverter specifically, in order to pass it on to plaintiff. It was embraced generally and that was sufficient. I, therefore, conclude that plaintiff has a vested right of entry and is entitled to recover. Gentlemen, return a verdict of guilty against all the defendants.

Mr. Cole: May we have exceptions?

The Court: Yes; full exceptions are allowed to the defendants for the refusal of the Court to direct a verdict for the defendants as per defendants' motion, and full exceptions are allowed the defendants to the action of the Court in directing a verdict for the plaintiff against the defendants.

HOWARD CARROW,
Circuit Judge.

Judgment Record

NEW JERSEY SUPREME COURT

Camden, Atlantic and Ventnor Land Company, vs. West Jersey and Seashore Railroad Company, Armon (or Armand) T. Nichols and Frank Ruffu.	Ejectment Action at Law in on Postea. John S. Westcott, Attorney.

West Jersey and Seashore Railroad Company, Armon (or Armand) T. Nichols, and Frank Ruffu, the defendants in this cause, were summoned to answer unto Camden, Atlantic and Ventnor Land Company, the plaintiff therein, in an action at law upon the following complaint:

Summons Issued August 31, 1916.

Plaintiff, Camden, Atlantic and Ventnor Land Company, a corporation under and by virtue of the laws of New Jersey, with principal office in Atlantic City, demands of the defendants, West Jersey and Sea Shore Rail Road Company, Armon T. Nichols and Frank Ruffu, the defendants therein the possession of a tract or parcel of land, with the appurtenances, situate in the City of Atlantic City, in said County of Atlantic, bounded and described as follows: Beginning at a point 40 feet distant South of the Southerly line of Atlantic Avenue, measured at right angles thereto and 150.6 feet Westwardly from the Westerly line of Arkansas Avenue, measured at right anangles thereto and extending thence (1) South-

wardly and parallel with Arkansas Avenue 55 feet; thence (2) Eastwardly and parallel with Atlantic Avenue 12.86 feet; thence (3) Northeastwardly, curving to the right following the arc of a circle having a radius of 892.2 feet in length of arc 124.75 feet to a point 26.05 feet *Westerly* of the Westerly line of Arkansas Avenue measured at right angles thereto and 40 feet Southwardly of the Southerly line of Atlantic Avenue measured at right angles thereto; thence (4) Westwardly and parallel with Atlantic Avenue 124.55 feet to the place of beginning.

And the plaintiff says that its right to the possession of same accrued on July 27, 1916, and the defendant wrongfully deprives it of the possession thereof to its damage five thousand dollars.

J. S. WESTCOTT,
Attorney of Plaintiff.

(Filed Sept. 12, 1916).

Defendant, West Jersey & Seashore Railroad Company, a corporation of the State of New Jersey, answering plaintiff's complaint, says:

1. It admits that it is in possession of a portion of the lands described in plaintiff's complaint.

2. It denies that any right or interest in the lands described in plaintiff's complaint accrued to the plaintiff on the 27th day of July, 1916.

3. It denies that plaintiff is wrongfully deprived of possession of said lands or any part thereof.

4. It denies that plaintiff has suffered any

damage by reason of defendant's possession of said lands.

BOURGEOIS & COULOMB,
Attorneys of Defendant.
West Jersey & Seashore Railroad Co.

(Filed Sept. 18, 1916).

Defendant, Armand T. Nichols, says:

1. He defends this action as to part of the premises claimed in the complaint, to wit:

All that certain strip or piece of land situate in the city of Atlantic City, county of Atlantic and state of New Jersey, bounded and described as follows:

Beginning at a point in the southeasterly line of Atlantic Avenue, at the distance of eighty-five feet measured southwestwardly along the said line of Atlantic Avenue (one hundred feet wide) with the southwesterly line of Arkansas Avenue (fifty feet wide), and extending thence by land about to be conveyed by the said Railroad Company to Samuel Jackson, south twenty eight degrees ten minutes east sixty five feet, and seven tenths of a foot to a point; thence southwestwardly on a line curving toward the left with a radius of eight hundred and ninety two feet and two tenths of a foot a distance of three hundred and five feet; more or less, to a point; thence by other land of the said West Jersey and Seashore Railroad Company, south sixty one degrees fifty minutes west seventeen feet to a point in the northeasterly line of Missouri Avenue (fifty feet wide); thence along said avenue, north twenty eight degrees ten minutes west fifty three feet to a point; thence northeastwardly on a line curv-

ing toward the right with a radius of nine hundred and forty two feet and two tenths of a foot a distance of two hundred and sixty two feet, more or less, to a point; thence south sixty one degrees fifty minutes west ten feet to a point; thence north twenty eight degrees ten minutes west forty feet to a point in the southeasterly line of Atlantic Avenue, aforesaid, and thence along said avenue, north sixty one degrees, fifty minutes east sixty five feet to the place of beginning. Containing seventeen thousand nine hundred and thirty one square feet, more or less.

And as to which particular part he denies the truth of the matters contained in the complaint.

THOMPSON & SMATHERS,
Attorneys for defendant.

(Filed Sept. 9, 1916).

Frank Ruffu, of Atlantic City, New Jersey, one of the defendants, answering the complaint says:

1. Defendant denies that the complainant is the owner of the premises described in the complaint, or that it has any right of possession.

DEFENSES:

Defendant is the owner of the property and lawfully in possession of the same.

C. L. COLE,
Attorney of Frank Ruffu.

(Filed Sept. 16, 1916).

This case was tried before his Honor, Howard Carrow, Circuit Court Judge, with a jury, at the

Atlantic Circuit on the 19th day of October, 1917.

The jury rendered a verdict of guilty against each of the defendants, and that the plaintiff is entitled to recover the possession of the premises set forth in the complaint from each of the said defendants.

Whereupon, it is adjudged that the plaintiff, Camden, Atlantic and Ventnor Land Company, do recover against the said defendants West Jersey and Seashore Railroad Company, Armon or
Costs $ (Armand) T.Nichols and Frank Ruffu, the possession of the premises mentioned and described in the complaint together with the appurtenances and its costs to be taxed.

Judgment entered October 25, 1917.

WM. S. GUMMERE,
C. J.

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

In testimony whereof I have set my hand and the seal of said Court at Trenton, this nineteenth day of January, A. D., nineteen hundred and eighteen.

(Seal)

WM. C. GEBHARDT,
Clerk.

Notice Of Appeal

NEW JERSEY SUPREME COURT

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY,	Plaintiff,
vs.	
WEST JERSEY AND SEASHORE RAILROAD COMPANY, *et al.*,	Defendants.

To John S. Westcott, Esq., Attorney of Plaintiff:

TAKE NOTICE that the defendants, West Jersey and Seashore Railroad Company and Frank Ruffu, appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause:

1. Because the Court erred in refusing to direct a verdict in favor of the defendant.

2. Because the Court erred in directing a verdict in favor of the plaintiff.

3. Because there was no evidence before the Court to support a verdict in favor of the plaintiff.

4. Because the Court upon the agreed state of of facts adjudged that in the law plaintiff was entitled to judgment in its favor whereas under the law judgment should have been rendered for the defendant.

BOURGEOIS & COULOMB,
Attorneys of Defendants, West Jersey and Seashore Railroad Co. and Frank Ruffu.