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NOTICE OF APPEAL TO THE COURT OF ERRORS AND APPEALS.

(Filed Sept. 26, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff,* v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Notice of Appeal to the Court of Errors and Appeals.

The plaintiff, Camden, Atlantic & Ventnor Land Company hereby appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the Atlantic County Circuit Court on the 4th day of September, 1928, in the cause entitled as above.

STARR, SUMMERILL & LLOYD,
Attorneys for and of Counsel with the Appellant.

COMPLAINT.

(Filed Sept. 26, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Complaint.

Suit commenced September 18, 1925.

Plaintiff, Camden, Atlantic and Ventnor Land Company, a corporation of New Jersey, says that:

1. On October 12, 1888, Camden and Atlantic Land Company, for the consideration of one dollar and by deed duly executed, conveyed to the Camden and Atlantic Railroad Company, a tract or piece of land, situate on Absecon Beach, in the Township of Egg Harbor, now Ventnor City, in the County of Atlantic and State of New Jersey, bounded and described as follows:

> Beginning at a stake in the middle of Portland Avenue, as laid down on the general plan of the Town of Ventnor, and in the northwestern

line of land of said railroad company, distant twenty-five feet northwestward from the center line of the railroad of said Company, and extending thence along the middle of said Portland Avenue north twenty-six degrees fifteen minutes west ninety-five feet to a stake in the southeastern line of a proposed Avenue, fifty feet wide; thence along the line of said proposed Avenue, north sixty-six degrees, forty-five minutes east seven hundred feet to Corallis Avenue (now called Cambridge Avenue), as laid down on general plan aforesaid, thence along the middle of said Corallis Avenue south twenty-six degrees fifteen minutes east ninety-five feet to a stake in the northwesterly line of the aforesaid plan of said railroad company, and thence by said line parallel with the center line of the railroad aforesaid, and twenty-five feet distant, northwestward therefrom, south sixty-three degrees, forty-five minutes west, seven hundred feet to the place of beginning.

Containing one acre and fifty-five one-hundredths acres of land, be the same more or less. in which deed was contained the following habendum clause, to wit:

"To have and to hold said lot or piece of land "hereditaments and premises hereby granted, "with the appurtenances, unto the Camden and "Atlantic Railroad Company, their successors "and assigns forever, as long as the same shall "be used by said Railroad Company for rail-"road purposes."

2. On May 8, 1889, the Camden and Atlantic Land Company granted and conveyed to the plaintiff by deed dated that day, all of the real and personal

property and estate of the Camden and Atlantic Land Company of every character and description, wheresoever and all its property, rights of every form and character, real, personal and mixed.

3. The Camden and Atlantic Railroad Company was merged into the West Jersey & Seashore Railroad Company by agreement dated February 28, 1896, filed in the office of the Secretary of State at Trenton, on May 4, 1896, by virtue of which merger, defendant, West Jersey & Seashore Railroad Company, acquired all the rights of the Camden & Atlantic Railroad Company in the lands and premises above described.

4. By deed dated April 8, 1925, the defendant, West Jersey & Seashore Railroad Company sold and conveyed to the defendant, Ventnor City, all that certain tract or parcel of land, situate in the City of Ventnor City, in the County of Atlantic and State of New Jersey, particularly described therein, as follows, viz:

> Beginning at the intersection of the southerly line of Ocean Avenue with the westerly line of Corallis Avenue, now Cambridge Avenue, and extending thence (1) eastwardly in and along the southerly line of Ocean Avenue three hundred feet to the easterly line of Sacramento Avenue and of that width throughout, between parallel lines, extending thence (2) southerly parallel with said Avenues, seventy feet to the northerly line of Atlantic Avenue; thence (3) continuing still southerly of that width throughout in the bed of Atlantic Avenue, twenty-five feet to the northerly line of the right of way of the said defendant, West Jersey & Seashore Railroad Company.

5. The defendant, Ventnor City, purchased the lands and premises described in the last preceding paragraph for the purpose of erecting a municipal building on that part thereof which is outside the limits of Atlantic Avenue.

6. The said defendant, Ventnor City, has no authority in law, or otherwise, to use the lands and premises mentioned in the last preceding paragraph for railroad purposes and does not intend to so use them.

7. Prior to the 8th of April, 1925, West Jersey & Seashore Railroad Company, defendant as aforesaid, discontinued the use of the lands and premises described in paragraph 4 of this complaint, as above set forth, for railroad purposes, whereupon and thereafter, to wit, on the 8th day of April, 1925, the legal title to said lands and premises reverted to the plaintiff, and the latter thereupon became the owner of the same in fee simple, and entitled to the possession of that part thereof not within the limits of Atlantic Avenue.

8. The lands and premises, to the possession of which the plaintiff is entitled, are described as follows:

> Beginning at the intersection of the southerly line of Ocean Avenue with the westerly line of Corallis Avenue (now Cambridge Avenue) and extending thence (1) westwardly in and along the southerly line of Ocean Avenue, three hundred feet to the easterly line of Sacramento Avenue, and of that width throughout, between parallel lines; extending thence (2) southerly parallel with said Avenue, seventy feet to the northerly line of Atlantic Avenue.

9. Plaintiff's right to the possession of said lands and premises lastly above described accrued on and prior to the 8th day of April, 1925.

10. Defendant, Ventnor City, on the said 8th day of April, 1925, wrongfully entered said lands and premises lastly above described, and dispossessed the plaintiff, and wrongfully took possession of the same, and has ever since continued in the possession of the same, and has wrongfully kept plaintiff out of possession thereof, depriving the plaintiff of the rents and profits.

11. Said rents and profits amount to the sum of $10,000 a year.

Plaintiff demands judgment for possession of the premises lastly above described, and damages for $20,000.

LEWIS STARR,
Attorney of Plaintiff.

ANSWER.

(Filed Oct. 5, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Answer.

The Answer of West Jersey & Seashore Railroad Company:

Defendant answering complaint filed in the above-stated cause says:

FIRST DEFENSE.

1. It admits the allegations contained in paragraph 1 of said complaint.

2. It neither admits nor denies the allegations contained in paragraph 2, as it has no knowledge or information touching said averment, and leaves plaintiff to prove the same.

3. It admits the allegations contained in paragraph 3 of said complaint.

4. It admits the allegations contained in paragraph 4 of said complaint.

5. It neither admits nor denies the allegations contained in paragraph 5, as it has no information concerning it and leaves plaintiff to prove the same.

6. It neither admits nor denies the allegations contained in paragraph 6, and leaves plaintiff to prove the same.

7. It admits the conveyance mentioned in paragraph 7, and admits that the lands described in said conveyance were not thereafter used by this defendant for railroad purposes; but denies that the plaintiff therefore or thereupon became the owner of the same in fee and denies that the plaintiff thereupon became entitled to the possession of that part of the land not included within the highway referred to in said description.

8. It denies that plaintiff is entitled to the possession of the lands described in paragraph 8.

9. It denies the allegations contained in paragraph 9 of said complaint.

10. It denies that Ventnor City on the 8th day of April, 1925, wrongfully entered into said lands and premises described in said complaint, and dispossessed the plaintiff and wrongfully took possession of the same.

It admits that Ventnor City has ever since remained in possession of the same, but denies that Ventnor City has wrongfully kept plaintiff out of the possession thereof depriving plaintiff of the rents and profits.

11. It denies the allegations contained in paragraph 11 of said complaint.

SECOND DEFENSE.

Defendant avers that under a proper construction of the deed made by the Camden & Atlantic Land Co., to Camden & Atlantic Railroad Co., on the 12th day of October, 1888, a copy of which is hereto annexed and made a part hereof, marked "Schedule 1" plaintiff has no title or interest in the lands described in plaintiff's complaint, to which it seeks to establish possession and title in this suit.

THIRD DEFENSE.

That on the 10th day of July, 1913, in a suit in ejectment instituted and then pending in the New Jersey Supreme Court, by Camden, Atlantic and Ventnor Land Company, plaintiff, herein, against West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, defendants herein, for the lands and premises described in plaintiff's complaint in this cause based upon the same deed of October 12, 1888, involved in this suit, said deed was by the Court construed in favor of defendant and against plaintiff, judgment was therein rendered in favor of the defendant and against the plaintiff

and duly recorded in Vol. 7 of Judgments, p. 54 in office of the Supreme Court.

That said judgment is *res adjudicata* of this suit and a bar thereto.

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

SCHEDULE 1.

Camden and Atlantic Land Company
To
The Camden and Atlantic Railroad Company.

THIS INDENTURE MADE the Twelfth day of October in the year of our Lord one thousand eight hundred and eighty eight, Between the Camden and Atlantic Land Company of the first part, and The Camden and Atlantic Railroad Company of the other part: Whereas, the said Company, duly incorporated by an Act of the Legislature of the State of New Jersey, entitled "An Act to incorporate The Camden and Atlantic Company," approved March 10, 1853, are seized and possessed in fee simple, of certain land and premises, situate on Absecom Beach, in the Township of Egg Harbour, in the County of Atlantic, including the premises hereinafter particularly described:

Now this indenture Witnesseth that the said The Camden and Atlantic Land Company, for and in con-

sideration of the sum of One Dollar to the said Company paid or secured to be paid by the said The Camden and Atlantic Railroad 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 The Camden and Atlantic Railroad Company and to their successors and assigns, all the following described Lot Tract or Piece of land situate on Absecom Beach, in the said Township of Egg Harbour in the County of Atlantic, and State of New Jersey, and bounded and described as follows: viz.

Beginning at a stake in the middle of Portland Avenue as laid down on the general plan of the Town of Ventnor and in the Northwestern line of land of the said Railroad Company distant twenty five feet northwestward from the centre line of the railroad of the said Company and extending thence along the middle of the said Portland Avenue north twenty six degrees fifteen minutes west ninety five feet to a stake in the southeastern line of a proposed avenue fifty feet wide, thence along the line of the said proposed Avenue north sixty three degrees forty five minutes East seven hundred feet to the middle of Corallis Avenue as laid down on the general plan aforesaid, thence along the middle of the said Corallis Avenue south twenty six degrees fifteen minutes east ninety five feet to a stake in the northwestern line of the aforesaid land of the said Railroad Company and thence by said land parallel with the centre line of the railroad aforesaid and twenty five feet distant northwestward therefrom South sixty three degrees forty five minutes west seven hundred feet to the place of beginning. Con-

taining One acre and fifty five hundredths of an acre more or less.

Being a part of the same premises conveyed to the said "The Camden and Atlantic Land Company" by Enoch Doughty and Jonathan Pitney and their wives, by deed dated June 1st, 1855, recorded in the Clerk's Office of the said county of Atlantic in Book H of Deeds, page 687 etc., and by Abraham Browning, John D. Laickenan, Executor, of J. E. P. Abbott, et al, by Deeds, dated Dec. 29, 1886, Dec. 20, 1886, and August 3, 1888 and recorded in Books Nos. 120, 114, and 126 pages 551, 306, and 271 respectively Together with all and singular the improvements, ways, privileges, hereditaments and appurtenances therewith belonging or in anywise appertaining, and the Reversions and Remainders, Rents, issues, and Profits thereof.

To have and to hold the said lot or piece of land hereditaments and premises hereby granted, with the appurtenances, unto the said The Camden and Atlantic Railroad Company their successors and assigns, forever, *so long as the same shall be used by said Railroad Company for Railroad purposes.* And the said The Camden and Atlantic Land Company do by these presents covenant, grant and agree, to and with The Camden and Atlantic Railroad Company, their successors and assigns, that the said Company all and singular the hereditaments and premises hereinbefore described and granted, or mentioned or intended so to be, with the appurtenances, unto the said The Camden and Atlantic Railroad Company their successors, and assigns, against the said Company, and their successors and against all and every person or persons whatsoever, lawfully claiming or to claim the same, or any part

thereof, by, from, or under them or any of them, shall and will by these presents, warrant and forever Defend.

In Witness Whereof, the said The Camden and Atlantic Land Company, have (pursuant to a resolution of said Company) caused the common seal of the said Company to be hereunto affixed the day and year first above written.

Samuel Richards,
President.

Attest:
S. Bartram Richards,
Secretary.

(Seal)

Sealed and delivered in
the presence of

NOTE:

The words "Heirs" being stricken out on the 8th, 25th, 26th, and 27th lines and the word "successors" being underlined in the 8th line, also the words, "so long as the same shall be used by said Railroad Company for Railroad purposes" being interlined in 25th line.

S. Bartram Richards,
Secretary.

Rene Guillou.

State of Pennsylvania, } ss.
City of Philadelphia } ss.

S. Bartram Richards being by me duly sworn on his oath saith that Samuel Richards 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 of the said Land Company and knows the common seal of the said Company; that the seal affixed to the foregoing Deed of Conveyance is the common seal of the said Company and was affixed in the presence and by the direction of the said Samuel Richards, 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.

S. Bartram Richards,
Secretary.

Sworn and subscribed before me at Philadelphia this twelfth day of October, A. D. 1888.

Rene Guillou.
Commissioner of Deeds for New Jersey.

Filed Oct. 5, 1925, at 8 A. M.

Wm. A. Blair,
Clerk.

ANSWER.

(Filed Oct. 9, 1925.)

ATLANTIC COUNTY CIRCUIT COURT

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Answer.

ANSWER OF VENTNOR CITY.

Defendant answering complaint filed in the above-stated cause, says:

FIRST DEFENSE.

1. It admits paragraph 1.

2. It neither admits nor denies paragraphs 2 and 3 says, that it has no knowledge thereof, and asks that the same be proven.

3. It admits paragraphs 4 and 5.

4. It denies paragraphs 6 and 7.

5. It denies that the plaintiff is entitled to the possession of the land described in paragraph 8.

6. It denies paragraphs 9, 10 and 11.

SECOND DEFENSE.

Defendant avers that under a proper construction of the deed made by the Camden & Atlantic Land Co., to Camden & Atlantic Railroad Co., on the 12th day of October, 1888, a copy of which is hereto annexed and made a part hereof, marked "Schedule 1" plaintiff has no title or interest in the lands described in plaintiff's complaint, to which it seeks to establish possession and title in this suit.

THIRD DEFENSE.

That on the 10th day of July, 1913, in a suit in ejectment instituted and then pending in the New Jersey Supreme Court by Camden, Atlantic and Ventnor Land Company, plaintiff herein, against West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, defendants herein, for the lands and premises described in plaintiff's complaint in this cause based upon the same deed of October 12, 1888, involved in this suit, said deed was by the Court construed in favor of defendant and against plaintiff, judgment was therein rendered in favor of the defendant and against the plaintiff, and duly recorded in Vol. 7, of Judgments p. 54 in office of the Supreme Court.

That said judgment is *res adjudicata* of this suit, and a bar thereto.

THOMPSON & HANSTEIN,
Attorneys of Defendant,
Ventnor City.

SCHEDULE 1.

Camden and Atlantic Land Company
To
The Camden and Atlantic Railroad Company.

THIS INDENTURE made the twelfth day of October in the year of our Lord one thousand eight hundred and eighty eight, Between the Camden and Atlantic Land Company of the first part, and The Camden and Atlantic Railroad Company of the other part,

Whereas, the said Company, duly incorporated by an Act of the Legislature of the State of New Jersey, entitled "An Act to incorporate The Camden and Atlantic Company" approved March 10, 1853, are seized and possessed in fee simple, of certain lands and premises situated on Absecom Beach, in the Township of Egg Harbour, in the County of Atlantic including the premises hereinafter particularly described.

Now this indenture, Witnesseth That the said The Camden and Atlantic Land Company, for and in consideration of the sum of One Dollar to the said Company paid or secured to be paid by the said The Camden and Atlantic Railroad Company, at or 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 The Camden and Atlantic Railroad Company and to their successors and assigns, all the following descirbed lot tract or piece of land situated on Absecom Beacg in the said Town-

ship of Egg Harbour, in the County of Atlantic, and State of New Jersey, and bounded and described as follows: viz:

Beginning at a stake in the middle of Portland Avenue as laid down, on the general plan of the Town of Ventnor and in the Northwestern line of land of the said Railroad Company distant twenty five feet northwestward from the centre line of the railroad of the said Company and extending thence along the middle of the said Portland Avenue north *twent*-six degrees fifteen minutes West ninety five feet to a stake in the southeastern line of a proposed avenue fifty feet wide thence along the line of the said proposed avenue north sixty three degrees forty five minutes east seven hundred feet to the middle of Corallis Avenue as laid down on the general plan aforesaid, thence along the middle of the said Corall*k*s Avenue south twenty six degrees fifteen minutes east ninety five feet to a stake in the northwestern line of the aforesaid land of the said Railroad Company and thence by said land, parallel with the centre line of the railroad aforesaid and twenty five feet distant northwestward therefrom south sixty three degrees forty five minutes west seven hundred feet to the place of beginning. Containing one acre and fifty five hundredths of an acre more or less.

Being a part of the same premises conveyed to the said "The Camden and Atlantic Land Company" by Enoch Dought and Jonathan Pitney and their w*a*ives, by deed dated June 1st, 1855 recorded in the Clerk's Office of the said county of Atlantic in book H. of Deeds, page 687 etc., and by Abraham Browning, John D. Laickenan, Executor of J. E. P. Abbott et al, by Deeds dated Dec. 29, 1886, Dec. 20, 1886 and August 3, 1888, and recorded in books Nos. 120, 114, and 126 pages 551, 306 and 271 respectively, to-

gether with all and singular the improvements, ways, privileges, hereditaments and appurtenances, therewith belonging, or in anywise appertaining and the Reversion and Remainders, rents, issue and profits thereof.

To have and to hold the said lot or piece of land hereditaments and premises hereby granted, with the appurtenances unto the said The Camden and Atlantic Railroad Company their successors and assigns, forever, *so long as the same shall be used by said Roalroad Company for Railroad purposes.* And the said The Camden and Atlantic Land Company do by these presents convenant, grant and agree to and with The Camden and Atlantic Railroad Company, their successors and assigns, that the said Copany all and singular the hereditaments and premises hereinbefore described and granted, or mentioned or intended so to be, with the appurtenances, unto the said The Camden and Atlantic Railroad Company their successors and assigns, against the said Company and their successors and against all and every person or persons whatsoever, lawfully claiming or to claim the same, or any part thereof, by, from or under them or any of them, shall and will by these presents, Warrant and forever Defend.

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

Samuel Richards,
President.

Attest:

S. Bartram Richards,
Secretary.

(Seal)

Sealed and delivered in
the presence of

NOTE:

The words "Heirs" being stricken out on the 8th, 25th, 26th, and 27th lines and the word "successors" being interlined on the 8th line, also the words "so long as the same shall be used by said Railroad Company for Railroad purp*oes*" being interline in 25th line.

S. Bartram Richards,
Secretary.

Rene Guillou.

State of Pennsylvania, City of Philadelphia, ss.

S. Bartram Richards, being by me duly sworn on his oath saith that Samuel Richards 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 of the said Land Company and knows the common seal of the said Company; that the seal affixed to the foregoing deed of conveyance is the common seal of the said Company and was affixed in the presence and by the direction of the said Samuel Richards, 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 there*tol.*

S. Bartram Richards,
Secretary.

Swor and subscribed before me at Philadelphia this twelfth day of October A. D. 1888.

Rene Guillou.
Commissioner of Deeds for New Jersey.

Filed Oct. 9, 1925, at 8. A. M.

William A. Blair,
Clerk. C. M. W.

REPLY.

(Filed Dec. 21, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Reply.

Plaintiff denies each and every of the allegations contained in the answer of the defendant, Ventnor City.

LEWIS STARR,
Attorney of Plaintiff.

REPLY.

(Filed Dec. 21, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Reply.

Plaintiff denies each and every of the allegations contained in the answer of the defendant, West Jersey & Seashore Railroad Company.

LEWIS STARR,
Attorney of Plaintiff.

ORDER TO AMEND.

(Filed March 14, 1927.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Order to Amend.

It is ordered that paragraph 7 of the bill of complaint in the above entitled cause be amended so that the same reads as follows:

7. On the 8th of April, 1925, West Jersey & Seashore Railroad Company, defendant as aforesaid, discontinued the use of the lands and premises described in paragraph 4 of this complaint, as above set forth, for railroad purposes, whereupon and thereafter, to wit, on the 8th day of April, 1925, the legal title to said lands and premises reverted to the plaintiff, and the latter thereupon became the owner of the same in fee simple, and entitled to the possession of that part thereof not within the limits of Atlantic Avenue.

And it is further ordered that paragraph 9 of the bill of complaint in the above entitled cause be amended so that the same reads as follows:

9. Plaintiff's right to the possession of said lands and premises lastly above described accrued on the 8th day of April, 1925.

W. F. Sooy,
C. C. J.

ANSWER TO AMENDMENT.

(Filed March 18, 1927.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Answer to Amendment.

Defendant, West Jersey & Seashore Railroad Company, answering the amendments to paragraphs 7 and 9 of complaint in the above-entitled cause, says:

1. It denies the allegations contained in paragraph 7 as amended.

2. It denies the allegations contained in paragraph 9 as amended.

BOURGEOIS & COULOMB,
Attorneys for Defendant, West Jersey & Seashore Railroad Company.

EXCEPTIONS TO COURT'S FINDINGS.

(Filed June 1, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY, ET AL., *Defendants.*	Exceptions to Court's Findings.

The plaintiff in the above entitled cause hereby excepts to each and every of the findings of the learned trial Judge of the issues raised in said cause.

STARR, SUMMERILL & LLOYD,
Attorneys of Plaintiff.

AMENDED RULE FOR JUDGMENT.

(Filed Sept. 11, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Amended Rule for Judgment.

This cause coming on to be heard before his Honor, W. FRANK SOOY, Circuit Court Judge, without a jury, the respective parties conceding that there was no disputed question of fact, and having waived the right of trial by jury, and the Court having considered the evidence produced in said cause, and having found the facts as expressed in the conclusions of said Judge, and being of the opinion that the plaintiff is not entitled to recover the lands and premises described in plaintiff's complaint:

It is, on this fourth day of September, 1928, on motion of Bourgeois & Coulomb, Attorneys of Defendants, ordered that judgment be entered in favor of the defendants and against the plaintiff of "No Cause of Action," with costs to be taxed.

W. F. SOOY,
Circuit Court Judge.

Filed and entered September 11, 1928, at 9. A. M.
WILLIAM A. BLAIR,
Clerk.

AMENDED JUDGMENT.

(Filed Sept. 11, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants.*	Action at Law. By consent. Amended Judgment. Bourgeois & Coulomb, Attys.

Judgment entered September 11, 1928, at 9 A. M.
Costs $31.25

This cause coming on to be heard before his Honor W. FRANK SOOY, Circuit Court Judge without a jury, the respective parties conceding that there was no disputed question of fact, and having waived the right of trial by jury and the Court having considered the evidence produced in said cause and having found the facts as expressed in the conclusions of said Judge and being of the opinion that the plaintiff is not entitled to recover the lands and

premises described in plaintiff's complaint: Whereupon it is ordered on this fourth day of September, 1928, that the defendants Ventnor City and West Jersey & Seashore Railroad Company recover of the plaintiff the sum of thirty-one dollars and twenty-five cents costs for "No cause of action."

WILLIAM A. BLAIR,
Clerk.

Circuit Court Judgment Book No. 15, page 329.

REASONS FOR REVERSAL.

(Filed Nov. 7, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff-Appellant,* v. VENTNOR CITY and WEST JERSEY & SEASHORE RAILROAD COMPANY, *Defendants-Respondents.*	On Appeal from Atlantic Circuit. Reasons for Reversal.

The Camden, Atlantic and Ventnor Land Company, plaintiff-appellant, hereby specifies the following grounds for the reversal of the judgment rendered in favor of Ventnor City and West Jer-

sey and Seashore Railroad Company, defendants-respondents:

1. Upon the facts admitted and proven, the learned trial Judge should have found that the plaintiff was entitled to a judgment against the defendants for the possession of the lands and premises set forth in the complaint.

2. The learned trial Judge erred in finding that upon the facts proven and admitted, judgment should have been entered in favor of the defendants.

3. Upon the facts admitted and established in the said cause, judgment should have been rendered in favor of the plaintiff for possession of the lands and premises set forth in the complaint and not for the defendants, as so ordered by the learned trial Judge.

4. The learned trial Judge erred in finding that the record of a former suit in ejectment brought by the Camden, Atlantic and Ventnor Land Company against the West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company and the judgment entered therein in the Supreme Court of New Jersey on July 10, 1913, in favor of the defendants therein and against the plaintiff was admissible in evidence in the present suit.

5. The learned trial Judge erred in finding that the judgment mentioned in the last preceding reason was a bar to recovery in favor of the plaintiff and against the defendants in the present action.

6. The learned trial Judge erred in finding that the postea included in the judgment mentioned in the

last preceding reason was properly a part of the judgment record for the purpose of reference thereto as an aid in determining the issues presented and decided in the former action.

7. The learned trial Judge erred in finding that the said postea referred to in the last preceding paragraph established the fact that judgment was entered therein on the issue in said suit presented, to wit: Construction of the deed dated May 8, 1889, under which the defendants claimed to hold the premises in question.

8. The learned trial Judge erred in finding that the deed dated May 8, 1889, made by The Camden and Atlantic Land Company to The Camden, Atlantic and Ventnor Land Company did convey an unqualified title in fee simple.

9. The learned trial Judge erred in holding that the right to possession upon the conveyance of the West Jersey and Seashore Railroad Company to Ventnor City, as set forth in the complaint, did not revert to the Camden and Atlantic Land Company or its successors in title.

10. The learned trial Judge erred in holding that the plaintiff did not become entitled to the possession of the land described in the complaint upon the execution and delivery of the deed from the West Jersey and Seashore Railroad Company to Ventnor City.

STARR, SUMMERILL & LLOYD,
Attorneys for and of Counsel with Plaintiff-Appellant.

[ENDORSED]

Service acknowledged Oct. 9, 1928.
J. S. Westcott,
Atty., Ventnor City.

NOTICE OF APPEAL TO THE COURT OF ERRORS AND APPEALS.

(Filed Sept. 26, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. WEST JERSEY & SEASHORE RAILROAD COMPANY AND ATLANTIC CITY & SHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Notice of Appeal to the Court of Errors and Appeals.

The plaintiff, Camden, Atlantic & Ventnor Land Company, hereby appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the Atlantic County Circuit Court on the 4th day of September, 1928, in the cause entitled as above.

STARR, SUMMERILL & LLOYD,
Attorneys for and of Counsel with the Appellant.

COMPLAINT.

(Filed Sept. 26, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. WEST JERSEY & SEASHORE RAILROAD COMPANY AND ATLANTIC CITY & SHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Complant.

Suit Commenced Sept. 18, 1925.

Plaintiff, Camden, Atlantic and Ventnor Land Company, a corporation of New Jersey, says that:

1. On October 12, 1888, Camden and Atlantic Land Company, for the consideration of one dollar, and by deed duly executed, conveyed to the Camden and Atlantic Railroad Company, a tract or piece of land situate on Absecon Beach, in the Township of Egg Harbor, now Ventnor City, in the County of Atlantic and State of New Jersey, bounded and described as follows:

Beginning at a stake in the middle of Portland Avenue, as laid down on the general plan of the

Town of Ventnor, and in the northwestern line of land of said railroad company, distance twenty-five feet northwestward from the center line of the railroad of said company, and extending thence along the middle of said Portland Avenue north twenty-six degrees fifteen minutes west ninety-five feet to a stake in the southeastern line of a proposed Avenue, fifty feet wide; thence along the line of said proposed Avenue, north sixty-six degrees, forty-five minutes east, seven hundred feet to Corallis Avenue, (now called Cambridge Avenue) as laid down on General Plan aforesaid; thence along the middle of said Corallis Avenue, south twenty-six degrees fifteen minutes east ninety-five feet to a stake in the northwesterly line of the aforesaid plan of said railroad company, and thence by said line parallel with the center line of the railroad aforesaid, and twenty-five feet distant, northwestward, therefrom, south sixty-three degrees, forty-five minutes west, seven hundred feet to the place of beginning.

Containing one acre and fifty-five one-hundredths acres of land, be the same more or less.

in which deed was contained the following habendum clause, to wit:

"To have and to hold said lot or piece of land, "hereditaments and premises, hereby granted, "with the appurtenances, unto the Camden and "Atlantic Railroad Company, their successors "and assigns forever, as long as the same shall "be used by said Railroad Company for rail-"road purposes."

2. On May 8, 1889, the Camden and Atlantic Land Company granted and conveyed to the plaintiff by

deed dated that day, all of the real and personal property and estate of the Camden and Atlantic Land Company of every character and description, wheresoever and all its property, rights of every form and character, real, personal and mixed.

3. The Camden and Atlantic Railroad Company was merged into the West Jersey & Seashore Railroad Company by agreement dated February 28, 1896, filed in the office of the Secretary of State at Trenton, on May 4, 1896, by virtue of which merger, defendant, West Jersey & Seashore Railroad Company, acquired all the rights of the Camden & Atlantic Railroad Company in the lands and premises above described.

4. By deed dated April 8, 1925, the defendant, West Jersey & Seashore Railroad Company sold and conveyed to Ventnor City, all that certain tract or parcel of land, situate in the City of Ventnor City, in the County of Atlantic and State of New Jersey, particularly described therein, as follows, viz:

> Beginning at the intersection of the southerly line of Ocean Avenue with the westerly line of Corallis Avenue, now Cambridge Avenue, and extending thence (1) eastwardly in and along the southerly line of Ocean Avenue three hundred feet to the easterly line of Sacramento Avenue and of that width throughout, between parallel lines, extending thence (2) southerly parallel with said Avenues, seventy feet to the northerly line of Atlantic Avenue; thence (3) continuing still southerly of that width throughout in the bed of Atlantic Avenue, twenty-five feet to the northerly line of the right of way of the said defendant, West Jersey & Seashore Railroad Company.

5. Ventnor City purchased the lands and premises described in the last preceding paragraph for the purpose of erecting a municipal building on that part thereof which is outside the limits of Atlantic Avenue.

6. Ventnor City has no authority in law or otherwise, to use the lands and premises mentioned in the last preceding paragraph for railroad purposes, and does not intend to so use them.

7. After the 8th of April, 1925, defendant, West Jersey & Seashore Railroad Company discontinued the use of the lands and premises conveyed by the Camden and Atlantic Land Company to the Camden and Atlantic Railroad Company, by deed dated November 12, 1888, particularly described in paragraph one hereof, for railroad purposes, whereupon, to wit: on the 8th day of April, 1925, and thereafter, the legal title to the said lands and premises reverted to the plaintiff and the latter thereupon became the owner of the same in fee simple, and entitled to possession of that part thereof not included within the limits of any of the highways referred to in said description.

8. The lands and premises, to the possession of which the plaintiff is entitled, are described as follows:

> Beginning at the intersection of the southerly line of Ocean Avenue with the westerly line of Sacramento Avenue, and extending thence (1) westwardly in and along the southerly line of Ocean Avenue three hundred feet to the easterly line of Portland Avenue, and of that width throughout, between parallel lines, extending

thence (2) southerly, parallel with said Avenues, seventy feet to the northerly line of Atlantic Avenue.

9. Atlantic City & Shore Railroad Company is in possession of the part of the lands and premises described in the last preceding paragraph.

10. Plaintiff's right to the possession of said lands and premises, described in paragraph 8 hereof, heretofore accrued, to wit; on the 8th day of April, 1925.

11. Defendants, on said 8th day of April, 1925, then being in possession of the lands described in paragraph 8 hereof, refused to deliver possession thereof, and has ever since refused to deliver possession and has kept and still keeps plaintiff out of the possession thereof, depriving it of the rents and profits.

12. The rents and profits amount to the sum of $10,000 a year.

Plaintiff demands judgment for the possession of the premises lastly above described, and damages in the sum of $20,000.

LEWIS STARR,
Attorney of Plaintiff.

ANSWER.

(Filed Oct. 5, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. WEST JERSEY & SEASHORE RAILROAD COMPANY AND ATLANTIC CITY & SHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Answer.

Defendants, answering complaint filed in the above stated cause, say:

FIRST DEFENSE.

1. They admit the allegations contained in paragraph 1 of said complaint.

2. They neither admit nor deny the allegations contained in paragraph 2, as they have no knowledge or information touching said averment, and leave plaintiff to prove the same.

3. They admit the allegations contained in paragraph 3 of said complaint.

4. They admit the allegations contained in paragraph 4 of said complaint.

5. They neither admit nor deny the allegations contained in paragraph 5, as they have no information concerning it and leave plaintiff to prove the same.

6. They neither admit nor deny the allegations contained in paragraph 6, as they have no information concerning the same and leave plaintiff to prove the same.

7. They admit the conveyance mentioned in paragraph 7, but deny that title to said lands and premisese reverted to plaintiff; and deny that the plaintiff therefore became the owner of same in fee simple, and deny that the plaintiff thereupon became entitled to possession of that part of the lands not included within the highway referred to in said description.

8. They deny that plaintiff is entitled to the possession of the lands described in paragraph 8.

9. They admit the allegations contained in paragraph 9 of said complaint.

10. They deny the allegations contained in paragraph 10 of said complaint.

11. They admit the allegations contained in paragraph 11 of said complaint.

12. They deny the allegations contained in paragraph 12 of said complaint.

SECOND DEFENSE.

Defendants aver that under a proper construction of the deed made by the Camden & Atlantic Land Co., to Camden & Atlantic Railroad Co., on the 12th day of October, 1888, a copy of which is hereto annexed and made a part hereof, marked "Schedule 1" plaintiff had no title or interest in the lands described in plaintiff's complaint to which it seeks to establish possession and title in this suit.

THIRD DEFENSE.

That on the 10th day of July, 1913, in a suit in ejectment instituted and then pending in the New Jersey Supreme Court, by Camden, Atlantic and Ventnor Land Company, plaintiff herein, against West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, defendants herein, for the lands and premises described in plaintiff's complaint in this cause based upon the same deed of October 12, 1888, involved in this suit, said deed was by the Court construed in favor of defendant and against plaintiff judgment was therein rendered in favor of the defendant and against the plaintiff and duly recorded in Vol. 7 of judgments, page 54, in the office of the Supreme Court.

That said judgment is *res adjudicata* of this suit and a bar thereto.

BOURGEOIS & COULOMB,
Attorneys of Defendants.

SCHEDULE 1.

Camden and Atlantic Land Company
to
The Camden and Atlantic Railroad Company.

THIS INDENTURE MADE the Twelfth day of October in the year of our Lord, one thousand eight hundred and eighty eight, Between the Camden and Atlantic Land Company of the first part, and The Camden and Atlantic Railroad Company, of the other part,

Whereas, the said Company, duly incorporated by an Act of the Legislature of the State of New Jersey, entitled "An Act to incorporate the Camden and Atlantic Company," approved March 10, 1853 are seized and possessed in fee simple, of certain land and premises, situated on Absecom beach, in the Township of Egg Harbour, in the County of Atlantic including the premises hereinafter particularly described,

Now This Indenture Witnesseth, that the said The Camden and Atlantic Land Company, for and in consideration of the sum of One Dollar to the said Company paid or secured to be paid by the said The Camden and Atlantic Railroad 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 The Camden and Atlantic Railroad Company and to their successors and assigns, all the following described Lot Tract or Piece of land situate on Absecom Beach, in the said Township of Egg Harbour, in the County of Atlantic and State of New Jersey, and bounded and described as follows viz:

Beginning at a stake in the middle of Portland Avenue as laid down on the general plan of the Town of Ventnor and in the Northwestern line of land of the said Railroad Company distant twenty five feet northwestward from the centre line of the railroad of the said Company and extending thence along the middle of the said Portland Avenue north twenty six degrees fifteen minutes west ninety five feet to a stake in the southeastern line of a proposed avenue fifty feet wide, thence along the line of the said proposed Avenue north sixty three degrees forty five minutes east seven hundred feet to the middle of Corallis Avenue as laid down on the general plan aforesaid, thence along the middle of the said Corallis Avenue south twenty six degrees fifteen minutes east ninety five feet to a stake in the northwestern line of the aforesaid land of the said Railroad Company and thence by said land parallel with the centre line of the railroad aforesaid and twenty five feet distant northwestward therefrom south sixty three degrees forty five minutes west seven hundred feet to the place of beginning. Containing One acre and fifty five hundredths of an acre more or less.

Being a part of the same premises conveyed to the said The Camden and Atlantic Land Company" by Enoch Doughty and Jonathan Pitney and their wives, by deed dated June 1st, 1855 recorded in the Clerk's Office of the said county of Atlantic in Book H of Deeds, page 687 etc., and by Abraham Brown-

ing, John D. Laickenan, Executor, of J. E. P. Abbott, et al by Deeds, dated Dec. 29, 1886 Dec., 20, 1886, and August 3, 1888 and recorded in Books Nos. 120, 114 and 126, pages 551, 306, and 271 respectively Together with all and singular the improvements, ways, privileges hereditaments and appurtenances therewith belonging, or in anywise appertaining, and the reversions and remainders, Rents, issues and Profits thereof.

To Have and to hold the said lot or piece of land hereditaments and premises hereby granted, with the appurtenances unto the said The Camden and Atlantic Railroad Company their successors and assigns, forever, *so long as the same shall be used by said Railroad Company for Railroad purposes.* And the said The Camden and Atlantic Land Company do by these presents covenant grant, and agree to and with The Camden and Atlantic Railroad Company, their successors and assigns, that the said Company, all and singular the hereditaments and premises hereinbefore described and granted, or mentioned or intended so to be with the appurtenances, unto the said The Camden and Atlantic Railroad Company their successors, heirs and assigns, against the said Company, and their successors, and against all and every person or persons whatsoever, lawfully claiming or to claim the same or any part thereof, by, from, or under them or any of them, shall and Will by these presents, Warrant and forever Defend.

In Witness Whereof the said The Camden and Atlantic Land Company have (pursuant to a resolution of said Company) caused the common seal of the said Company to be hereunto affixed the day and year first above written.

Samuel Richards,
President

Attest:
S. Bartram Richards,
Secretary
(Seal)
Sealed and Delivered in
the presence of:

NOTE:

The words "heirs" being stricken out on the 8th, 25th, 26th and 27th lines and the word "successors" being interlined in the 8th line, also the words "so long as the same shall be used by said Railroad Company for Railroad purposes" being interlined in 25th line.

S. Bartram Richards,
secretary.
Rene Guillou.

State of Pennsylvania, }
City of Philadelphia, } ss.

S. Bartram Richards being by me duly sworn on his oath saith that Samuel Richards 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 of the said Land Company, and knows the common seal of the said Company; that the seal affixed to the foregoing Deed of Conveyance is the common seal of the said Company and was affixed in the presence and by the direction of the said Samuel Richards, 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.

S. Bartram Richards
Secretary

Sworn and subscribed before me
at Philadelphia this twelfth
day of October, A. D. 1888
Rene Guillou,
Commissioner of Deeds for New Jersey.

Filed Oct. 5, 1925 at 8 A. M.
William A. Blair, Clerk.

REPLY.

(Filed Dec. 21, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. WEST JERSEY & SEASHORE RAILROAD COMPANY AND ATLANTIC CITY & SHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Reply.

Plaintiff denies each and every of the allegations contained in the answer of the defendant, Atlantic City & Shore Railroad Company.

LEWIS STARR,
Attorney of Plaintiff.

REPLY.

(Filed Dec. 21, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*, v. WEST JERSEY & SEASHORE RAILROAD COMPANY AND ATLANTIC CITY & SHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Reply.

Plaintiff denies each and every of the allegations contained in the answer of the defendant, Atlantic City & Shore Railroad Company.

LEWIS STARR,
Attorney of Plaintiff.

EXCEPTIONS TO COURT'S FINDINGS.

(Filed June 1, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

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

Exceptions to Court's Findings.

The plaintiff in the above-entitled cause hereby excepts to each and every of the findings of the learned trial Judge of the issues raised in said cause.

STARR, SUMMERILL & LLOYD,
Attorneys of Plaintiff.

AMENDED RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC & VENTNOR LAND COMPANY, *Plaintiff*, v. WEST JERSEY & SEASHORE RAILROAD COMPANY AND ATLANTIC CITY & SHORE RAILROAD COMPANY, *Defendants.*	Action at Law. Amended Rule for Judgment.

This cause coming on to be heard before his Honor, W. Frank Sooy, Circuit Court Judge, without a jury, the respective parties conceding that there was no disputed question of fact, and having waived the right of trial by jury, and the Court having considered the evidence produced in said cause, and having found the facts as expressed in the conclusions of said Judge, and being of the opinion that the plaintiff is not entitled to recover the lands and premises described in plaintiff's complaint:

It is, on this fourth day of September, 1928, on motion of Bourgeois & Coulomb, attorneys of defendants, ordered, that judgment be entered in favor of the defendants and against the plaintiff of "no cause of action," with costs to be taxed.

W. F. SOOY,
Circuit Court Judge.

Filed and entered September 11, 1928, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

AMENDED JUDGMENT.

(Filed Sept. 11, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.
May Term, 1928.

CAMDEN, ATLANTIC & VENTNOR LAND COMPANY, *Plaintiff,* v. WEST JERSEY & SEASHORE RAILROAD COMPANY AND ATLANTIC CITY & SHORE RAILROAD COMPANY, *Defendants.*	Action at Law. By consent. Amended Judgment. Bourgeois & Coulomb, Attys

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Judgment entered September 11, 1928, at 9 A. M.
Costs.....$31.25
This cause coming on to be heard before his Honor, W. Frank Sooy, Circuit Court Judge, without a jury, the respective parties conceding that there was no disputed question of fact, and having waived the right of trial by jury, and the Court having considered the evidence produced in said cause, and having found the facts as expressed in the conclusions

of said Judge, and being of the opinion that the plaintiff is not entitled to recover the lands and premises described in plaintiff's complaint: Whereupon it is on this fourth day of September, 1928, ordered that the defendants, West Jersey & Seashore Railroad Company, and Atlantic City & Shore Railroad Company recover of the plaintiff, Camden, Atlantic & Ventnor Land Company, the sum of thirty-one dollars and twenty-five cents, costs for "No Cause of Action."

WILLIAM A. BLAIR,
Clerk.

Circuit Court Judgment Book No. 15, page 329.

REASONS FOR REVERSAL.

(Filed Nov. 7, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff-Appellant,* v. WEST JERSEY & SEASHORE RAILROAD COMPANY AND ATLANTIC CITY & SHORE RAILROAD COMPANY, *Defendants-Respondents.*	On Appeal from Atlantic Circuit. Reasons for Reversal.

The Camden, Atlantic and Ventnor Land Company, plaintiff-appellant, hereby specifies the following grounds for the reversal of the judgment rendered in favor of the West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, defendants-respondents:

1. Upon the facts admitted and proven, the learned trial Judge should have found that the plaintiff was entitled to a judgment against the defendants for the possession of the lands and premises set forth in the complaint.

2. The learned trial Judge erred in finding that upon the facts proven and admitted, judgment should have been entered in favor of the defendants.

3. Upon the facts admitted and established in the said cause, judgment should have been rendered in favor of the plaintiff for possession of the lands and premises set forth in the complaint and not for the defendants, as so ordered by the learned trial Judge.

4. The learned trial Judge erred in finding that the record of a former suit in ejectment brought by the Camden, Atlantic and Ventnor Land Company against the West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company and the judgment entered therein in the Supreme Court of New Jersey on July 10, 1913, in favor of the defendants therein and against the plaintiff was admissible in evidence in the present suit.

5. The learned trial Judge erred in finding that the judgment mentioned in the last preceding reason was a bar to recovery in favor of the plaintiff and against the defendants in the present action.

6. The learned trial Judge erred in finding that the postea included in the judgment mentioned in the last preceding reason was properly a part of the judgment record for the purpose of reference thereto as an aid in determining the issues presented and decided in the former action.

7. The learned trial Judge erred in finding that the said postea referred to in the last preceding

paragraph established the fact that judgment was entered therein on the issue in said suit presented, to wit: Construction of the deed dated May 8, 1889, under which the defendants claimed to hold the premises in question.

8. The learned trial Judge erred in finding that the deed dated May 8, 1889, made by The Camden and Atlantic Land Company to The Camden, Atlantic and Ventnor Land Company did convey an unqualified title in fee simple.

9. The learned trial Judge erred in holding that the right to possession upon the conveyance of the West Jersey and Seashore Railroad Company to Ventnor City, as set forth in the complaint, did not revert to the Camden and Atlantic Land Company or its successors in title.

10. The learned trial Judge erred in holding that the plaintiff did not become entitled to the possession of the land described in the complaint upon the execution and delivery of the deed from the West Jersey and Seashore Railroad Company to Ventnor City.

STARR, SUMMERILL & LLOYD,
Attorneys for and of Counsel with Plaintiff-Appellant.

[ENDORSED]

Service acknowledged Nov. 6, 1928.
Bourgeois & Coulomb,
Attys. Respondents.

TESTIMONY.

CIRCUIT COURT ATLANTIC COUNTY.

Camden, Atlantic & Ventnor Land Co.,
Plaintiff,
v.
West Jersey & Seashore Railroad Company and Atlantic City & Shore Railroad Company,
Defendants.

Camden, Atlantic & Ventnor Land Co.,
Plaintiff,
v.
Ventnor City and West Jersey & Seashore Railroad Co.,
Defendants.

Before Hon. William Frank Sooy, J.

Atlantic City, N. J.,
Friday, Mar. 4, 1927.

APPEARANCES:

LEWIS STARR, ESQ., attorney for plaintiff.

JOHN S. WESTCOTT, ESQ., attorney for Ventnor City.

MESSRS. BOURGEOIS & COULOMB, (By Mr. Bourgeois), attorneys for West Jersey & Seashore R. R. Co., and Atlantic City & Shore R. R. Co.

Mr. Starr: As far as the Ventnor City and the railroad company is concerned, that case applies to the land between Sacramento and Cambridge and Atlantic Avenue and Ocean Avenue, and the case in which the two railroads are the defendants applies to the block toward the west, and the plaintiff is Camden, Atlantic & Ventnor Land Company.

Now we have had a conference with counsel today and we have agreed to a plan which I believe will simplify the matter a great deal, and we have here a stipulation which we desire to have offered, with the various facts which seem to be pertinent to this inquiry.

And there are some formal records to go in, and I think that will be the extent of the proceedings today.

The Court: All right. Then you are both going to file briefs?

Mr. Starr: That is the understanding; yes, sir.

There are two questions involved, as I conceive it, and I think these gentlemen agree with me. One is the interpretation to be put upon the original deed from the Camden & Atlantic Land Company to the Camden & Atlantic Railroad Company. And the second is the effect of the judgment which was entered I think in 1913 against this present plaintiff. Those are the two legal questions involved.

I first desire to offer in evidence ——

Mr. Bourgeois: Why don't you offer the stipulation first?

Mr. Starr: I did offer that. Have that marked as an exhibit.

Mr. Bourgeois: P1.

(Stipulation referred to received in evidence and marked Exhibit P1.)

Mr. Starr: Now I offer in evidence the map.

(Map referred to received in evidence and marked Exhibit P2.)

Mr. Starr: On behalf of the plaintiff I offer in evidence a certified copy of the deed from the Camden & Atlantic Land Company to The Camden & Atlantic Railroad Company, dated October 12, 1888, and recorded in the office of the county clerk in May's Landing, in Book 127 of Deeds, page 221.

(Deed referred to received in evidence and marked Exhibit P3.)

Mr. Starr: I also offer in evidence a certified copy of the deed made by The Camden & Atlantic Land Company to The Camden, Atlantic & Ventnor Land Company, which is the plaintiff in this action, dated May 8, 1889, and recorded November 20, 1891, in the clerk's office in May's Landing, in Book 160 of Deeds, page 1.

(Deed referred to received in evidence and marked Exhibit P4.)

Mr. Starr: I also offer in evidence a certified copy of the deed from the West Jersey and Seashore Railroad Company to Ventnor City, dated April 8, 1925, recorded May 19, 1925, in Book 769 of Deeds, page 314.

(Deed referred to received in evidence and marked Exhibit P5.)

Mr. Starr: I also offer in evidence a certified copy of the Ordinance No. 1, 1925, adopted February 24, 1925.

(Paper referred to received in evidence and marked Exhibit P6.)

Mr. Starr: There is a slight amendment I wish to make to the complaint in the case in which the city is the defendant. It is to amend paragraph 7 of the complaint, the first line, where it reads: "Prior to the 8th of April, 1925," and it is to be changed so as to read: "On the 8th of April, 1925." And I will file the formal amendment as a part of the record. And the last line of paragraph 9, which reads: "On or prior to the 8th of April, 1925," to

be changed so as to read: "On the 8th of April, 1925."

I think we rest.

Mr. Bourgeois: Now, I want to explain to your Honor so you will probably better understand the case. The deed that Judge Starr has offered in evidence from the Camden & Atlantic Land Company was for the tract of land bounded by Cambridge Avenue on the east and extending through to Portland Avenue on the west. It involves both tracts.

Now on the 8th of April, 1925, the railroad company sold the tract on the easterly end extending from Cambridge Avenue to Sacramento Avenue, going to the center of those streets, I suppose, and the center of Ocean Avenue, but extending into Atlantic Avenue only twenty-five feet. The other part of the street was reserved in the railroad company.

The description contained in the complaint covers that land in this suit, but they only claim to have the right of entry upon the land—not all the land that was conveyed to the city, but only on the land within the property boundary lines, not any part of the street at all.

Now the stipulation provides and shows that this tract, of the loop tract, encroaches on or covers a point of the land that is conveyed to Ventnor by the railroad company.

Now in 1911 this same company, Camden, Atlantic & Ventnor Land Company, brought an ejectment suit against the West Jersey & Seashore Railroad Company and the Atlantic City & Shore Railroad Company, to eject them from both of those tracts of land, and that suit resulted in a verdict in favor of the defendant company. We have treated that as *res adjudicata* in these two suits.

In the suit against the railroad company and the

Atlantic City & Shore Railroad Company, the tract of land is the same, the parties are the same, and I am going to offer in evidence that previous stipulation we entered into in that other suit, simply to show the evidence in both cases is practically the same. In the other tract of land the West Jersey & Seashore Railroad Company is made a party this time as it was before, but they have joined with the West Jersey & Seashore the City of Ventnor instead of the Atlantic City & Shore Railroad Company.

The Court: Because the Atlantic City & Shore sold.

Mr. Bourgeois: No. They have joined them. They did not join the Atlantic City & Shore Railroad Company. We contend that that previous suit is *res adjudicata* in both these suits because the West Jersey & Seashore is the same, the land is the same, and the evidence is the same.

The Judge's copy of the former judgment is more complete than mine, and I want to offer it in evidence as D1. That is a certified copy of the record in the previous suit between the Camden, Atlantic & Ventnor Land Company and West Jersey and Seashore Railroad Company, and Atlantic City & Shore Railroad Company.

(Received in evidence and marked Exhibit D1.)

Mr. Bourgeois: Now I also want to offer in evidence the copy of the stipulation entered into between the parties in that previous suit; and mark that D2.

(Same received in evidence and marked Exhibit D2.)

Mr. Starr: I object to that, if your Honor please, it being incompetent and immaterial. I cannot conceive for one moment how that could be evidential in this proceeding. It was an entirely different matter, the stipulation in that suit—we have a stipulation here.

The theory upon which these suits are brought is this. The deed to the Camden & Atlantic Railroad Company provided this conveyance should be made as long as the land is used for railroad purposes:

"To have and to hold the said lot or piece of land, hereditaments and premises hereby granted, with the appurtenances unto the said The Camden and Atlantic Railroad Company, their successors and assigns, forever, so long as the same shall be used by said railroad company for railroad purposes."

Now the theory upon which these two suits are brought—as far as the city is concerned, there has been absolute cessation of the use of the land for railroad purposes. So far as the railroad is concerned, having disposed of a portion of the land for purposes other than railroad, there is a forfeiture under the terms of that grant.

Now the stipulation or the facts which appear in this former suit are absolutely immaterial, irrelevant and incompetent in this suit. They have offered in evidence, without objection, of course, the record itself, and that gives the pleadings and the judgment. Now I don't think that the stipulation that was entered into in that proceeding is at all relevant or competent in this proceeding.

Mr. Bourgeois: Now, if your Honor please, I think it is. But your Honor may hold ultimately that it is not, but if it is not offered in evidence you

cannot, and it can do no harm in allowing it to go in, because there is no jury here. If it has no force it can be disregarded.

The Court: It would seem to me it didn't have.

Mr. Bourgeois: I think there is a case in the Court of Appeals which I think might change your mind, a case decided by Judge Fencher, where he speaks about the testimony being the same in both suits. It is the same deed exactly.

The Court: Then we will consider the offer as having been made and the objection having been made, and I will rule on that.

Mr. Starr: So it may be shown I made the objection, I desire to have an exception.

The Court: All right.

Mr. Bourgeois: That seems to be all that we have to offer in evidence. That completes the testimony.

Mr. Starr: That completes the case.

Mr. Bourgeois: I would also like it if you would give us some notion of what your theory is.

Mr. Starr: I just stated to his Honor that the theory is that there has been a forfeiture, a cessation of the qualified fee by reason of the transfer of a part of this property to the Ventnor City. We allege our right of possession was the 8th of April. I will put the theory in a written brief.

Mr. Bourgeois: The point I am trying to get from Judge Starr is this. We don't expect to put anything over on each other. I have no thought of putting anything over on him, and I don't expect he thinks he can put anything very much over on me.

This premise of this deed conveys the land in fee. It is made to the Camden and Atlantic Railroad Company, its successors and assigns in fee simple. Now the habendum is as follows:

"To have and to hold the said lot or piece of land, hereditaments and premises hereby granted, with the appurtenances unto the said The Camden & Atlantic Railroad Company, their successors and assigns, forever," and then goes on the habendum, "so long as the same shall be used by said railroad company for railroad purposes."

Now our theory is that where the estate is granted by the terms of the deed and there is no question but what—about the estate that is granted where it is granted in fee simple, for instance, that cannot be cut down by the habendum. And we have cases in our State to that effect.

Now I am trying to get from Judge Starr, if I can, so that I can know his theory, what force he attributes to this clause added after what would be a complete habendum.

Mr. Starr: My theory is based upon three or four cases in New Jersey. I will give you those if you want them. They will be included in the brief.

Mr. Bourgeois: The pipe line case?

Mr. Starr: The pipe line case, the Brown case, and the Century case.

Mr. Bourgeois: Your theory is terminable fee.

Mr. Starr: Qualified fee comes to an end when the condition which is set forth in the deed comes into existence.

Mr. Bourgeois: That is all I wanted to know. Our question is about the question of *res adjudicata,* that the point that one case was decided last year and another this year doesn't make any difference, because if that were so you never could have a case that would be *res adjudicata.*

The Court: Was that suit based on the theory the other company had ceased to use the land for railroad purposes?

Mr. Bourgeois: Yes. They had on this piece of land that the Ventnor City now has, they had a little station used for a freight station, and that was used for a freight station and passenger also from 1896 to about 1901, and then they changed the passenger station over to the other side, the lower end of the tract next to Portland Avenue. Then they used the platform on the land, this end of it, for freight purposes until 1907, and then they entered into an agreement with Ventnor City by which that was removed and turned into a grass plot, being ordered by the Atlantic City and Shore and the taxes paid by the West Jersey and Seashore. In other words, they kept the land, and that was the condition in 1911. Then four years after they had moved the buildings back of it, this same company brought suit on the ground that this deed was only a terminable fee and they were entitled to the possession of it. That was an ejectment suit the same as this.

And Judge Carrow determined on our stipulation that it was a fee simple and that the qualification at the end of the habendum was not effective at all. Then it went along all these years until 1925, when they brought this second suit for the same land, against the same West Jersey and Seashore Railroad Company, and on the same deed, the same qualification. It is for precisely the same land, and it is on practically the same evidence, the same stipulations. The facts are the same then as now.

The Court: I suppose the only change has been

Mr. Starr: An absolute termination by the sale to the city, and we contend that the prior suit has no effect whatever with respect to the conditions which now exist.

Mr. Bourgeois: They contend there was an absolute termination then.

The Court: According to your theory of what Judge Carrow decided, it didn't make any difference whether there had been a termination of the use or not, because he decided it was a fee simple. All right.

I am going to take all the exhibits and the clerk will keep them all together until you get in your briefs. Or, if you want to, you can keep all these exhibits until you send in your brief.

Mr. Starr: I prefer that.

(Briefs to be submitted.)

STIPULATION.

NEW JERSEY SUPREME COURT.

CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY, *Plaintiff*,

v.

WEST JERSEY & SEASHORE RAILROAD COMPANY, *et al.*, *Defendants.*

and

CAMDEN, ATLANTIC AND VENTNOR LAND CO., *Plaintiff*,

v.

VENTNOR CITY, *et al.*, *Defendants.*

Stipulation.

It is stipulated between the respective parties:

1. The defendant, West Jersey and Seashore Railroad Company, is a duly incorporated railroad company, being constituted by merger in 1897 of a number of railroad companies, one of which was the Camden and Atlantic Railroad Company.

2. That Camden and Atlantic Railroad Company was incorporated by an Act of the Legislature in

1852, found in Pamphlet Laws of that year, p. 263, which Act has several times been amended.

3. That Camden and Atlantic Land Company was incorporated by an Act of the Legislature in 1853, found in Pamphlet Laws of that year, p. 337.

4. That Camden and Atlantic Land Company on the 12th day of October, 1888, was the owner in fee of a large tract of land in Egg Harbor Township, Atlantic County, New Jersey, abutting upon the right of way of the Camden and Atlantic Railroad Company, including the lands described in the first paragraph of plaintiff's complaint.

5. That on the 12th day of October, 1888, the Camden and Atlantic Land Company conveyed to the Camden and Atlantic Railroad Company, by deed of conveyance, the lands described in the two suits hereinabove mentioned, which deed of conveyance was recorded in the clerk's office of Atlantic County on the 15th day of October, 1888, in Book No. 127 of Deeds, p. 221.

6. That the West Jersey and Seashore Railroad Company by the merger of the Camden and Atlantic Railroad Company and various other railroad companies, under the name of the said West Jersey and Seashore Railroad Company, became seized and possessed of the real estate and other property of the Camden and Atlantic Railroad Company, including the lands described in the above two suits.

7. That from 1897 until 1901, there was erected on the lands between Cambridge and Sacramento

Avenues, a small building used for station purposes up until the year 1901, and after the year 1901 until the year 1907, it was used for a freight station. During the year 1907, it was removed to the tract of land lying between Sacramento and Portland Avenues, and was then converted into a railroad office building, and passenger shelter station, where it still remains, and is still so used.

8. That from 1896 until the present time, there has been constructed on the lands lying between Sacramento and Portland Avenues, a railroad loop connecting with the double tracks on Atlantic Avenue, which has been continuously used, and is at present used, for railroad purposes.

9. That the tract of land between Cambridge Avenue and Sacramento Avenue, lying between the northerly line of Atlantic Avenue and the southerly line of Ocean Avenue, has been maintained as a grass plot by the West Jersey and Seashore Railroad Company and the Atlantic City and Shore Railroad Company, from the year 1907 until the conveyance of that tract of land to Ventnor City, on the eighth day of April, 1925, the West Jersey and Seashore Railroad Company, during all that period, having paid taxes on said land, and the same having been in the possession of the said West Jersey and Seashore Railroad Company and the Atlantic City and Shore Railroad Company.

10. That the northerly track of the loop passes over a portion of the land conveyed by the West Jersey and Seashore Railroad Company to the City of Ventnor on April 8, 1925, which track is used by the Atlantic City and Shore Railroad Company for

railroad purposes, and has been so used since 1896, but said track does not pass over any portion of the lands described in paragraph 8 of plaintiff's complaint.

11. That the Atlantic City and Shore Railroad Company was incorporated in 1906, under the General Railroad Act, entitled: "An Act concerning Railroads," 1903, Pamphlet Laws of that year, p. 645.

12. That the Atlantic City and Shore Railroad Company during the year 1906 entered into a trackage agreement with the West Jersey and Seashore Railroad Company for the use of the tracks of the said West Jersey and Seashore Railroad Company, between the Inlet, Atlantic City, and Longport, and the loop erected on the lands above described, which said agreement is still in full force and effect.

13. That the Atlantic City and Shore Railroad Company conducts an interstate railroad business, through the various municipalities along its said line between Longport and Atlantic City.

14. That on and after April 8, 1925, the West Jersey and Seashore Railroad Company ceased to use the lands and premises described in paragraph 8 of the complaint for any purpose, whatever.

15. That the moneys received from the sale of the lands mentioned in plaintiff's complaint were used by the railroad company for railroad purposes.

16. That Ventnor City was incorporated as a city under an Act of the Legislature, entitled: "An Act

relating to and providing for the government of cities of this State containing a population of less than twelve thousand inhabitants," approved March 24, 1897, Pamphlet Laws, p. 46.

17. That on the 8th day of April, 1925, West Jersey and Seashore Railroad Company conveyed to Ventnor City the lands described in paragraph 4 of plaintiff's complaint, pursuant to an ordinance numbered 1—1925, entitled: "An ordinance providing for the acquiring by the city of lands for the erection thereon of buildings proper and suitable for the transaction of municipal business, location of public offices for officers of the city, and for municipal and public purposes, and providing for the payment of the cost thereof," approved February 25, 1925.

18. That Corallis Avenue, mentioned in the conveyance from Camden and Atlantic Land Company to Camden and Atlantic Railroad Company is now known as Cambridge Avenue, and the proposed street mentioned in said deed from the Camden and Atlantic Land Company to Camden and Atlantic Railroad Company is now known as Ocean Avenue.

LEWIS STARR,
Attorney for Plaintiff.
JOHN S. WESTCOTT,
HIRAM STEELMAN,
Attorneys for Ventnor City.
BOURGEOIS & COULOMB,
Attorneys for West Jersey and Seashore Railroad Co. and Atlantic City and Shore Railroad Co.

EXHIBIT P2.

Exhibit P2 is a map, copy of which is attached hereto.

EXHIBIT P3.

The Camden & Atlantic Land Co.
To
The Camden & Atlantic Railroad Co.
} Deed

THIS INDENTURE, made the Twelfth day of October in the year of our Lord one thousand eight hundred and eighty eight.

BETWEEN The Camden and Atlantic Land Company, of the first part, and The Camden and Atlantic Rail Road Company of the other part:

WHEREAS, the said Company, duly incorporated by an Act of the Legislature of the State of New Jersey, entitled "An Act to incorporate The Camden and Atlantic Land Company" approved March 10, 1853 are seized and possessed in fee simple of certain land and premises, situated on Absecon Beach in the Township of Egg Harbour in the County of Atlantic, including the premises hereinafter particular*y* described;

NOW THIS INDENTURE WITNESSETH,

That the said The Camden and Atlantic Land Company, for and in consideration of the sum of one dollar to the said Company paid or secured to be paid by the said The Camden and Atlantic Rail Road Company, at or 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 The Camden and Atlantic Rail Road Company, and to their successors and assigns, all the following described lot, tract or piece of land situate on Absecon Beach in the said Township of Egg Harbour, in the County of Atlantic and State of New Jersey, and bounded and described as follows, viz:—

Beginning at a stake in the middle of Portland Avenue as laid down on the general plan of the Town of Ventor and in the northwestern line of land of the said Railroad Company, distant twenty five feet northwestward from the centre line of the railroad of the said Company and extending thence along the middle of the said Portland Avenue, north twenty six degrees, fifteen minutes west, ninety five feet to a stake in the southwestern line of a proposed Avenue, fifty feet wide; thence along the line of the said proposed avenue, north sixty three degrees forty five minutes east, seven hundred feet the middle of Corallis Avenue, as laid down on the general plan aforesaid, thence along the middle of the said Corallis Avenue, south, twenty six degrees, fifteen minutes east, ninety five feet to a stake in the northwestern line of the aforesaid land of the said Rail Road Company and thence by said land parallel with the centre line of the railroad aforesaid and twenty five feet distant northwestward therefrom, south, sixty three degress forty five minutes west, seven hundred feet to the place of beginning. Con-

taining one acre and fifty five hundredths of an acre more or less.

Being a part of the same premises conveyed to the said "The Camden and Atlantic Land Company" by Enoch Doughty and Jonathan Pitney and their wives, by deed dated June 1st, 1855 recorded in the Clerk's Office of the said County of Atlantic in Book H of Deeds, page 687 &c., and by Abraham Browning, et ux, John D. Larckeman, Executor, and J. E. P. Abbott, et al, by Deeds dated Dec. 29, 1886, December 20, 1886, and August 3, 1888 and recorded in Books Nos. 120, 114 & 126 pages 551, 306 & 271 respectively.

TOGETHER with all and singular, the improvements, ways, privileges, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof;

TO HAVE AND TO HOLD the said lot or piece of land hereditaments and premises hereby granted, with the appurtenances unto the said The Camden and Atlantic Railroad Company, their successors and assigns, forever, so long as the same shall be used by said Railroad Company for Railroad purposes.

And the said The Camden and Atlantic Land Company do by these presents covenant, grant and agree to and with the said The Camden and Atlantic Rail Road Company, their successors and assigns, that the said Company, all and singular, the hereditaments and premises hereinbefore described and granted or mentioned or intended so to be, with the appurtenances, unto the said The Camden and Atlantic Railroad Company their successors and assigns, against the said Company and their successors and against all and every person or persons

whatsoever, lawfully claiming or to claim the same or any part thereof, by, from or under them or any of them, shall and will by these presents warrant and forever defend.

IN WITNESS WHEREOF, the said The Camden and Atlantic Land Company have (pursuant to a resolution of said Company) caused the common seal of the said Company to be hereunto affixed the day and year first above written.

Samuel Richards
(Corporate Seal)
Attest:
S. Bartram Richards
Secretary

Sealed and Delivered in the presence of
Note the word "heirs" being stricken out in the 8th, 25th, 26th, & 27th lines and the words "successors" being interlined in the 8th line also the words "so long as the same shall be used by said "Railroad Company for Railroad purposes" being interlined in 25th line.
S. Bartram Richards, Secty.
Rene Guillon

State of Pennsylvania, City of Philadelphia, ss.

S. Bartram Richards, being by me duly sworn, on his oath saith, that Samuel Richards 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 of the said Land Company, and knows the common seal of the said Company; that the seal affixed to the foregoing Deed of Conveyance is the Common Seal of

the said Company, and was affixed in the presence and by the direction of the said Samuel Richards, 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.

S. Bartram Richards
Secty.

Sworn and subscribed before me
at Philadelphia this twelfth day
of October A. D. 1888
Gene Gullion (Seal) Commissioner
of Deeds for New Jersey.
Rec'd & Recorded Oct. 15th, A. D.
1888

Lewis Evans, Clerk

Deed Bk. 127 pg. 221.

EXHIBIT P4.

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 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, released 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 wheresoe*ve* situated 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
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 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 & 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. 20th A. D. 1891.
Deed Book No. 160 page 1. Lewis Evans, Clk.

EXHIBIT P5.

DEED—West Jersey & Seashore Railroad Co. to Ventnor City.

THIS INDENTURE, made the eighth day of April, in the year of our Lord one thousand nine hundred and twenty five. (1925).

BETWEEN West Jersey and Seashore Railroad

Company, a corporation of the State of New Jersey, party of the first part, and Ventnor City, a municipality of the said State of New Jersey, party of the second part;

WITNESSETH that the said party of the first part, for and in consideration of the sum of Sixty five thousand Dollars ($65,000.00) lawful money of the United States of America, unto it well and truly paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, enfeoffed, released and confirmed and by these presents does grant, bargain, sell, alien, enfeoff, release and confirm unto the said party of the second part, its successors and assigns. All that certain tract or parcel of land situate in the City of Ventnor City, in the County of Atlantic and State of New Jersey, particularly described as follows, viz:

BEGINNING at the intersection of the southerly line of Ocean Avenue, with the Westerly line of Corrallis Avenue (now Cambridge Avenue) and extending thence (1) Westwardly, in and along the southerly line of Ocean Avenue three hundred (300) feet to the easterly line of Sacramento Avenue and of that width throughout between parallel lines, extending thence (2) Southerly, parallel with said Avenues seventy (70) feet to the northerly line of Atlantic Avenue; thence (3) continuing still southerly of that width throughout in the bed of Atlantic Avenue twenty five (25) feet to the Northerly line of the right of way of the party of the first part.

(Being a part of the same premises which The Camden and Atlantic Land Company by deed dated the twelfth day of October, 1888 and recorded in the Clerk's office of Atlantic County, New Jersey in Book 127 of deeds for said County page 221 &c.,

granted and conveyed unto The Camden and Atlantic Railroad Company, in fee. And the said The Camden and Atlantic Railroad Company, by Agreement of Consolidation and Merger dated the twenty eighth day of February, 1896 and filed in the office of the Secretary of State of the State of New Jersey, on the fourth day of May, 1896 with the other Companies therein mentioned, became consolidated and merged into the West Jersey and Seashore Railroad Company, the party of the first part hereto.)

TOGETHER with all and singular the improvements, streets, alleys, passages, ways, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances whatsoever unto the hereby granted premises belonging or in anywise appertaining and the reversions and remainders rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever, of it, the said party of the first part, as well at law as in equity or otherwise howsoever, of, in and to the same, and every part thereof. Reserving, however unto the said party of the first part, its successors and assigns, the title to that portion of the street in Atlantic Avenue lying between the middle line thereof, and the Northerly line of its right of way, which is twenty five (25) feet southerly from and parallel to the northerly line of Atlantic Avenue, extending from the middle line of Corrallis Avenue (now Cambridge Avenue) to the middle line of Sacramento Avenue.

TO HAVE AND TO HOLD the premises hereby granted or mentioned or intended so to be, with the appurtenances (Reserving as aforesaid) unto the said party of the second part, its successors and assigns, to and for the only proper use, and behoof of the said party of the second part, its successors

and assigns forever. And the said party of the first part for itself, and its successors does by these presents covenant, grant and agree to and with the said party of the second part, its successors and assigns, that it, the said party of the first part, and its successors, all and singular the hereditaments and premises hereinbefore described and granted or mentioned and intended so to be, with the appurtenances, unto the said party of the second part, its successors and assigns, against it, the said party of the first part, and its successors and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof, by, from or under it, them or any of them, shall and will (reserving as aforesaid) warrant and forever defend.

And the said party of the first part does hereby dedicate to public use for street purposes all that part of Atlantic Avenue, lying between the middle line of Corrallis Avenue (now Cambridge Avenue) and the middle line of Sacramento Avenue of which it is the owner, of the fee lying northerly of a line distant twelve (12) feet, one and one half (1½) inches northerly of the center line of Atlantic Avenue. Upon condition, however, that such dedication shall be for ordinary street traffic only, and shall never be subject to railroad or railway uses.

IN WITNESS WHEREOF, the said party of the first part has caused its common or corporate seal to be hereunto affixed duly attested, and these presents to be executed on its behalf by its Vice President, the day and year first above written.

West Jersey and Seashore Railroad Company (Corporate seal)
By Thomas W. Hulme, Vice President.

Attest: Lewis Neilson,
Secretary.

State of Pennsylvania, County of Philadelphia, ss.

BE IT REMEMBERED, that on this eighth day of April, in the year of our Lord one thousand nine hundred and twenty five (1925) before me, a Foreign Commissioner of deeds for New Jersey, in Pennsylvania, personally appeared Lewis Neilson who being by me duly sworn on his oath saith that he is the Secretary of the West Jersey and Seashore Railroad Company, the grantor within named and that Thomas W. Hulme, is the Vice President; that deponent knows the common or corporate seal of said grantor and that the seal annexed to the within deed of conveyance is such common or corporate seal; that said deed of conveyance was signed by the said Vice President and the seal of said grantor affixed thereto in the presence of deponent; that said deed of conveyance was signed, sealed and delivered as and for the voluntary act and deed of said grantor for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of said grantor; and at the execution thereof this deponent subscribed his name thereto as witness.

Lewis Neilson

Sworn and subscribed to before
me the day and year aforesaid.
N. Spering (seal)
A Foreign Commissioner of deeds
for New Jersey in Pennsylvania.
My commission expires January
16, 1920.

Received and recorded May 19, 1925 at 10 A. M.
William A. Blair, Clerk.
Deed Book No. 769 page 314.

EXHIBIT P6.

ORDINANCE # 1, 1925.

AN ORDINANCE PROVIDING FOR THE ACQUIRING BY THE CITY OF LANDS FOR THE ERECTION THEREON OF BUILDINGS PROPER AND SUITABLE FOR THE TRANSACTION OF MUNICIPAL BUSINESS, LOCATION OF PUBLIC OFFICES FOR OFFICERS OF THE CITY AND FOR MUNICIPAL AND PUBLIC USES AND PROVIDING FOR THE PAYMENT OF THE COSTS THEREOF.

WHEREAS in the opinion of the Common Council of Ventnor City it is necessary and required that there shall be provided for the Public Officers and the transaction of Public business and for Municipal or Public use or purposes, a Municipal Public Building and for that purpose the lands situate in Ventnor City, County of Atlantic, State of New Jersey, bounded on the north by Ocean Avenue and the east by Cambridge Avenue, on the south by Atlantic Avenue and on the west by Sacramento Avenue, is a suitable and proper place for the location of a Municipal Building, the fee of which said lands can be acquired by the City at the price or sum of Sixty-five thousand dollars, ($65,000), which is a proper and reasonable price to be paid therefor, now therefore,

BE IT ORDAINED BY THE COMMON COUNCIL OF VENTNOR CITY,

Section 1. That for the purpose of erecting and constructing thereon a Municipal Building for Municipal and Public uses and purposes and for the transaction of municipal business, the location of its

Public offices, officers of the Municipality, there be acquired by the City of Ventnor City in fee the lands situate in Ventnor City, County of Atlantic and State of New Jersey, bounded on the north by Ocean Avenue and the east by Cambridge Avenue, on the south by Atlantic Avenue and on the west by Sacramento Avenue at the price or sum of Sixty-five thousand dollars, ($65,000).

Section 2. That to provide the moneys necessary and required to purchase the said lands there be issued by the City, Temporary Notes to the amount not exceeding the sum of Sixty-five thousand dollars, ($65,000) which said notes shall be payable within five (5) years from the date hereof with interest thereon not exceeding six per-cent (6%) per annum and which said temporary loan shall be paid from the proceeds of an issue of bonds to be hereafter provided for.

Section 3. That this Ordinance shall take effect immediately.

Passed at a regular meeting of Common Council of Ventnor City, New Jersey, held this twenty-fourth day of February, A. D., Nineteen hundred and twenty-five.

(signed) Joseph R. Bartlett
President of Common Council

ATTEST:
(signed) Charles E. Repetto
City Clerk

APPROVED:
Feb. 25th., 1925.
(signed) Carleton E. Adams
Mayor of Ventnor City, N. J.

I, Charles E. Repetto, City Clerk of the City of Ventnor City, do hereby certify that the foregoing Ordinance is a true and correct copy of Ordinance

#1, 1925, regularly passed and duly adopted by the Common Council of Ventnor City, New Jersey, at a regular meeting of Council held the twenty-fourth day of February, A. D., 1925.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this eleventh day of January, A. D., Nineteen hundred and twenty-six.

Charles E. Repetto
City Clerk

EXHIBIT D1.

NEW JERSEY ss

THE STATE OF NEW JERSEY to the Sheriff of the County of Atlantic, Greeting:

(SEAL)

We command you, to summon the West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company to appear before our Supreme Court, at Trenton on the twentieth day of May instant, to answer to the complaint of the Camden Atlantic and Ventnor Land Company who demand of them the possession of all those certain lots or pieces of land with the appurtenances, situate in Ventnor City, in the County of Atlantic and State of New Jersey, bounded and described as follows. Beginning at a point in the Northerly line of Atlantic Avenue where the same is intersected by the Easterly line of Portland Avenue and running thence (1) Eastwardly and in the Northerly line of Atlantic Avenue three hundred feet to the Westerly line of Sacr*amneto* avenue thence (2) Northwardly and in the Westerly line of Sacramento avenue seventy feet to the Southerly line of Ocean avenue, thence (3) Westwardly and in the Southerly line of

Ocean avenue three hundred feet to the Easterly line of Portland avenue; thence (4) Southwardly and in the Easterly line of Portland avenue seventy feet to the line of Atlantic avenue the place of beginning, also Beginning at a point in the Northerly line of Atlantic avenue where the same is intersected by the Easterly line of Sacramento avenue and running thence (1) Eastwardly and in the said Northerly line of Atlantic avenue three hundred feet to the West line of Cambridge avenue (formerly called Corrallis) thence (2) Northwardly and in the Westerly line of Cambridge avenue (formerly called Corrallis avenue) seventy feet to the Southerly line of Ocean avenue; thence (3) Westwardly and in the Southerly line of Ocean avenue three hundred feet to the East line of Sacramento avenue seventy feet to the place of beginning.

And in default of their appearing and defending this action judgment will be entered against them, and they will be turned out of possession of said lands. And have you then and there this writ.

Witness William S. Gummere, Esq., Chief Justice at Trenton, this second day of May, in the year of our Lord one thousand nine hundred and eleven.

J. S. Westcott, Attorney.

Wm. Riker, Jr., Clerk.

[Endorsed.]

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

Camden, Atlantic & Ventnor Land Co.,
v.
West Jersey and Seashore Railroad Company,

In Ejectment,
SUMMONS.

Retble. May 20, 1911.
J. S. Westcott,
Atty. of Pltf.

New Jersey Supreme Court of the twentieth day of May, in the year of our Lord one thousand nine hundred and eleven.

Atlantic County ss

Camden Atlantic and Ventnor Land Company, the plaintiff in this action by John S. Westcott, its attorney, demands of the West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, the defendants therein, the possession of all those certain lots or pieces of land, with the appurtenance situate in Ventnor City, in the County of Atlantic and State of New Jersey, bounded and described as follows:—Beginning at a point in the Northerly line of Atlantic avenue where the same is intersected by the Easterly line of Portland avenue and running thence (1) Eastwardly and in the Northerly line of Atlantic avenue three hundred feet to the Westerly line of Sacramento Avenue thence (2) Northwardly and in the Westerly line of Sacramento avenue seventy feet to the Southerly line of Ocean avenue; thence (3) Westwardly and in the Southerly line of Ocean avenue three hundred feet to the Easterly line of Portland avenue; thence (4) Southwardly and in the Easterly line of Portland avenue seventy feet to the place of beginning. Also Beginning at a point in the Northerly line of

Atlantic avenue where the same is intersected by the Easterly line of Sacramento avenue and running thence (1) Eastwardly and in the said Northerly line of Atlantic avenue three hundred feet to the West line of Cambridge avenue (formerly called Corrallis Avenue) thence (2) Northwardly and in the Westerly line of Cambridge avenue (formerly called Corrallis avenue) seventy feet to the Southerly line of Ocean avenue; thence (3) westwardly and in the southerly line of Ocean avenue three hundred feet to the East line of Sacramento avenue; thence (4) Southwardly and in the Easterly line of Sacramento avenue seventy feet to the place of beginning. And the plaintiff says that its right to the possession of the same accrued on the twentieth day of January, nineteen hundred and eleven, and that the defendants wrongfully deprive it of the possession thereof, to its damage five thousand dollars.

J. S. Westcott,
Atty. of Pltff.

TO THE WITHIN NAMED DEFENDANT:

In case the within summons and declaration are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days; and that, in case you file said affidavit, unless you file a plea or demurrer within twenty days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

In case the within summons and declaration are served upon you by the leaving of a copy at your

dwelling house or place of abode, then take notice that unless you appear and file a plea or demurrer within twenty days after the date of service hereof upon you, judgment will be entered against you.

J. S. Westcott,
Attorney.

Duly served within summons and declaration May 5th, 1911, on West Jersey and Seashore Railroad Company by delivering a copy personally to Israel G. Adams, a director of said West Jersey and Seashore Railroad Company on Atlantic Avenue, between Tennessee and South Carolina Avenue, Atlantic City, N. J.

Enoch L. Johnson,
Sheriff.

I hereby depute and appoint Louis Barber to serve the within summons and declaration on Atlantic City and Shore Railroad Company, Witness my hand and seal this fifth day of May A. D. 1911.

Enoch L. Johnson,
Sheriff.
SEAL.

Duly served within summons and declaration, May 5th, 1911, on Atlantic City and Shore Railroad Company by delivering a copy personally to John N. Akarman, Superintendent of said Atlantic City and Shore Railroad Company, at the office of the said Company # 8 South Virginia Avenue, Atlantic City, N. J.

Enoch L. Johnson, Sheriff, by
Louis Barber,
Special Deputy Sheriff.

Sheriff's Fees $6.74.

NEW JERSEY SUPREME COURT.

Camden Atlantic and Ventnor Land Company,
v.
West Jersey and Seashore Railroad Company,

On Contract.

STATE OF NEW JERSEY } SS.
ATLANTIC COUNTY, }

Enoch L. Johnson, Sheriff of the County of Atlantic, being duly sworn according to law, on his oath saith, that on the fifth day of May, nineteen hundred and eleven he served on the defendant West Jersey and Seashore Railroad Company, by delivering to Israel G. Adams, a director of said West Jersey and Seashore Railroad Company, personally, a full, true and correct copy of the annexed declaration in the above stated cause, with the summons to which said declaration is annexed, and that there was endorsed on the said declaration a notice that if the defendant intends to make a defense to the said action it shall within ten days after the date of personal service of said copy of the declaration file with the Clerk of the above-mentioned Court an affidavit of merits, and unless in case such affidavit shall be so filed, the said defendant shall file a plea or demurrer to the said action within twenty days after the date of service of said copy of the declaration, judgment by default would be entered against it.

Sheriff.

Sworn and subscribed to before me this sixth day of May, A. D. 1911.

Notary Public of N. J.

NEW JERSEY SUPREME COURT.

Camden Atlantic and Ventnor Land Company,
v.
West Jersey and Seashore Railroad Company,
} On Contract.

STATE OF NEW JERSEY } SS.
ATLANTIC COUNTY, }

Louis Barber, Special Deputy, Sheriff of the County of Atlantic, being duly sworn according to law, on his oath saith, that on the fifth day of May, nineteen hundred and eleven he served on the defendant Atlantic City and Shore Railroad Company be delivering to John N. Akarman, Superintendent, of said Atlantic City and Shore Railroad Company personally, a full, true and correct copy of the annexed declaration in the above stated cause, with the summons to which said declaration is annexed, and that there was endorsed on the said declaration a notice that if the defendant intends to make a defense to the said action it shall within ten days after the date of personal service of said copy of the declaration file with the Clerk of the above-mentioned Court an affidavit of merits, and unless in

case such affidavit shall be so filed, the said defendant shall file a plea or demurrer to the said action within twenty days after the date of service of said copy of the declaration, judgment by default would be entered against it.

Louis Barber,
Special Deputy Sheriff.

Sworn and subscribed to before me this
sixth day of May, A. D. 1911.

Melvin, A. Abbott,
Seal. Notary Public of N. J.

[Endorsed.]

NEW JERSEY SUPREME COURT.
Atlantic County.

Camden, Atlantic & Ventnor Land Company,
Plaintiff,
v.
West Jersey and Seashore Railroad Company, et al.

In Ejectment.
DECLARATION & SUMMONS.

J. S. Westcott,
Atty. of Pltff.
Filed May 17, 1911.
Wm. Riker, Jr.,
Clerk.

NEW JERSEY SUPREME COURT.

Camden, Atlantic & Ventnor Land Company,
Plaintiff,

v.

West Jersey and Seashore Railroad Company,
Defendant.

In Ejectment.
PLEA.

And the said West Jersey and Seashore Railroad Company, by Bourgeois & Coulomb, its attorneys, appears and defends this action, and says that it is not guilty of the injury whereof the said Camden, Atlantic & Ventnor Land Company hath complained in its declaration, nor of any part thereof, and of this it puts itself upon the country and the said Camden, Atlantic & Ventnor Land Company doth the like.

Bourgeois & Coulomb,
Attys. Deft.

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

J. T. WALLIS of full age, being duly sworn, on his oath says that he is the Superintendent of the West Jersey and Seashore Railroad Company, the above named defendant, and its agent for the purpose of making this affidavit, that the above plea is not intended for the purpose of delay, but that affiant believes that the said defendant has a just

and legal defense to the action on the merits of the case.

J. T. Wallis

Sworn and subscribed before me
this 13th day of May, 1911.
W. E. Ringel
Notary Public,
Notary Public
Commission Expires,
Feb. 7, 1915.
SEAL.

[Endorsed.]

NEW JERSEY SUPREME COURT.

Camden, Atlantic & Ventnor Land Company,
Plaintiff,

v.

West Jersey and Seashore Railroad Company,
Defendant.

IN EJECTMENT.
PLEA.

Bourgeois & Coulomb,
Attys. for Defendant.
Filed May 17, 1911.
Wm. Riker, Jr.,
Clerk.

NEW JERSEY SUPREME COURT.

Camden, Atlantic and Ventnor Company,
Plaintiff,
v.
West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company,
Defendants.

IN EJECTMENT.
PLEA.

And the said Atlantic City and Shore Railroad Company, by Bourgeois & Coulomb, its attorneys, appears and defends this action and says that it is not guilty of the injury whereof the said Camden, Atlantic and Ventnor Land Company hath complained in its declaration, nor of any part thereof, and of this it puts itself upon the country and the said Camden, Atlantic and Ventnor Land Company doth the like.

Bourgeois & Coulomb,
Attorneys of Defendant.

State of New Jersey, } ss.
County of Atlantic, }

JOHN N. AKARMAN, being duly sworn, according to law, on his oath deposes and says, that he is the Superintendent of the Atlantic City and Shore Railroad Company, the above named defendant, and its agent for the purpose of making this affidavit; that the above plea is not intended for the purpose

of delay, but that affiant believes that the said defendant has a just and legal defense to said action on the merits of the case.

John N. Akarman,

Sworn and subscribed before me
this 20th day of May, 1911.
Louis E. Stern,
Atty. at Law of N. J.

[ENDORSED.]

NEW JERSEY SUPREME COURT.

Camden, Atlantic and Ventnor Land Company,
Plaintiff,
v.
West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company,
Defendants.

IN EJECTMENT.
PLEA.

Bourgeois & Coulomb,
Attys. of Defendants.
Filed May 22, 1911.
Wm. Riker, Jr.,
Clerk.

NEW JERSEY SUPREME COURT.

Camden, Atlantic and Ventnor Land Company, Plaintiff,
v.
West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, Defendants.

IN EJECTMENT.
ORDER TO ENTER JUDGMENT.

Postea in favor of the above named defendants having been signed and filed,

IT IS on this 8th day of July, nineteen hundred and thirteen, on motion of Bourgeois & Coulomb, Attorneys of Defendants, ORDERED that judgment be entered thereon forthwith.

Bourgeois & Coulomb,
Attorneys of Defendants.

I consent to the making of the above order.

J. S. Westcott,
Attorneys of Plaintiff.

[ENDORSED.]

NEW JERSEY SUPREME COURT.

Camden, Atlantic and Ventnor Land Company,
Plaintiff,
v.

West Jersey and Seashore Railroad
Company and Atlantic City and
Shore Railroad Company,
Defendants.

IN EJECTMENT.
ORDER TO ENTER JUDGMENT.

Bourgeois & Coulomb,
Attys. of Defts.
Filed Jul 10, 1913.
Wm. C. Gebhardt,
Clerk.

Afterwards, that is to say, on the twenty-second day of May, nineteen hundred and thirteen, at a Circuit Court held at May's Landing, in and for the County of Atlantic, before his Honor Howard Carrow, one of the Circuit Court Judges, to whom said cause had been referred by his Honor, Samuel Kalisch, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, according to the form of the statute in such case made and provided, comes as well the within named Camden, Atlantic and Ventnor Land Company, plaintiff, as the within named West Jersey and Seashore Railroad Company, and Atlantic City and Shore Railroad Company, defendants, by their respective attorneys within named, and it being agreed in open court by the parties and their respective attorneys within named to waive a jury and try said cause before the aforesaid Trial Judge, and the parties by their respective attorneys having stipulated and agreed upon the testimony and facts pertinent to

the issue in said cause, and it appearing that plaintiff's title was derived from the Camden and Atlantic Land Company by deed of conveyance bearing date the eighth day of May, eighteen hundred and eighty nine, and that defendant's title was derived from the Camden and Atlantic Land Company by deed of conveyance to the Camden and Atlantic Railroad Company dated the twelfth day of October, eighteen hundred and eighty eight, and that defendant company became seized of said lands by merger of the Camden and Atlantic Railroad Company into the West Jersey and Seashore Railroad Company, and it further appearing from the evidence in said cause that the deed of conveyance from Camden and Atlantic Land Company to Camden and Atlantic Railroad Company aforesaid was a conveyance of the lands in question in fee; and it further appearing that the defendant, Atlantic City and Shore Railroad Company was entitled to certain rights in and over the lands in question by virtue of an agreement between it and West Jersey and Seashore Railroad Company, the said court did adjudge that the deed of conveyance from Camden and Atlantic Land Company to Camden and Atlantic Railroad Company aforesaid was a conveyance in fee, and that defendant, West Jersey and Seashore Railroad Company, held said lands in fee simple, and did further adjudge that the said defendants, West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, not guilty of the trespass and ejectment within laid to their charge in manner and form as the said plaintiff, Camden, Atlantic and Ventnor Land Company hath thereof complained against them.

Howard Carrow,
Circuit Court Judge.

[ENDORSED.]

NEW JERSEY SUPREME COURT.

CAMDEN, ATLANTIC & VENTNOR LAND COMPANY,
v.
WEST JERSEY SEASHORE RAILROAD CO. ET AL.

IN EJECTMENT.
POSTEA.

Judgt. for Defts.
Costs, $
Bourgeois & Coulomb,
Attorneys.
Filed Jul. 10, 1913.
Wm. C. Gebhardt,
Clerk.

NEW JERSEY SUPREME COURT.

West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company,
ads
Camden Atlantic and Ventnor Land Company,
} IN EJECTMENT ON POSTEA.

This cause having been tried at the last Atlantic Circuit, and a verdict rendered in favor of defen-

dants and against the plaintiff and that said defendants are not guilty of the trespass and ejectment as charged, as appears by the postea now here returned. It is ordered that said postea be filed and judgment thereon be and hereby is entered in accordance with said verdict with costs to be taxed.

Entered July 10, 1913,

On motion of

Bourgois & Coulomb,

Attys.

NEW JERSEY SUPREME COURT.

Camden, Atlantic and Ventnor Land Company, v. West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company.	In Ejectment. On Postea. Judgment for Defendant. Bourgeois & Coulomb, Attorneys.

Judgment entered this tenth day of July A. D. nineteen hundred and thirteen for the sum of

Wm. S. Gummere,

C. J.

I Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, By virtue of a special

warrant of Attorney, to me directed from the attorneys of defendants with named hereby acknowledge that said defendants are satisfied of their judgment. Dated June third, 1921.

Enoch L. Johnson,
Clerk.

I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fourteeenth day of October A. D. nineteen hundred and twenty-five.

Edward J. Kelleher,
Clerk.

EXHIBIT D2.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

Camden, Atlantic & Ventnor Land Co.,
v.
West Jersey & Seashore Railroad Co.

In Ejectment.

May's Landing, N. J., May 26th, 1913.

Before Hon. Howard Carrow, Judge, and Jury.

APPEARANCES.

For Plaintiff: U. G. Styron, Esq.; J. S. Wescott, Esq.

For Defendant: Messrs. Bourgeois & Coulomb.

IT IS STIPULATED between the respective parties that Camden and Atlantic Railroad Company was incorporated by an act of the legislature in 1852, found in Pamphlet Laws, page 263, of that year;

And was supplemented by an act of the legislature in 1861, found in Pamphlet Laws, page 224, of that year.

2. That Camden and Atlantic Land Company was incorporated by an act of the legislature in 1853, found in Pamphlet Laws, page 337, of that year.

3. That the Camden and Atlantic Land Company on the twelfth of October, 1888, was the owner of lands including the locus in quo situate in Egg Harbor Township, Atlantic County, New Jersey.

4. That Camden and Atlantic Railroad Company was merged into the West Jersey and Seashore Railroad Company about 1897, and thereby became seized and possessed of the real estate and other property of the Camden and Atlantic Railroad Company.

5. That Atlantic City and Shore Railroad Company is incorporated under the General Railroad Act, entitled, "An act concerning railroads," 1903, Pamphlet Laws, page 645.

6. That Atlantic City and Shore Railroad Company was incorporated in 1906.

7. That Atlantic City and Shore Railroad Company in 1906 entered into an agreement with the West Jersey and Seashore Railroad Company, in consideration of certain periodical payments, which agreement is still in force and effect, for the use of the tracks and lands of the West Jersey and Seashore Railroad Company between the Inlet in Atlantic City and Longport for express and passenger traffic purposes.

MR. BOURGEOIS: The following facts are stipulated and agreed upon: That at the time of the conveyance, October 12, 1888, to the Camden and Atlantic Railroad Company, the Camden and Atlantic Railroad Company operated a single track railroad down the middle of Atlantic Avenue from Atlantic City Inlet to Longport with cars propelled by steam; that immediately upon the making of the

grant to the Camden and Atlantic Railroad Company by Camden and Atlantic Land Company on October 12, 1888, a small station was erected by the Land Company in Atlantic Avenue on the lands in question, Atlantic Avenue not then having been opened up along the northerly side of the railroad track, which station was used for the accommodation of passengers of said railroad and for receiving and housing freight until the same was delivered to the consignee. That in 1896 the road was double tracked and an additional station was erected on the opposite side of the street; that both said stations were used for the accommodation of passengers of said railroad until 1901, and that the erly side of said tracks was used for housing and station built on the lands in question on the northdelivering freight until 1901. That in 1901 both said stations were moved eastward, one being placed on the easterly portion of the lands in question and used for the accommodation of passengers of said railroad and the housing and delivering of freight to consignees; the other was located on the opposite side of Atlantic Avenue. The moving of the stations eastward was occasioned by the building of the loop upon the land in question, it connecting with the east and west bound tracks. That in 1907 the station located on the easterly portion of the land in question was moved to the westerly portion of said land, where it still remains, and since 1907 until the present time it has been used for the accommodation of passengers of said roalroads and one end of it has been partitioned off and is used as an office by the operating company, Atlantic City and Shore Railroad Company, to time and dispatch its cars. The portion of the station which had stood on the easterly portion of the land in question that was used for housing freight was in 1907 moved to Mobile

Avenue in Margate City. That in 1901 a track was run from the west bound track in Atlantic Avenue across the northerly side of Atlantic Avenue on to the lands in question, which track formed a loop on said lands and then joined the east bound track on Atlantic Avenue, and was used by the cars to turn their passenger cars, which passenger cars were operated by electricity and stopped at street crossings, but also carried passengers on through tickets from Washington, New York and other points through to Ventnor and Longport, and also carried baggage from foreign points, such as Washington, New York, etc., to Ventnor. That said loop remained on said lands at all times since 1901, but that the track in the north side of Atlantic Avenue was cut by the Sheriff of Atlantic County on January seventeenth, 1911, in executing a writ of execution in the case of Ventnor City against West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, and said loop remained cut until December 20, 1911. That on December 20, 1911, a certain agreement was entered into between Ventnor City and West Jersey and Seashore Railroad Company, which agreement granted to said Railroad Company the right to lay its tracks across the north side of Atlantic Avenue, and that said Railroad Company should refrain and desist from using the land in question for freight or storage purposes, a copy of which is hereto annexed. That the tract of land in question is located in the central part of Ventnor City, one half way between Atlantic City and Margate City lines. That the freight is carried over said road by steam power by the West Jersey and Seashore Railroad Company and passengers and express matter are carried over said road by Atlantic City and Shore Railroad Company.

MR. WESCOTT: That the railroad company has refused to bill freight to Ventnor City since 1907.

MR. BOURGEOIS: They have refused to bill freight. If you put carload lots in there, I will let it go. I am willing to stipulate that they have not delivered carload lots since 1907, and they have not delivered parcels since July, 1911.

MR. STYRON: The railroad company had refused prior to the institution of this suit to deliver any freight.

MR. BOURGEOIS: Yes, I think that is true. You can put it that the railroad company had refused to deliver freight on there on this land at the time this suit was brought.

MR. WESCOTT: It is further stipulated that the use of the lands for the loop for the turning of the cars has been used for the office or station located at the northeast corner of Portland and Atlantic Avenues, which is a small building with an open part or shed for passengers to stand, with an enclosed portion used for a dispatcher or timing office. That at portions of the year, namely, during the Spring, Summer and Fall, the building referred to is used only as a waiting shed for passengers, the dispatcher's office being transferred to Savannah or Mobile Avenue in Margate City. That at the time of the execution of the deed from the land company to the railroad company, Ventnor City, as now spoken of, formed a portion of Egg Harbor Township; that the whole section was wholly unimproved; that the land company were the owners of large holdings of lands, and since 1903 there have been built in Ventnor City more than eight hundred houses and the tract of land in question is located in the center of the residential portion of said city.

REQUESTS OF PLAINTIFF FOR FINDINGS BY TRIAL JUDGE OF THE ISSUES RAISED IN THE ABOVE ENTITLED CAUSES.

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC & VENTNOR LAND CO.,
Plaintiff,
v.
VENTNOR CITY, et al.,
Defendants.
and
CAMDEN, ATLANTIC & VENTNOR LAND CO.,
Plaintiff,
v.
WEST JERSEY & SEASHORE RAILROAD COMPANY, *et al.*,
Defendants.

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1. The record of the former suit brought by the Camden, Atlantic & Ventnor Land Co. against the West Jersey & Seashore Railroad Company and Atlantic City and Shore Railroad Company, in which the summons was tested May 2, 1911, as shown by the exhibit offered by the defendants in these causes, is not admissible, competent nor relevant to sustain

or support the defense of *res adjudicata* or former adjudication set up in the defendants' answers.

2. The judgment, referred to as in the former suit in the last preceding request, brought by the plaintiff herein against the West Jersey & Seashore Railroad Company and Atlantic City and Shore Railroad Company, is not a bar to a recovery by the plaintiff in the present actions.

3. The postea signed by Judge Carrow, attached to the record in the former suit, referred to in the above request, No. 1, and contained in the exhibit offered by the defendant herein, in which he finds that the deed of conveyance from the Camden and Atlantic Land Co. to the Camden & Atlantic Railroad Company, dated May 8, 1889, was a conveyance in fee, and upon the delivery of said conveyance, the Camden and Atlantic Railroad Company and subsequently the West Jersey & Seashore Railroad Company held the lands, described in said deed, in fee simple, was and is not properly a part of the judgment, and such finding by Judge Carrow is not conclusive in these pending suits, as to a construction to be put on said deed by the trial Judge herein, and that the latter is not bound, in the determination of issues in these suits, by the construction put upon said deed by Judge Carrow.

4. The deed offered as an exhibit in these cases, dated May 8, 1889, made by the Camden and Atlantic Land Co. to Camden & Atlantic Railroad Company, did not convey an unqualified title in fee simple, but conveyed a title to and granted the right of possession of the lands and premises by the Cam-

den & Atlantic Railroad Company, their successors and assigns, so long as the said lands and premises should be used by the said railroad company for railroad purposes and no longer.

5. The conveyance by the West Jersey & Seashore Railroad Company to the City of Ventnor, by deed offered as an exhibit in this cause, amounted to a discontinuance of the use of the lands therein described for railroad purposes, and the title thereto and the right of possession thereof, reverted to the original grantor in said deed, to wit: Camden & Atlantic Land Co., and its successors in title.

6. Plaintiff in the suit against the City of Ventnor, *et al.*, above mentioned, became entitled to the possession of the lands and premises described in the complaint, upon the execution and delivery of the deed to the City of Ventnor, and that judgment should be entered in favor of the plaintiff in such action.

7. Plaintiff in the suit against the railroad companies, above mentioned, became entitled to the possession of the lands described in the complaint, in said suit, upon the execution and delivery of the said deed from the West Jersey & Seashore Railroad Company to the City of Ventnor, for a portion of the lands described in the deed from the Camden and Atlantic Land Co. to the Camden & Atlantic Railroad Company, and judgment should be in favor of the plaintiff, in such suit, for the possession of the lands described in the complaint filed therein.

Respectfully submitted,

STARR, SUMMERILL & LLOYD,
Attorneys of Plaintiff.

CONCLUSIONS.

(Filed April 11, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC & VENTNOR LAND CO.,
Plaintiff,
v.
WEST JERSEY & SEASHORE R. R. Co., *et al.*,
Defendants.
and
CAMDEN, ATLANTIC AND VENTNOR LAND CO.,
Plaintiff,
v.
VENTNOR CITY, *et al.*,
Defendants.

IN EJECTMENT.
CONCLUSIONS.

STARR, SUMMERILL & LLOYD for plaintiff.
BOURGEOIS & COULOMB for defendants.

SOOY, J.

This is a suit in ejcetment tried before me, without a jury. The facts being, in the main, stipulated as follows:

1. That defendant, West Jersey and Seashore Railroad Company, is a duly incorporated railroad company, being constituted by merger in 1897 of a number of railroad companies, one of which was the Camden and Atlantic Railroad Company.

2. That Camden and Atlantic Railroad Company was incorporated by and Act of the Legislature in 1852, found in P. L. of that year, p. 263, which Act has been several times amended.

3. That Camden and Atlantic Railroad Company was incorporated by and Act of the Legislature in 1853, found in P. L. of that year at p. 337.

4. That Camden and Atlantic Railroad Company on the 12th day of October, 1888, was the owner in fee of a large tract of land in Egg Harbor Township, Atlantic County, New Jersey, abuttin upon the right of way of the Camden and Atlantic Railroad Company, including the lands described in the first paragraph of plaintiff's complaint.

5. That on the 12th day of October, 1888, the Camden and Atlantic R. R. Co., by deed of conveyance, conveyed the lands described in the two suits hereinabove mentioned, which deed was recorded in the Clerk's office of Atlantic County on the 15th day of October, 1888, in Book No. 127 of Deeds, p. 221.

6. That the West Jersey & Seashore R. R. Co., by the merger of the Camden and Atlantic R. R. Co. and various other railroad companies, under the name of the West Jersey and Seashore R. R. Co., became seized and possessed of the real estate of the Cam-

den and Atlantic R. R. Co., including the lands described in the above two suits.

7. That from 1897 until 1901, there was erected on the lands between Cambridge and Sacramento Avenues, a small building used for station purposes up until the year 1901, and after the year 1901 until the year 1907, it was used for a freight station. During the year 1907, it was removed to the tract of land lying between Sacramento and Portland Avenues, and eas then converted into a railroad office building, and passenger shelter station, where it still remains and is still so used.

8. That from 1896 until the present time, there has been constructed on the lands lying between Sacramento and Portland Avenues, a railroad loop connecting with the double tracks on Atlantic Avenue, which has been continuously used, and is at present used, for railroad purposes.

9. That the tract of land between Cambridge Ave. and Sacramento Avenue, lying between the northerly line of Atlantic Avenue and the southerly line of Ocean Avenue, has been maintained as a grass plot by the West Jersey and Seashore R. R. Co. and the Atlantic City and Shore R. R. Co., from the year 1907 until the conveyance of that tract of lands to Ventnor City, on the 8th day of April, 1925, the West Jersey and Seashore R. R. Co. during all that period having paid taxes on said land, and the same having beeen in the possession of the said W. J. and S. R. R. Co. and the A. C. & S. R. R. Co.

10. That the northerly track of the loop passes over a portion of the land conveyed by the W. & S.

R. R. Co. to the City of Ventnor on April 8, 1925, which track is used by the A. C. & S. R. R. Co. for railroad purposes, and has been so used since 1896, but said track does not pass over any portion of the lands described in paragraph 8 of plaintiff's complaint.

11. That the A. C. & S. R. R. Co. was incorporated in 1906, under the General Railroad Act, entitled: "An Act concerning railroads," 1903, P. L. of that year, p. 645.

12. That the A. C. & S. R. R. Co. during the year 1906 entered into a trackage agreement with the W. J. & S. R. R. Co. for the use of the tracks of the said W. J. & S. R. R. Co. between the Inlet, Atlantic City, and Longport and the loop erected on the lands above described, which said agreement is still in full force and effect.

13. That the A. C. & S. R. R. Co. conducts an interstate railroad business, through the various municipalities along its said line between Longport and Atlantic City.

14. That on and after April 8, 1925, the W. J. & S. R. R. Co. ceased to use the lands and premises described in paragraph 8 of the complaint for any purpose whatever.

15. That the moneys received from the sale of the lands mentioned in plaintiff's complaint were used by the railroad company for railroad purposes.

16. That Ventnor City was incorporated as a city under and Act of the Legislature entitled: "An Act

relating to and providing for the government of cities of this State containing a population of less than twelve thousand inhabitants," approved March 24, 1897, P. L., p. 46.

17. That on the 8th day of April, 1925, W. J. & S. R. R. Co. conveyed to Ventnor City the lands described in paragraph 4 of plaintiff's complaint, pursuant to an ordinance numbered 1-1925, entitled: "An Ordinance for the acquiring by the city of lands for the er*cetion* thereon of buildings proper and suitable for the transaction of municipal business, location of public offices for officers of the city, and for municipal and public purposes, and providing for the cost thereof," approved Feb. 25, 1925.

18. That Corallis Avenue, mentioned in the conveyance from C. & A. L. Co. to C. & A. R. R. Co. is now known as Cambridge Avenue, and the proposed street mentioned in said deed from the Camden and Atlantic Land Co. to Camden and Atlantic R. R. Co. is now knoen as Ocean Avenue.

It further appears that in 1911 the plaintiff instituted a suit in ejectment against the W. J. & S. R. R. Co. and the A. C. & S. R. R. Co. in respect to the *locus in quo,* and that judgment was entered in favor of the defendants. It also appears that in the former suit the right to possession was based on an abandonment of use for railroad purposes of said lands and that a construction of the deeds under which the defendants held was essential to a decision of that case.

Defendants, in the instant case, offered in evidence the judgment record of the former suit which was admitted without objection. Defendants also offered in evidence a stipulation of facts used in the

former case, wh*cih* offer was objected to by plaintiff, and which is admitted, not for the purpose of binding the present plaintiff with the facts therein stipulated as being evidence against it in the instant case, but for the purpose of information for the Court, in order that it may ascertain what issues were raised and actually presented in the former case.

But two questions are presented for decision, and they are:

1. The construction to be put upon the deed made by the Camden and Atlantic Land Company to the Camden and Atlantic Railroad Company, dated October 12, 1888.

2. The effect of a judgment of the Supreme Court entered July 10, 1913, in favor of the West Jersey and Seashore Railroad Company and against the plaintiff in the two present actions, on an ejectment suit begun May 2, 1911.

The two questions for decision are as stated in plaintif*f's* brief and defendants, in their brief, restate the same questions. The question with reference to number one is: What was the character of the estate created by the deed to the railroad company from the land co.?

Plaintif*f's* contention is that there was conveyed by that deed a qualified or base fee and not an absolutely indefes*a*ble estate *i. e.*, fee simple. Plaintiff relies on the following New Jersey authorities:

Pipe Line Co. v. D. L. & W. R. R. Co., 62 L. 254;
State v. Brown, 27 L. 13;
Cemetery Co. v. Buckmaster, 49 L. 449;
Freeholders v. Buck, 79 E. 472.

Defendant also relies, in part, on the authority of the pipe line case.

Before discussing these cases, I might say, that it seems to me to be well established in this State, that where, in a deed, the premises do not mention the estate granted, or, where the estate granted in the premises is ambiguous, that then the habendum becomes operative and controlling; and it also seems to me, to be well established that if the premises grant a fee simple estate in appropriate and unambiguous language, that then the habendum cannot divest or cut down such a grant.

Smith v. Woodruff, 12 N. J. L. J. 149;
Havens v. Seashore Land Co., 47 E. 365;
Staffordwell Gravel Co. v. Newell, 53 L. 412,
and cases therein cited.

In the Havens-Seashore Land Co. case, Vice-Chancellor Van Fleet, at page 371, 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."

The language of the granting clause in the deed subjudice, is:

"Have granted, bargained, sold, released and confirmed and by these presents do grant, bargain, sell, release and confirm unto the said The Camden and Atlantic Railroad Company, AND TO THEIR SUCCESSORS AND ASSIGNS, All the

following described lot, tract or piece of land, situate, &c.—TOGETHER with all and singular the im*r*povements, ways, &c.—and the reversions and remainders, rents, issues and profits thereof."

The habendum is:

"To Have and To Hold the said lot or piece of land, hereditaments and premises hereby granted, with the appurtenances, unto the said Camden and Atlantic Railroad Company, their successors and assigns, forever. So long as the same shall be used by said railroad company for railroad purposes."

In the Pipe Line case, *ibid.*, the Court, in its opinion, held and said:

"The operative words of conveyance, in the Stewart deed were of a grant to the company, its successors and assigns forever, words which, by the common law in a grant to a corporation, convey a FEE SIMPLE estate."

If this be so, then how can it be said that a less estate was granted in the premises of the land company deed?

Plaintiff says that, notwithstanding the language of the Court in the pipe line case as above quoted, that the Court went farther and held in that case that by virtue of the construction of the entire Stewart deed there was only a qualified fee or a fee simple determinable. It is true that the Court in the pipe line case so held and then went further and held "that the company as owner of a qualified fee has the same rights and privileges in the estate until the qualifications upon which it is limited are at an end as if it held in fee simple."

The question involved in the pipe case was whether the railroad company was entitled to maintain a pipe line across or under a right of way reserved in the deed. The question as to whether the

conveyance to the railroad company was a fee simple absolute or a qualified fee made no difference, and, subsequently, in Camden & Atlantic Land Co. v. W. J. & S. R. R. Co., 92 L., at page 388, the Court of Erres and Appeals held:

"It will be observed from the above recital that the character of the estate vested in the railroad company by the Stewart deed was not directly involved in the solution of the question determined; for the act of the pipe line company was clearly tortious whether the railroad company held an estate in fee simple absolute, or whether it held a qualified estate or base fee which had not been determined. In calling attention to the fact that the decision of the case did not necessarily involve a determination of the effect to be given to the habendum clause of the deed, we are not to be understood as expressing any doubt as to the correctness of the construction put upon it. We observe, however, that there is a very respectable authority in other jurisdictions for the view that a declaration in an habendum that the grant is for a special purpose, without other words does not operate to debase a fee simple absolute, created by the granting clause of a deed, to a qualified determinable fee, particularly where the purpose declared is the only one for which the grantee can lawfully hold real estate.

It is the intention of the Court by the language quoted above to affirm the dicta of the pipe line case and to permit the habendum to debase an unqualified fee clearly granted by the premises? I think not, particularly where, as in the instant case, there is a grant to a corporation, the railroad company, its successors and assigns. TOGETHER with &c., and where, as in this deed, the covenant of warranty warrants the estate granted in the premises without

reservation or limitation. The warranty is against the grantor and against all and every other person or persons whatsoever. It is well to note that the warranty in the Stewart deed was "to warrant, secure and forever defend the premises granted unto the said company, FOR THE PURPOSES EXPRESSED IN THE DEED.

It will be observed that in the Stewart deed the grant was to the railroad company, its successors and assigns forever, "the tract of land and premises described in its deed, AND WITH FULL POWER TO MAKE USE OF THE SAME IN ALL LAWFUL WAYS FOR THE PURPOSE OF THE EXTENSION OF ITS SAID RAILROAD AND AS PART OF THE ROUTE THEREOF."
and then the HABENDUM—To Have and to hold for the purpose of its charter provisions.

The habendum in the Stewart deed did not debase a fee simple estate already granted. It simply reiterated that which had been stated in part at least, in the granting clause. The provision in the premises was "for the purpose of the extension of its said railroad and as part of the route thereof." The habendum "for all the purposes mentioned in said act of incorporation."

Does the decision in the case of the State v. Brown, *ibid,* control so as to entitle plaintiff to succeed?

The freeholders had granted to Brown a license to build a dock wharf or pier in front of lands Brown claimed to own. On certiorari to test the validity of the license so granted the Court said:

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

The Legislature had defined the term "shore

owner'' to mean the owner of lands above the shore line. The Court held that Brown was not such a shore owner, because the canal company had title to a strip in front of his lands and that the title of the canal company under the construction placed upon the deed in the case submitted was a qualified fee. Here, again, as the Court said, it made no difference in the final outcome whether the title was fee simple absolute or a qualified fee. It will also be noted that there were no reservations in the canal company deed. The next case relied upon by plaintiff is Cemetery Co. v. Buckmaster, *ibid.* In that case the Court did not decided the question here involved. The Court did determine that the owner of the burial lot held it in fee and was entitled to possession.

Freeholders v. Buck, *ibid,* is not on point because it clearly appears therein that the granting clause was to the freeholders, their successors, &c. ''to and for the use and purpose of building and erecting thereon public offices for the clerk and surrogate.'' To have and to hold ''so long as same shall be used for the purposes hereinbefore mentioned and no longer.''

I hold, therefore, that the granting clause in the deed from the land company to the railroad company in the instant case, conveyed an estate in fee simple absolute and that being my decision, it must necessarily follow that the estate so granted cannot be divested or cut down by the habendum.

The next question is does the former judgment bar plaintiff in its present suits.

It appears from the stipulation that on July 10th, 1913, judgment was entered in the Supreme Court of this State against the Camden, Atlantic and Ventnor Land Company in an ejectment suit sued out by it against the West Jersey and Seashore Railroad

Company and the Atlantic City and Shore Railroad Company, in which suit plaintiff sought to recover possession of the *locus in quo* or part thereof, on the ground that the railroad companies had ceased using the property for railroad purposees and that the lands reverted to plaintiff under the proper construction of the deed now before me, *i. e.*, that the deed conveyed a base or qualified fee, and that plaintiff was entitled to possession.

I have before me the pleadings in that case, together with the judgment record, including of course the postea.

The language of the postea is, in part, as follows:

"And it further appearing from the evidence in said cause that the deed of conveyance from Camden and Atlantic Land Company to Camden and Atlantic Railroad Company aforesaid was a conveyance in fee—the said Court did adjudge that the deed of conveyance from C. & A. Land Company to C. & A. Railroad Company was a conveyance in fee and that defendant, West Jersey and Seashore Railroad Company held said lands in fee simple."

From which it appears that the Court in the former suit found that the deed was a deed in fee simple absolute and that the defendants in that suit held the lands in fee simple.

Plaintiff says that the issues in the first suit are not identical with the issues here presented and that since the determination of the first suit (plaintiff admits the correctness of the decision therein) the situation has materially changed and that a new action has accrued. He also says that "aside from the statement appearing in the postea, the former judgment is no bar to the plaintiff herein" and that a judgment in ejectment will not conclude the defeated party as to title subsequently accruing, cit-

ing Hunt v. O'Neil, 44 L. 564; that the postea is not a part of the judgment and cannot of itself be the basis of a plea of *res adjudicata;* that the recitals in the postea are mere surplusage and not binding on the plaintiff, and that even if the recitals are binding they speak as of 1911 (the year in which the suit was brought) and merely state that the railroad company had a title in fee as of that year; that the words of Judge Carrow have no reference to the possible state of defendant's title after an abandonment for railroad purposes; and that the use of the word "fee" or "fee simple" frequently do not mean a fee simple absolute.

In the case of Radford v. Myers, 231 U. S., p. 725, Mr. Justice Day, at p. 730, said:

"To determine this issue, we examine the judgment in the former case, the pleadings filed and the issue made and if necessary to elucidate the matter decided, the opinion of the Court which rendered the judgment."

In Southern Minnesota Railroad Extension Co. v. St. Paul, 55 Fed. Rep. 690, the opinion of the Court was:

"On a plea of *res adjudicata,* where the former judgment was rendered, pursuant to the findings and conclusions of a Referee, the Court may examine the entire report of such Referee, as well as the pleadings, for the purpose of ascertaining what issues were in fact raised and decided."

Mershon v. Williams, 31 Atl. Rep. 778, is to the same effect.

The former suit as appears from the judgment record, and admission of the parties hereto, involved just two points (1) whether there had been such an abandonment of the property for use for railroad purposes as would justify a re-entry and (2) did the

deed convey a fee simple absolute or a base or qualified fee. The decision was, no matter whether the defendant has ceased to use the land for railroad purposes or not, the deed under which it holds conveys a fee simple absolute. Thus the issue appears to have been decided and so was the postea prepared and signed and upon it judgment was entered and plaintiff took no appeal.

With the correctness of the findings in the first case I am not concerened in the instant case. The judgment in the former suit remains and is binding on this Court. Manley v. Mickle, 53 E. 55. I, therefore, find and conclude that the judgment in the former suit constitutes a bar to the present action, thus deciding both questions adversely to plaintiff.

Judgment may be entered in both suits in favor of the defendant and against the plaintiff.

In response to plaintiff's requests for findings by the trial Judge of the issues raised in these causes, the following are hereby appended to my conclusions.

1. The record of the former suit is admissible for the reasons set forth in the foregoing conclusions.

2. The judgment mentioned in this request is a bar to recovery by plaintiff in this action for the reasons set forth in the foregoing conclusions.

3. The postea is properly a part of the judgment record for the purpose of reference thereto as an aid in determining the issues presented and decided in the former suit and from the postea it clearly appears that judgment was entered against the plaintiff on the issue in said suit presented, *i. e.*, a construction of the deed under which defendants held the premises in question.

4. The deed of May 8, 1889, referred to in the fourth request did convey an unqualified title in fee simple.

5. The right to possession, upon the conveyance by the railroad company to Ventnor City, did not revert to the Camden and Atlantic Land Co. or its successors in title.

6. Plaintiff in the instant cases did not become entitled to the possession of the lands described in the complaint upon the execution and delivery of the deed from the railroad company to Ventnor City and judgment should not be entered in favor of the plaintiff but, on the contrary, should be entered in favor of defendants.

7. Same answer as in request number six.

In response to plaintiff's requests for findings by the trial Judge of the issues raised in these causes, the following are hereby appended to my conclusions.

1. The record of the former suit is admissible for the reasons set forth in the foregoing conclusions.

2. The judgment mentioned in this request is a bar to recovery by plaintiff in this action for the reasons set forth in the foregoing conclusions.

3. The postea is properly a part of the judgment record for the purpose of reference thereto as an aid in determining the issues presented and decided in the former suit and from the postea it clearly appears that judgment was entered against plaintiff on

the issue in said suit presented, *i. e.,* a construction of the deed under which defendants held the premises in question.

4. The deed of May 8, 1889, referred to in the fourth request did convey an unqualified title in fee simple.

5. The right to possession upon the conveyance by the railroad company to Ventnor City, did not revert to the Camden and Atlantic Land Co. or its successors in title.

6. Plaintiff in the instant cases did not become entitled to the possession of the lands described in the complaint upon the execution and delivery of the deed from the railroad company to Ventnor City and judgment should not be entered in favor of the plaintiff but, on the contrary, should be entered in favor of defendants.

7. Same answer as in request number six.

Filed April 11, 1928 at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

CORRECTION OF CONCLUSIONS.

(Filed April 25, 1928.)

ATLANTIC COUNTY CIRCUIT COURT.

CAMDEN, ATLANTIC and VENTNOR LAND CO., *Plaintiff*, v. WEST JERSEY & SEASHORE RAILROAD COMPANY, *et al.*, *Defendants*, and CAMDEN, ATLANTIC and VENTNOR LAND CO., *Plaintiff*, v. VENTNOR CITY, *et al.*, *Defendants*.	In Ejectment. Correction of Conclusions.

STARR, SUMMERILL & LLOYD, for plaintiffs.
BOURGEOIS & COULOMB, for defendants.

SOOY, J.:

There appears on the first page of the conclusions, heretofore filed in the above causes, some errors which should be corrected and this order may be entered for that purpose.

It is, on this 23rd day of April, 1928, ordered, by the Court, that paragraph three on the first page of said conclusions be changed to read:

"3. The Camden and Atlantic Land Company was incorporated by an Act of the Legislature in 1853, found in P. L. of that year at p. 387."

That the first line of paragraph 4, the word "Railroad" be changed to "Land," so that the same shall read "That Camden and Atlantic Land Co., on the 12th day of October, 1888, was the owner," &c.

That the second line of paragraph 5 be changed so that the initials "R. R." be changed to "Land," so that said paragraph, as amended, shall read "That on the 12th day of October, 1888, the Camden & Atlantic Land Company, by deed of conveyance, conveyed the land described," &c.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CAMDEN, ATLANTIC AND VENTNOR LAND CO.,
Plaintiff-Appellant,

v.

WEST JERSEY AND SEASHORE RAILROAD COMPANY, *et al.*,
Defendants-Appellees,

and

CAMDEN, ATLANTIC AND VENTNOR LAND CO.,
Plaintiff-Appellant,

v.

VENTNOR CITY, *et al.*,
Defendants-Appellees.

IN EJECTMENT.

ON APPEAL FROM THE CIRCUIT COURT OF ATLANTIC COUNTY.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

STATEMENT OF THE CASE.

These cases involve the title to two blocks of land at Ventnor, New Jersey.

The one in which the two railroad companies are the defendants refers to the block bounded by Atlantic, Sacramento, Ocean and Portland Avenues.

The one in which Ventnor City is one of the defendants is bounded by Atlantic, Sacramento, Ocean and Cambridge Avenues.

The *loci in quo* are the lands between the lines of the various avenues and do not include the land situate within the lines of any of the streets bounding the same.

Three legal questions arise:

1. The construction to be put upon the deed made by the Camden and Atlantic Land Company to the Camden and Atlantic Railroad Company, dated October 12, 1888 (C. p. 70).

2. The effect of a judgment of the Supreme Court entered July 10, 1913, in favor of the West Jersey and Seashore Railroad Company and the Atlantic City and Shore Railroad Company and against the plaintiff, in the two present actions, in an ejectment suit begun May 2, 1911 (C. p. 99, line 34).

3. The right of the plaintiff to recover in either or both of the suits.

FACTS.

A stipulation was entered into between the parties which necessitated the taking of practically no testimony to show the facts involved in the litigation (C., p. 65).

Prior to October 12, 1888, the Camden and Atlantic Land Company was the owner in fee of both parcels of land involved in these actions.

The said land company, by deed dated October 12, 1888, Exhibit P3, conveyed to the Camden and Atlantic Railroad Company a parcel of land described as follows:

> BEGINNING at a stake in the middle of Portland Avenue as laid down on the general plan of the Town of Ventnor and in the northwestern line of land of the said Railroad Company, distant twenty-five feet northwestward from the centre line of the railroad of the said company and extending thence along the middle of the said Portland Avenue, north twenty-six degrees, fifteen minutes west, ninety-five feet to a stake in the southeastern line of a proposed Avenue, fifty feet wide; thence along the line of the said proposed avenue, north sixty-three degrees forty-five minutes east, seven hundred feet the middle of Corallis Avenue, as laid down on the general plan aforesaid, thence along the middle of the said Corallis Avenue, south twenty-six degrees, fifteen minutes east, ninety-five feet to a stake in the northwestern line of the aforesaid land of the said Rail Road Company and thence by said land parallel with the centre line of the railroad aforesaid and twenty-five feet distant northwestward there-

from, south, sixty-three degrees forty-five minutes west, seven hundred feet to the place of beginning. Containing one acre and fifty-five hundredths of an acre more or less.

This deed contained the following habendum clause:

"TO HAVE AND TO HOLD the said lot or "piece of land hereditaments and premises "hereby granted, with the appurtenances unto "the said The Camden and Atlantic Railroad "Company, their successors and assigns, for-"ever, so long as the same shall be used by "said Railroad Company for Railroad pur-"poses." (C. p. 70.)

All the rights of the Camden and Atlantic Railroad Company acquired by the last mentioned deed became vested in the West Jersey and Seashore Railroad Company, by virtue of a merger, referred to in the stipulation.

By deed dated May 8, 1889, the Camden and Atlantic Land Company conveyed all of its right, title and interest in the two parcels of land involved in this case to the present plaintiff. This deed is Exhibit P4 and was recorded November 20, 1889, in Deed Book at Mays Landing, 160, page 1 (C. p. 74).

This deed conveyed to the plaintiff:

"All its (the grantor's) real and personal "property and estate of every character and "description wheresoever and all its property "rights of every form and character, real, per-"sonal and mixed."

The Atlantic City and Seashore Railroad Company has a trackage agreement with the West Jersey and Seashore Railroad Company and is in pos-

session of the parcel of land situate west of Sacramento Avenue.

On February 24, 1925, Ventnor City adopted ordinance No. 1 of that year, authorizing the acquisition of the parcel of land situated east of Sacramento Avenue for the consideration of $65,000, as a suitable and proper place for the location of a municipal building. This ordinance is Exhibit P6 (C. p. 82).

Pursuant to said ordinance, the city purchased the tract of land between the street lines of Atlantic, Cambridge, Ocean and Sacramento Avenues by deed dated April 8, 1925, Exhibit P 5 (C. p. 77). This deed recites that for a consideration of $65,000, the grantor conveys to the grantee the lands described in paragraph 4 of each of the complaints filed in the above named causes, with a reservation of a portion of Atlantic Avenue for street purposes, which tract is outside of the *locus in quo,* claimed by the plaintiff as against the city.

There was also a provision in the deed that the railroad company did thereby dedicate to public use all that part of Atlantic Avenue lying between the middle line of Cambridge Avenue and the middle line of Sacramento Avenue, lying northerly of a line distant twelve feet and one and-half inches north of the center line of Atlantic Avenue, upon condition that such dedication should be for ordinary street traffic only and never be subject to railroad or railroad uses. This deed contained a covenant of general warranty.

The block of land lying westward of Sacramento Avenue was, at the time this suit was brought, in the possession of the two defendants and used for railroad purposes. There has, however, been a complete abandonment by the West Jersey and Seashore Railroad Company of the parcel east of Sac-

ramento Avenue at and since the time of the conveyance by it to Ventnor City, for the purpose of erecting a municipal building.

The answers set up, as *res judicata,* a prior judgment between the present plaintiff and the two railroad companies, recovered in an ejectment proceeding commenced May 2, 1911 (see Exhibit D1, page 84, *et seq.*). Judgment was entered July 10, 1913 (C. p. 99, l. 34).

The postea signed by Judge Carrow, Circuit Court Judge, contained this recital:

> "It further appearing from the evidence in "said cause that the deed of conveyance from "the Camden and Atlantic Land Company to "the Camden and Atlantic Railroad Company "aforesaid was a conveyance of the lands in "question in fee * * * * * the said Court did "adjudge that the deed of conveyance from the "Camden and Atlantic Land Company to the "Camden and Atlantic Railroad Company "aforesaid was a conveyance in fee, and that "the defendant, West Jersey and Seashore "Railroad Company held said lands in fee sim-"ple and did further adjudge that the said de-"fendants, West Jersey and Seashore Rail-"road Company and Atlantic City and Shore "Railroad Company, not guilty of the trespass "and ejectment within laid to their charge in "manner and form as the said plaintiff, Cam-"den, Atlantic and Ventnor Land Company "hath thereof complained against them" (C. p. 98, l. 13).

ARGUMENT.

I.

WHAT WAS THE CHARACTER OF THE ESTATE CREATED BY THE DEED TO THE RAILROAD COMPANY FROM THE LAND COMPANY?

The contention of the plaintiff is that the railroad company, by the deed dated October 12, 1888, did not obtain an absolutely indefeasible estate, but rather the title acquired was in the nature of a qualified or base fee of the character described and referred to in case of *Pipe Line Company v. D. L. & W.*, 62 N. J. L. 265, and in the case of *Camden, &c., Land Company v. West Jersey and Seashore Railroad Company*, 92 N. J. L. 385.

In the former case, the Court of Errors and Appeals 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 that case, the grantors conveyed to the railroad company, and its successors and assigns forever, the lands involved, with full power to make use of the same in all lawful ways for the purpose of the extension of its railroad, and as part of the route thereof with the following habendum:

> "To have and to hold the said above de-
> "scribed lands and premises with the appur-
> "tenances, unto Morris Essex Railroad, and
> "its successors and assigns forever, for all the
> "purposes mentioned in said act of incorpora-
> "tion, and supplements thereto, passed and to
> "be passed."

In that case the action was brought by the railroad company against the Pipe Line Company to recover damages for trespassing upon the land conveyed by the deed in question. At the trial, the Judge denied the defendants' motion for a non-suit, and at the close of the case, directed a verdict in favor of the plaintiff.

The exceptions taken and the assignments of error presented this question, "Did the defendants in error own the soil in the crossing in fee, or did the railroad company have only an easement over the land?"

In deciding this question, it therefore became necessary for the Appellate Court to construe the deed in question and to determine whether it gave the railroad merely an easement or a fee, and in ascertaining whether the railroad company had a fee, it seems only proper that the Court should have defined the character of that fee.

The Appellate 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 he had held a fee simple, and, in the meantime, the whole estate vested in the grantee, subject only to the possibility of reverter to the grantor.

From a consideration of the Pipe Line case, it follows, logically, that we must turn to an examination of the case of the present plaintiff against the West Jersey and Seashore Railroad Company, decided by the Court of Errors and Appeals in 92 N. J. L. 384. In this case, while a similar question was involved,

it had to do with another deed made by the Camden and Atlantic Land Company to the Camden and Atlantic Railroad Company, the habendum clause of which was somewhat different.

The habendum clause was as follows:

> "To have and to hold the same unto the said "parties of the second part, their heirs and as- "signs for the purposes of said railroad, for "and during the continuance of said railroad, "to their only use, benefit, and behoof, for- "ever."

The Chief Justice in construing this language, said, with reference to the opinion of the Court of Errors in the Pipe Line case:

> "In calling attention to the fact that the de- "cision of the case did not necessarily involve "a determination of the effect to be given to "the habendum clause of the deed, we are not "to be understood as expressing any doubt as "to the correctness of the construction put upon "it. We observe, however, that there is very "respectable authority in other jurisdictions "for the view that a declaration in an ha- "bendum that the grant is for a special pur- "pose, without other words, does not operate "to debase a fee simple absolute, created by "the granting clause of the deed, to a qualified "or determinable fee, particularly where the "purpose declared is the only one for which "the grantee can lawfully hold real estate.
>
> "We consider, however, that the doctrine of "the cited case is not applicable to that which "is now before us. *If the habendum clause, af- "ter providing that the grantee was to have "and hold the lands conveyed to it, its succes- "sors and assigns, for the purposes of its rail-*

> "*road, and had stopped there, the Pipe Line*
> "*case would be apposite.* But this is not the
> "situation. The habendum further declares
> "that the grantee is to hold the lands conveyed
> " 'for and during the continuance of the said
> "railroad.' Conceding the soundness of the
> "principle that where the habendum clause de-
> "clares the grantee shall hold the land granted
> "for a specific purpose, and not more, his es-
> "tate is determined when that purpose, is
> "abandoned, this doctrine can have no applica-
> "tion where the habendum in a subsequent
> "clause negatives the idea that the words con-
> "stitute a limitation upon the duration of the
> "estate, by expressly declaring that the fee
> "of the grantee shall continue so long as cer-
> "tain conditions shall remain unchanged, or
> "until a certain event shall have happened; or
> "during a designated period which may be
> "either definite or indefinite in extent."

The Court of Appeals having determined that the pipe line case was not necessarily decisive of the case then under consideration and that there was respectable authority in other jurisdictions holding the other way, the learned Chief Justice continues,

> "* * * * in our opinion, insertion of the words
> " 'after and during the continuance of the said
> "railroad' in the habendum, renders the estate
> "of the grantee determinable, only if and when
> "its railroad shall have ceased to exist,"

And on page 390, the Chief Justice concludes his opinion with the following statement:

> "The qualified fee vested in the Railroad
> "Company still remains in it or its grantee;

"and as is stated in the Pipe Line case (pages "268, 269), 'so long as the qualified fee remains, "the grantor or his heirs have no right of en- "try upon the lands.' "

Here we have an opinion of the Court of Errors, interpreting a deed in which the habendum clause is similar to the one in the deed now under consideration, and holding that such a deed conveys a qualified fee, or fee simple determinable. It seems perfectly clear that the Court of Appeals in the case of Camden Atlantic &c. Company v. the Railroad Company above cited, based its decision on the fact that the habendum clause, made the fee determinable upon the railroad's going out of business or ceasing to exist. Therefore, the fact that the railroad company was still in existence controlled the decision of the Court.

Clearly it cannot be contended that the opinion or decision in this last named case, in any way, modifies or overrules the interpretation of the Court of Errors in the Pipe Line case. On the contrary the language of the Court in that case is affirmed in the case just discussed.

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

"To have and to hold the said lot or piece "of land, hereditaments and premises hereby "granted, with the appurtenances unto the said "The Camden and Atlantic Railroad Company, "their successors and assigns, forever, so long "as the same shall be used by the said railroad "company for railroad purposes."

We, therefore, contend that the pipe line case along with the railroad case, above referred to, are the leading cases upon the subject and the decisions

there reached are dispositive of the question here involved. It is to be noted that the habendum clause in the case under consideration makes the fee determinable upon the land no longer being used by the railroad. The single ground for distinguishing the two cases, lies in the difference in the habendum clauses. The last case cited makes the fee simple, determinable upon the railroad, no longer existing. The habendum clause in the present deed makes the fee simple determinable upon the railroad no longer using the property. Hence the fact that the railroad was still in existence in the former case, accounts for the result there reached.

In *State v. Brown,* 27 N. J. 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 in the deed in this case, to wit: "so long as the same shall be used by said railroad company for railroad purposes."

Another case in which substantially the same question was involved is in *Cemetery Company v. Buckmaster,* 49 N. J. 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 sepulchre only, and to or for no other "uses whatever, subject, however, to the condi- "tions and limitations and with the privileges "specified in the rules and regulations now "made or that may hereafter be made and "adopted by the manager of the said cemetery "for the government of the lot-holders and vis- "itors 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.

This case illustrates in some measure, the distinction which exists between this line of authority and the authority of the pipe line case and that of the railroad case, for we find that the Chancellor after having first affirmed the doctrine of the *Havens v. Seashore Land Co. Case,* stating on page 462 of his opinion, that the conveyance under which Miss Buckmaster claims passes to her the fee in the property, and it is for her own use, although that use is limited.

Squarely in accord with this view, and more clearly illustrating the distinction we are seeking to establish, is the decision of Vice-Chancellor Leaming in *Freeholders of the County of Cumberland v. Buck,* 79 N. J. Eq., 472, 82 Atlantic 418.

In this case, the words of Grant are:

"Do give, grant, bargain, sell and convey "unto the board of chosen freeholders of the "county of Cumberland aforesaid, and to their "successors, to and for the use and purpose of "building and erecting thereon public offices "for the Clerk and Surrogate of the County "of Cumberland, that lot," &c.

The words of the habendum clause are:

> "To have and to hold the said lot of land, "and the right to use the alley aforesaid, unto "the board of chosen freeholders of the County "of Cumberland aforesaid, and their succes- "sors, and to their only proper use, benefit, "and behoof, so long as the same shall be used "for the purposes hereinbefore mentioned and "no longer."

In his opinion the Vice-Chancellor says, on page 477:

> "The habendum of the deed, which is wholly "consistent with all its other parts, and there- "fore determines what estate is granted, is: "'To have and to hold * * * * so long as the "same shall be used for the purposes herein- "before mentioned and no longer.' The period "named marks the limitations of the estate "as to time; at the end of that period the de- "terminable estate ceases and the fee vests in "the grantor, or his heirs, by reverter. The "words 'so long as the same shall be used for "the purposes hereinbefore mentioned' are "sufficient for the creation of a limitation; the "added words 'and no longer' remove all pos- "sibility of doubt touching the quality of the "estate granted. It is clearly impossible to re- "gard this language as not having been in- "tended to defeat the estate granted or as in "the nature of a covenant or trust."

Thus, in the case at bar, the words of grant convey a fee, and the words of the habendum clause in no way seek to change the fee thus conveyed to that of a lesser estate. The words of the habendum clause, do, however, describe the character of that

fee as being a fee simple determinable (determinable upon the railroad no longer using the land for railroad purposes).

This is the traditional method used in conveying an estate in fee simple determinable.

As incidental to this 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 the appropriate method by 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 a 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 as a part thereof, so far as our experience goes, this is the universal practice adopted in such cases.

In each of the five cases above referred to, to wit: the pipe line, the present plaintiff against West Jersey & Seashore Railroad, the Brown, Buck 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 to- "tally 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 ~~property. In other words, we have here a convey-~~ to the use connected with the conveyance of the

property. In other words, we have here a convey
ance 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 we 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, it 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. v. 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 v. Billings, 44 Me. 416.

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

Mitchel v. Wilson, 17 Fed. Cas. No. 9672.

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 v. Atwood,* 26 N. J. Eq. 504, affirmed 1 Stewart 275.

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

ing 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, if 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 v. 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 v. 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 v. 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 v. Murch, 64 Me. 54.

II.

EJECTMENT WILL LIE IN FAVOR OF THE PLAINTIFF.

One of the contentions of the defendants, as we understand it, is that the only right which the Camden and 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 and Atlantic Land Company to the plaintiff did not vest in the plaintiff the right of re-entry, which might be taken ad-

vantage 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 and 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 and Atlantic Land Company to the plaintiff.

We contend, however, that since 1851, the possibility of a reverter is transferable in New Jersey under the provisions 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 gran-"tor 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 indif-

"ferently called his reverter or escheat; but, "from the remote probability of the return, "when the fee was granted, it became custom- "ary to call it after the grant of the fee his "possibility of reverter. By degrees that ex- "pression 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 sim- "ple. 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 debonis 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."

Gray on Perpetuities, Sec. 13, has the following to say with reference to possibilities of reverter:

"Some estates are terminable by special or "collateral limitations. For instance, an estate "to A until B returned from Rome, or an es- "tate to A and his heirs until they ceased to "be tenants of the Manor of Dale. On the hap- "pening of the contingency, the feoffer was "in, of his old estate without entry. The es- "tate was not cut short as it would have been "by entry for breach of condition, but expired "by the terms of its original limitation. After "a life estate of this kind, a remainder could "be limited. After such a fee it has com- "monly been supposed that there could be no "remainder, but there was a so-called possi- "bility of reverter to the feoffer 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 condi-
> "tion, having no right or interest left in the
> "property other than the mere chance of re-
> "gaining 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 property,
> "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 dis-
> "positions 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 reversion, nor, properly
> "speaking, a possibility of reverter. The most
> "exact designation of it is the possibility of for-
> "feiture. If it be not released to the owner
> "of the land, it passes to the heirs of the gran-
> "tor, not by way of descent, but by representa-
> "tion. It is to be carefully noted as the one
> "remaining right or instance connected with
> "real property of today, which by the prevail-
> "ing 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 entry for condi- "tion 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 heredita- "ments, or any part of such right, estate or "interest, respectively, although the contin- "gency on which such right, estate or interest "are to vest may not have happened; 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 en- "titled 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 assigned to him, and the "same actions, suits and remedies therefor "as the person originally entitled thereto or "his heirs would then have been entitled to if "no conveyance, devise, assignment or other "disposition thereof had been made; provided, "that no person shall have been or be empow- "ered 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 ex- "pectancy 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 or may have become entitled "under any deed to be thereafter executed, or

> "under the will of any living person; and pro-
> "vided, 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 expect-
> "ancy therein mentioned liable to be levied
> "upon and sold by virtue of an execution."

The Supreme Court of this State, in *Cornelius v. Ivins,* 26 N. J. 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 principles 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
> "ejectment."

The latest and most important authority in New Jersey upon this question is the case of *Bouvier v. Railroad Company,* 67 N. J. 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, wherein 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 contention of the "plaintiff in error. It is suggested also that "the proviso in the Act, that no chose in ac- "tion shall thereby be made assignable at law, "excepts rights of entry after breach from its "operation, but I do not take this view. Some "Judges have spoken of the right after breach "as a mere chose in action, but the designa- "tion is inaccurate. A right of entry is an in- "terest 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 personal- "ty. The Victorian statute included personal "property, and the proviso was appropriate. "It probably was retained in our Act through "inadvertence, unless its application was in- "tended 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 and 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 of the Camden and Atlantic Land Company is sufficient for that purpose, the right of re-entry became vested in the plaintiff.

We contend further that the deed, from the land company to plaintiff, above referred to, 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 and 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 (C. P. 75):

> "Whereas the Stockholders of the Camden "and Atlantic Land Company have caused to "be organized under the General Corporation "Act of the State of New Jersey, a new cor- "poration under the name of the Camden At- "lantic 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 Com- "pany be and they are hereby directed and re- "quired to prepare and execute under the seal "of the company one or more deeds transfer- "ring in due form of law to the said Camden "Atlantic and Ventnor Land Company all Es- "tate Rights and Interest both real and per- "sonal 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."

The vendor by said conveyance, did

> "grant, bargain, sell, release and confirm, unto "the Camden Atlantic and Ventnor Land Com- "pany, and its successors and assigns, all of "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."

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 cessation of use 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 prop- "erty 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 *Southard v. Central Railroad Company,* 2 Dutch. 14-22, where the Court had occasion to construe the words "all rights of any kind," contained in the first section of the supple-

ment 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 "devisable."

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 inter- "est, right or estate shall have been or be de- "vised, conveyed or assigned, his heirs, and "assigns, shall, on the happening of such con- "tingency, 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 "and assigns, and to have the same interest, "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 reme- "dies therefor 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 in the decision of the pipe line case, p. 268, 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 v. Brewer,* 32 N. J. 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 contingency 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 hundred "pounds, and the like. In such case the estate "determines, as soon as the contingency hap- "pens, and the next subsequent estate, which "depends upon such determination, becomes "immediately vested, without any act to be "done by him who is next in expectancy, but "when an estate is, strictly speaking, upon con- "dition indeed, as if granted expressly upon con- "dition, to be void upon the payment of forty "pounds by the grantor, or so that the grantee "continues unmarried, or provided he go to

> "York, &c., the law permits it to endure beyond "the time when such contingency happens, un- "less 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 v. Wigg, 1 Atk. 383;
Doe v. 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 v. Hamilton, Cal. 66 Pac. 10;
Gray v. Blanchard, 8 Pick. 284;
Jackson v. 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 is 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.

Gray v. 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 v. 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 v. 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 v. Glocke, Wis. 89 N. W. 118;
Thomas v. Record, 47 Me. 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 v. 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," etc. 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 v. Record, 47 Me. 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 v. Butterhoff,* 84 N. J. 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 "condition, which forms part of the considera- "tion, 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, subjudice, however, the grant of the land was during the continuance of the use of the land which was conveyed, an entirely different situation.

III.

THERE BEING A CESSATION OF USE AS TO PART OF THE LAND DEEDED BY THE CAMDEN AND ATLANTIC LAND COMPANY, WE CONTEND THAT THE ENTIRE TRACT THUS CONVEYED, REVERTED TO THE ORIGINAL GRANTOR AND ITS GRANTEE, AND PLAINTIFF IS ENTITLED TO A JUDGMENT IN BOTH SUITS.

This question was adverted to by the opinion of Vice-Chancellor Leaming in the decision of *Board of Chosen Freeholders v. Buck,* 79 N. J. E. 472, at 480.

Any other construction would do violence to the phraseology of the deed, as everywhere in the deed the land is referred to as a single lot or tract. Obviously, the intention of the parties, which intention controls the construction of the deed, was to consider the land as an indivisible unit. Thus the failure to use all the land for railroad purposes, causes the whole estate to terminate and the whole tract reverts to the grantor.

This view is squarely supported by the decision of the Court of Errors in *Bouvier v. Baltimore and New York Railway Co.,* 67 N. J. L. 280, at 286.

There a conveyance, by metes and bounds, similar to the one at bar, was held to grant a single tract and a breach of condition as to part of the land, caused the estate to revert as an entirety.

Compare in this connection *Clarke v. Cummings,* 5 Barb. (N. Y.) 339. The Court held there that a severance of the occupation of demised premises, the rent being paid to the lessor by the respective

tenants, is not a severance of the conditions of the lease, and a breach of the conditions of the lease by one of the occupants, works a forfeiture of the whole lease. The general rule is the estate is indivisible and the condition occurring which terminates it, the whole estate terminates.

IV.

ON THE QUESTION OF REVERSION.

It is admitted no prior reversions are involved here, but it is perfectly clear that a grant of reversion, which might have been in existence at a time prior to the deed, had no effect on a possibility of reverter created by the deed itself. Only a possibility of reverter was involved here. There were no reversions created by the deed.

Therefore defendant's argument, upon this point is palpably without merit, since the deed of plaintiff's predecessor in title, can in no way prevent plaintiff from creating a new possibility of reverter by his own deed. Nor is this inconsistent with a grant of whatever reversions may have come to plaintiff from the deed of plaintiff's predecessor in title.

V.

ON EFFECT OF WARRANTY.

Defendant's argument is to the effect of the warranty, is based entirely on the case of *Ross v. Adams,* 28 N. J. L. 160. It is submitted the case is not applicable, but even so, it was reversed on this

point by the Court of Errors, which Court held that a warranty attaches only to the estate granted. The conveyance is the principle, the covenant the incident. The decision of the Appellate Court is found in *Adams v. Ross,* 30 N. J. L. 505, at 509.

VI.

THE JUDGMENT IN THE FORMER SUIT IS NOT A BAR TO THE PRESENT ACTION.

Section 44 of the Ejectment Act, which gives conclusive effect to a judgment in ejectment, relates only to the right of possession and the title as they existed at the institution of the suit.

The deed from the West Jersey and Seashore Railroad Company to Ventnor was conclusive evidence of an intention to abandon, at least, that portion of the land theretofore conveyed to the railroad company for railroad purposes. Therefore, the title or right to possession accrued, without question, upon the execution of that deed, it being manifested by the same that the grantor intended no longer to devote the land to the purposes for which it was conveyed.

This principle is supported by the following authorities:

Miller v. Barber, 73 N. J. L. 38, at 41;
Hunt v. O'Neill, 44 N. J. L. 564;
Hoboken Land and Improvement Co. v. Mayor, etc., of Hoboken, 36 N. J. L. 540, at 545;
In *re Hubert,* 129 Atl. 698;
See 9 *R. C. L.,* page 926.

It will be observed that the complaints filed set up a right to possession as of the time when the deed was made to the city and the basis of the action of the plaintiff is that, then it was, that the land ceased to be used for railroad purposes and the title reverted to the plaintiff, as the successor of the Camden and Atlantic Land Company, the original grantor.

The real point in issue between the parties is the effect of the interpretation of the deed involved, as expressed in the postea of Judge Carrow, upon which judgment was entered in the former case.

It is well settled, that at common law, a judgment in an action of ejectment was not a bar to another and similar action between the same parties for the same land. The reason for this was not merely because the suit was for possession, but is found in the origin of the action of ejectment itself. Originally ejectment was only an action of trespass by a lessee against one who had ousted him of his term. Hence, plaintiff recovered only possession and the freehold was not directly in controversy. In its origin is found the explanation of the common law rule.

It is admitted that this common law rule has been largely changed by statute. However, in view of the fact that the statute in this case is in derogation of a common law right, such statute must be strictly construed.

A judgment in ejectment will not conclude the defeated party as to a title and right of possession subsequently accruing.

The conclusiveness and estoppel of a judgment to recover possession to real estate must be limited to

the rights of the parties as they existed at the time when the verdict and judgment were rendered and neither party is concluded from showing that their rights have been varied or extinguished at a subsequent period and thus, from bringing a new action based upon these new rights.

Baker v. Butte Water Company, 107 Pacific 819.

See *Hunt v. O'Neil,* 44 Law 564, and other cases heretofore cited, holding, without exception, that a judgment in ejectment will not conclude the defeated party as to a title or right to possession subsequently accruing.

See also *Miller v. Barner,* 73 N. J. Law, 38 at 41, also *In re Hubert,* 98 N. J. Eq. 35.

A judgment in an action of ejectment against the plaintiff because of his not having the legal title to the premises is certainly not a bar to a second action by him upon an after acquired legal title. Having acquired a new and distinct legal title, he has the same right to assert it in a new suit as would a stranger who had acquired it.

The Court of Errors in the case of *Meirick against Whittman Lewis, &c., Co.,* 98 N. J. Law 531, in discussing the question of *res adjudicata,* says:

> "The recognized rule applicable to the topic "under discussion, supported by a long line of "cases, is thus stated in 23 Cyc. 1158: 'A proper "test in determining whether a prior judgment "between the same parties, concerning the same "matters, is a bar to a subsequent action, is to "ascertain whether the same evidence, which is

> "necessary to sustain the second action, would
> "have been sufficient to authorize a recovery in
> "the first; if so, the prior judgment is a bar.
> "But if the evidence in the second suit is suffi-
> "cient to authorize a recovery, but could not
> "have produced a different result in the first
> "suit, the failure of the plaintiff in the first
> "suit, is no bar to his recovery in the other suit,
> "although it is for the same cause of action.'
> "Cited, with approval in Hoffmeir v. Trost, 83
> "N. J. L. 358, 260; 15 R. C. L. 784, par. 239."

We submit that the evidence in the second suit is sufficient to authorize a recovery but could not have produced a different result in the first suit, due to the fact that the defendant railroad company was still in possession of the property and using the same for railroad purposes.

In the former case, the fact that the railroad was using the land, was, under the provision of the habendum clause, decisive of the entire case and the determination of the question of whether the railroad held a fee simple or a fee simple determinable was not necessary for a decision in the case.

The same statement that was made, by the Chief Justice in the case of the present plaintiff against the *West Jersey & Seashore Railroad* in 92 N. J. Law 385, of the pipe line case, might be made, by this Court, in regard to the previous case now under discussion.

In *Radford v. Myers,* 231 U. S. 725, Mr. Justice Day, on p. 733, says:

"Judgments become estoppels, because they "affect matters upon which the parties have "been heard or have had an opportunity to be "heard, but are not conclusive upon matters not "in question or immaterial."

Likewise, in the case of *South Minnesota Railroad Extension Company v. St. Paul,* 55 Federal 690, the Court in its opinion points out that the Court may examine all of the pleadings for the purpose of ascertaining what issues were in fact raised and decided. In other words, the important question is not interpretation of evidence or documents, but rather what issues have actually been raised by the parties and upon what issues the parties have had opportunity to be heard.

It is beyond any doubt, clear that the doctrine of *res adjudicata* applies in a second suit only where the issue of the second suit is identical with that of the first suit. The point is very clearly established in the case of *Bradford v. Myer,* 231 U. S., page 735. In that case, at page 730, Mr. Justice Day, speaking for the Court in referring to the effect of an earlier suit, says:

"As the suit in the Michigan Court was not "upon the identical cause of action litigated in "the United States Circuit Court, the estoppel "operates only as to matters in issue or points "controverted and actually decided in that "suit.

Nor does the case of *Mershon v. Williams,* cited in the Court below on behalf of the defendants in any way vary the general doctrine of law herein stated. This case was an attempt to restrain by preliminary

injunction the prosecution of an action at law for mesne profits. The action for mesne profits was based upon an earlier recovery in ejectment by the defendants against the complainants in an action at law. In this situation, both the action at law and that in equity turned on precisely the same point, the construction of a notice given by one party to the other. It was held that equity had no jurisdiction to review the judgment of the Supreme Court for any supposed error in the construction of the effect of the aforesaid notice. In other words, equity was merely following the law.

It is clear that the situation in this last-mentioned case is in no way applicable to the situation of the case at bar. The differences are very obvious and it is perhaps sufficient to point out only one of them. In the Mershon case, the complainant in equity was seeking merely to avoid a decision of the Supreme Court.

This distinction is recognized by the Supreme Court in a case at law between *Mershon and Williams,* 1899, reported in 63 N. J. L. 398. It was there held that a plea of former judgment only marks an estoppel as to those matters capable of being controverted between the parties at the time of the proceedings in the former action.

From the above, it is clear that the plaintiff is in no way questioning the doctrine of *Manley v. Mickle,* 53 N. J. Eq. 155, also cited by defendant. There is no effort being made by the plaintiff to show that any former judgment between the parties is erroneous.

But for the statement appearing in the postea, the former judgment could not possibly be a bar to the plaintiff's action herein.

In a consideration of the effect of the postea of Judge Carrow, several well-settled rules must be taken into account.

In the first place, the postea is not a part of the judgment and cannot of itself be the basis for the plea of *res adjudicata.* At common law the postea was not sufficient evidence to prove a verdict. An examined copy of the whole record had to be put in evidence. See *Saunders on Pleading and Evidence,* 911.

In the second place, the recital in the postea is mere surplusage and not binding on the plaintiff herein. See *Forgotson v. Raubitschek,* 87 N. Y. S. 503. The Court there held that a memorandum filed with the trial Judge stating the grounds of his decision is no part of the judgment.

See also *Miller v. Philips,* 92 Kansas 662, 141 Pacific 217 (1914). The Court in this last case held that unnecessary statements or recitals in the journal entry of an order of dismissal are not adjudications binding on the parties in a subsequent action at law. In *Citizen's v. Brigham,* 61 Kansas 727, 60 Pacific 754, it was held that the conclusiveness of a judgment by a Court does not exist in the reasons given for it, but exists only in the judgment itself.

See also 15 *Ruling Case Law,* section 35, page 596, where the text reads, "Words needlessly appended to a judgment may be disregarded as sur-

plusage." Thus, the peculiar wording of the postea was surplusage. Such surplusage cannot here be the basis of a former judgment to estop plaintiff on the doctrine of *res adjudicata.*

It is also to be noticed that, even if the words of Judge Carrow be taken as binding on the plaintiff in the former action, nevertheless the doctrine of *res adjudicata* still does not apply to the plaintiff's detriment in this action.

The postea speaks as of the date of 1911 and states that in 1911, West Jersey and Seashore Railroad Company still had title in fee of the premises in controversy. Such a statement is perfectly consistent with the plaintiff's case in that in 1911 the defendant's title was still a fee and had not yet been determined through defendant's failure to use the property for railroad purposes. The language of Judge Carrow has no reference to the possible state of defendant's title after an abandonment of the land for railroad purposes. The use of the word "fee" or "fee simple" frequently does not mean a fee simple absolute, as the two former terms may be applied to a base or determinable fee or to a conditional fee. See 21 *C. J.*, page 919, sec. 8, and the following cases cited therein: *Orr v. Yates,* 209 Ill. 222; 70 N. E. 731, at 733; *Richardson v. Noyes,* 2 Mass. 56, at 62; *Fletcher v. Fletcher,* 88 Ind. 418; *Waldron v. Gianini,* 6 Hill (N. Y.) 601; *People v. White,* 11 Barb (N. Y.) 26; *Greenewalt v. Greenewalt,* 71 Pennsylvania 483, at 487; *Adonis v. Berner,* 102 S. Carolina 7; 86 S. E. 211, at 215.

Under the circumstances and in view of the authorities cited, it is submitted that the question of

right or title in the premises in question, as of the time of the institution of the present suit, was not directly in issue or determined in the former suit, and was not necessary to that decision.

It is further submitted that the present suit is brought on a materially different state of facts from those involved in the suit in 1911. This must be so, since the failure to use for railroad purposes did not occur until 1925. Therefore it is clear that the plaintiff is in no way bound by the judgment in 1911 and the defendant cannot effectively herein interpose the plea of *res adjudicata.*

Obviously, if an appeal had been taken to the Court of Errors from the judgment entered, upon the postea signed by Judge Carrow, the only question, before the Appellate Court would have been, whether or not the judgment entered was correct, without taking into consideration, alone, the construction, placed in the postea, by the Judge, on the deed referred to therein, and also if the facts of the case, regardless of such interpretation, showed that the plaintiff was not entitled to the possession at the time said suit was brought. In other words, the Appellate Court would have disregarded the construction if, from the entire record, it appeared that the plaintiff was not entitled to recover. The Appellate Court would not have reversed the judgment for the defendant even had Judge Carrow's interpretation been erroneous. The result, therefore, of an appeal would have been an affirmance of the judgment, which would not, in any way, affect the construction, by Judge Carrow, of the deed in question.

Manifestly, the conclusion reached by Judge Carrow upon the right of the plaintiff to recover was, on the whole case, correct, because, at that time, there was not sufficient evidence to show that the defendant had then ceased using the *locus in quo* for railroad purposes.

Therefore, the former judgment is only conclusive as to the right of the plaintiff, as it existed, when such suit was brought. Now the situation is entirely changed. There can be no question as to the cessation of the right of the defendants to possession of the lands, upon the theory that the tenure continued only while the same were used for railroad purposes.

VII.

COMMENT UPON THE REASONS GIVEN BY THE LEARNED TRIAL JUDGE FOR THE FINDING IN FAVOR OF THE DEFENDANT AND THE AUTHORITIES CITED BY HIM.

As to the interpretation put upon the deed from the land company to the railroad company.

It was suggested by the trial Judge that the opinion of Mr. Justice Van Sickle in *Smith v. Woodruff*, 12 N. J. L. J. 149, controlled 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 reduce the estate previously granted. The attempt, in the case

under discussion, was to reduce the estate granted to the first taker from a fee, which was clearly created by the granting clause to a life estate. This is not the same question as the one with which we are here concerned, as will be shown by subsequent illustrations and citations.

The trial Judge seemed to think that the case of *Havens against Seashore Land Company,* 47 N. J. Eq. 365, is likewise controlling.

The granting clause in the Havens case was in these words:

> "Witnesseth that the said John Curtis, for "and in consideration of the just and full sum "of sixteen pounds, proclamation money, hath "remised, released and forever quitclaimed, "and by these presents, for himself and his "heirs, doth fully, clearly and absolutely re- "mise, release and forever quitclaim unto the "said Joseph Lawrence all his right, title, in- "terest and property," &c.

It will at once be observed that this granting clause does not convey to the grantee and his heirs, and hence we are forced to fall back upon the habendum clause, to find the technical words, "and his heirs." The granting clause being ambiguous, the habendum clause is resorted to to show that a fee was intended to be granted. The question in the Havens case is whether a life estate or a fee simple was granted.

VanFleet, V. C., in page 371 of his opinion, says:

> "When the granting clause of a deed is silent "as to the estate intended to be conveyed, re- "sort 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."

If the granting clause be clear, then the habendum clause may not vary the quality of the estate granted.

It is clear that the doctrine suggested in the Havens case is applicable only when the habendum clause might be construed to defeat the estate described in the granting clause and not when the habendum clause is used merely to describe the character of the estate conveyed in the granting clause. In a word, the estate conveyed by the railroad deed in the granting clause, was a fee and the habendum clause in no way changes the estate from being that of a fee, it merely describes it as being a fee simple determinable under certain conditions.

In a like manner, the case of *Staffordville Gravel Company v. Newell,* 53 N. J. Law 412, cited by the learned trial Judge, holds, that if the language of the granting clause of the indenture should be considered doubtfully ambiguous, then the language of the habendum becomes important.

The Chief Justice, in his opinion, states the rule as follows:

> "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 con-
> "trol the premises."

It is submitted that the respective doctrines of the Havens case and that of the pipe line case are not in conflict. The distinction between the two principles, set forth in these cases, is more fully explained under point one of this brief.

The cases cited by the learned trial Judge in the second half of his opinion, regarding the defense of *res adjudicata,* have already been commented upon under point VI of this brief.

We submit, therefore, that the judgments appealed from must be reversed.

STARR, SUMMERILL & LLOYD,
Attorneys of Appellants.
LEWIS STARR,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CAMDEN, ATLANTIC AND VENTNOR LAND CO.,
Plaintiff-Appellant,

v.

WEST JERSEY AND SEASHORE RAILROAD COMPANY, *et al.*,
Defendants-Respondents.

and

CAMDEN, ATLANTIC AND VENTNOR LAND CO.,
Plaintiff-Appellant,

v.

VENTNOR CITY, *et al.*,
Defendants-Respondents.

IN EJECTMENT.

ON APPEAL FROM THE CIRCUIT COURT OF ATLANTIC COUNTY.

REPLY BRIEF OF STARR, SUMMERILL & LLOYD, ATTORNEYS FOR PLAINTIFF-APPELLANT IN EACH OF THE ABOVE-ENTITLED CAUSES.

On page 3 of a typewritten copy of the brief of the defendant as served, the following appears:

> "Sometime after the making of the deed "above referred to, the land was intersected by "a street extending North from Atlantic Ave- "nue and at right angles thereto and cutting the "lands in question in two parcels of equal di- "mensions."

We have examined the record in these cases very carefully and can find no proof supporting this statement. There is nothing in either case, to show when Sacramento Avenue was opened as a public highway. In any event, any change in the physical status of the various highways either extending through or abutting the tract of land sold by the Camden & Atlantic Land Company to the Camden & Atlantic Railroad Company was with the consent of the latter, because the deed in question was dated October 12, 1888.

On the same page, this statement appears in the brief of the defendant:

> "The tract of land lying East of the only "open street was sold to the City of Ventnor, "and the City has erected thereon a City Hall."

The record is absolutely silent with respect to any improvement by the City of Ventnor on the tract of land conveyed by the railroad company to it, and if there has been any improvement by the latter, it was made at the risk of the City because the tract of land, when the ejectment suit against it was instituted, was unimproved.

The statement inserted at the beginning of the third point of the defendants' brief is not strictly accurate. The summons and complaint in the orig-

inal suit instituted, by the present plaintiff in 1913, did not contain any allegation whatever with respect to the ground of the plaintiff's cause of action. The complaint was prepared under the practice as it existed prior to the amendments of the Practice Act of 1912 and alleged generally that the defendant was in possession of the tracts of land described therein, and the plaintiff's right of possession accrued on January 20, 1911, and that defendants wrongfully deprived it of the possession thereof (C. p. 86).

The same error of statement appears under point four of the defendants' brief.

There are no statements in the complaint other than those which were requisite and necessary by the form of pleading set out in the ejectment act.

In another place in the plaintiff's brief, page 22 of the typewritten copy, the statement is made that Judge Carrow could have decided the former suit in favor of the defendant, only upon a construction of the deed in question for which the defendants contend. This is not literally accurate for the reason that the defendant, at the time of the institution of the former proceeding, had not abandoned the use of any portion of the *locus in quo.*

The 9th paragraph of the stipulation, C. p. 67, shows that the land between Cambridge and Sacramento Avenues was, at the time of the institution of the first suit, maintained as a grass plot by the defendant and had been so used from 1907 until April 8, 1925, the date of the deed to the City, and that the defendant had been in possession of the said tract of land and paid taxes thereon (C. p. 67).

The irrefutable intention, to discontinue the use of the land, for railroad purposes was evidenced by the deed to the City.

Therefore, as stated in our original brief, if an appeal had been taken in the first suit, the Court would not have reversed, because of this fact.

We call the Court's attention to these inaccuracies in the defendants' brief, in order that the case may be decided, by the record as made in the court below, and not based upon matters that are not before that Court.

Respectfully submitted,

STARR, SUMMERILL & LLOYD,
Attorneys of Appellants.
LEWIS STARR,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CAMDEN, ATLANTIC AND VENTNOR LAND CO.,
Plaintiff-Appellant,

v.

WEST JERSEY AND SEASHORE RAILROAD COMPANY, *et al.,*
Defendants-Respondents.

AND

CAMDEN, ATLANTIC AND VENTNOR LAND CO.,
Plaintiff-Appellant,

v.

VENTNOR CITY, *et al.,*
Defendants-Respondents.

IN EJECTMENT.

ON APPEAL FROM THE CIRCUIT COURT OF ATLANTIC COUNTY.

BRIEF OF BOURGEOIS & COULOMB, ATTORNEYS OF DEFENDANTS-RESPONDENTS, WEST JERSEY AND SEASHORE RAILROAD COMPANY and ATLANTIC CITY AND SHORE RAILROAD COMPANY.

This appeal brings here for review a judgment of the Atlantic County Circuit Court in favor of the defendants-respondents in an action in ejectment. Practically all of the facts were stipulated, and there is no dispute concerning them. The case was tried before Circuit Court Judge, Honorable W. Frank Sooy, without a jury, and he directed the entry of the verdict against the plaintiff and in favor of the defendants.

FACTS.

The facts of the case are as follows:

On the 12th day of October, 1888, the Camden and Atlantic Land Company was the owner of a large tract of land in Atlantic County (then in Egg Harbor Township) which is held by fee simple title.

On the 12th day of October, 1888, the Camden and Atlantic Land Company conveyed a portion of this land beginning at a stake in the middle of Portland Avenue in the northwesterly line of lands of the said railroad company distant 25 ft. northwesterly from the center line of the railroad of said company, and extending thence along the middle of said Portland Avenue north 26 degrees 15 minutes west 95 ft. to a stake in the southeasterly line of a proposed avenue 50 ft. wide (Ocean Avenue); thence along the line of said proposed avenue north 63 degrees 45 minutes east 700 ft. to the middle of Corallis (Cambridge) Avenue; thence along the middle of Corallis (Cambridge) Avenue south 26 degrees 15 minutes east 95 ft. to a stake in the northwesterly line of the aforesaid land of the said railroad company; thence by said land parallel with the center line of the railroad aforesaid and 25 ft. distant

northwestward therefrom south 63 degrees 45 minutes west 700 ft. to the place of beginning, to the Camden & Atlantic Railroad Co.

The premises were in the following language:

"THIS INDENTURE, * * * WHEREAS, the said company, duly incorporated by an Act of the Legislature of the State of New Jersey, entitled 'An Act to incorporate the Camden and Atlantic Land Company,' approved March 10, 1853, are seized and possessed, in fee simple, of certain land and premises, situated in Absecon Beach, in the Township of Egg Harbour, in the County of Atlantic, including the premises hereinafter particularly described.

NOW THIS INDENTURE WITNESSETH, That the said the Camden and Atlantic Land Company, for and in consideration of the sum of One Dollar to the said Company paid or secured to be paid by the said the Camden and Atlantic Railroad 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 the Camden and Atlantic Railroad Company, and to their successors and assigns, ALL the following described Lot, Tract or Piece of Land, situate in Absecon Beach, in the said Township of Egg Harbour, in the County of Atlantic, and State of New Jersey, and bounded and described as follows, viz: BEGINNING * * * TOGETHER with all and singular the improvements, ways, privileges, hereditaments and appurtenances, thereunto belonging, or in anywise appertaining, and the Reversions and Remainders, Rents, Issues and Profits thereof."

By the granting clause of the deed, which is clear and unambiguous, a fee simple title is granted. The habendum reads as follows:

> "TO HAVE AND TO HOLD the said lot or piece of land, hereditaments and premises hereby granted, with the appurtenances, unto the said the Camden and Atlantic Railroad Company, their successors and assigns, forever. So long as the same shall be used by said Railroad Company for Railroad purposes."

Then follows the warranty by the Camden and Atlantic Land Company, by which it covenants and warrants said premises forever.

Sometime after the making of the deed above referred to, the land was intersected by a street extending north from Atlantic Avenue, and at right angles thereto, and cutting the land in question into two parcels of equal dimensions. There is a loop track extending from the westbound track of the railroad in a northwest direction across the newly opened street, and thence across the west portion of the land to a point near its northwest corner, and thence by a reverse loop crossing Atlantic Avenue to the eastbound track. On the west portion of the lot there is also erected a small waiting room for passengers.

The tract of land lying east of the newly opened street was sold to the City of Ventnor, and the City has erected thereon a City Hall.

For the first twenty-five years after this conveyance was made, no question arose as to the sufficiency of the railroad company's fee simple title therein, but for the past fifteen years there has been constant contention on the part of the Camden, Atlantic and Ventnor Land Company, grantee of the Camden & Atlantic Land Company, touching the title

acquired by the railroad company in said Deed of 1888, the railroad company contending that the deed conveyed a fee simple title, the Camden, Atlantic and Ventnor Land Company, grantee of the Camden and Atlantic Land Company, contending that it conveyed only a base fee and not a fee simple title.

In the present suit of the Camden, Atlantic and Ventnor Land Company v. Ventnor City and the West Jersey and Seashore Railroad Company, the plaintiff seeks to carve out a portion of the original grant, alleging that as to that portion it is not used for railroad purposes, and for that reason claims that the Railroad Company's title has become void, because the portion that they carved out is not being used for railroad purposes.

THE ESTATE GRANTED BY THE DEED FROM THE CAMDEN, ATLANTIC AND VENTNOR LAND COMPANY WAS A FEE SIMPLE ESTATE AND NOT A BASE OR DETERMINABLE FEE.

The precise contention of the defendants-respondents is that by the clear and unambiguous language of the granting part of the deed, a fee simple title was granted, and that this fee simple title after being granted, in the absence of ambiguity, could not be controlled, contradicted or modified by the habendum.

The language of the granting clause is:

> "HAVE granted, bargained, sold, released and confirmed, and by these presents DO grant, bargain, sell, release and confirm unto the said the Camden and Atlantic Railroad Company, and to their *successors* and *assigns.*"

In the case of *Pipe Line Co. v. D. L. & W. R. R. Co.* (62 N. J. L., 254), at p. 267, the Court of Errors and Appeals said:

> "The operative words of a conveyance of a grant to a corporation, its successors and assigns, forever, by the Common Law conveys a fee-simple title."

So that, independent of the habendum, a fee simple estate was granted. The language, as above stated, is clear and unambiguous. The question then arises: Can this grant of a fee simple in clear, unambiguous language be contradicted, modified or controlled by the habendum clause? Defendant contends that it cannot be.

Originally, and before the recording acts, the premises of a deed frequently did not contain the estate granted. It contained the parties, the recital of the various deeds in the chain of title, and description, and in such cases, the office of the habendum was to fix and determine the estate granted.

In the case of *Smith v. Woodruff*, decided by Van Sickel, J., in Union Circuit, and reported in 12 N. J. L. Journal, p. 149, which involved the use of an habendum and the force to be given it, Judge Van Sickel said:

> "The case turns on the construction of the deed. The grant is to her and to her heirs and assigns; habendum, 'to the party of the second part, her heirs and assigns, forever, for and during the period of her natural life, as her whole dower in all the real estate of said James H. Smith, deceased.' "

The language of the habendum is almost parallel with the language of the habendum in this case. The Judge said, p. 149:

> "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 the 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."

The books are uniform in declaring this to be the rule of construction: 4 Kent, 468; *Dodwell v. Gibbs* (5 B. & Cress. 709); Bl. Com., 298; 2 Wash. R. Prop. 689; 4 Greenl. Cruise, 273. "The intention of the grantors must be drawn from the legal rules of interpretation and construction applied to the language used."

In the present case, to give effect to the habendum would turn this fee simple title into a base fee. The granting part would thus be contradicted by the habendum, which may not in law be done. The estate granted would, by the habendum, be modified or cut down to a base fee, which likewise in law cannot be done.

In the case of *New York Indians v. United States* (170 U. S., 1-42 L. Ed., 927) at p. 934, the Supreme Court of the United States, speaking of the habendum, said:

> "It may explain, enlarge, or qualify, but cannot contradict or defeat the estate granted by the premises, and where the grant is uncertain or indefinite concerning the estate intended to be vested in the grantee, the habendum performs the office of defining, qualifying, or controlling it. *Jones, Real Prop.*, Sec. 563; Devlin, Deeds, Sec. 215."

In the present case, the latter clause in the habendum not only contradicts the former clause in the habendum, but also contradicts the grant in the premises.

Section 220 of Devlin, 2d Ed., is as follows:

> "While the habendum cannot abridge an estate granted, 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."

The premises in a deed comprise all preceding the habendum.

In the case of *Hafner v. Irwin* (34 Am. Dec., 390), the Judge, speaking of habendum, said:

> "Dwight, in the premises of the deed, bargained and sold the property to the plaintiff, his heirs, executors, etc. However, in the same deed, the habendum is to M. W. Curry, his heirs and assigns in trust, etc. All the parts of a deed which precede the habendum, taken together, are called the premises; of which it is said, the office is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted. * * * 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."

and, quoting from Chancellor Kent, says:

> "Chancellor Kent remarks, that in modern conveyancing the habendum clause in deeds has degenerated into a mere useless form; for the premises contain the names of the parties and the specification of the thing granted, and the deed becomes effectual without any habendum."

then, continuing, the Judge says:

> "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 Curry, makes that part of the deed repugnant to the premises, and therefore void."

In the case of *Riggin, et al., v. Love, et al.,* (72 Ill., 553), the Supreme Court of Illinois, discussing the habendum, at p. 555, said:

> "They argue, that the granting clause in the deed conveys the estate to Eliza McGilton without any limitation or qualification; that this, under the statute relating to Conveyances, is sufficient to convey the fee, although words which, at common law, were necessary for that purpose are omitted; and that, consequently, the words in the *habendum* clause are *repugnant* to the grant, and void."
>
> "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. 4 Kent's Com. (8th Ed.), 524; 2 Washb. on Real Estate (2d Ed.), 689."

In the case of *Budd v. Brooke* (43 Am. Dec. 321) the Supreme Court of Maryland, in describing the habendum, at p. 337, said:

> "The technical meaning of the word premises, in a deed of conveyance, is everything which precedes the habendum; and it is in the premises of a deed, that the thing is really granted. The premises of the grant before us, passing, as we conceive, the lands granted in conformity to the last will and testament of Thomas Brooke, and the declared intent of both grantor and grantees, the next inquiry to be answered is, has the habendum such controlling influence over the grant as to defeat the estates created by the premises, and substitute, in their places, entirely different estates, contrary to the manifest intent of the parties to the grant? According to our construction of the grant, made by the premises, it is in direct conflict with that contained in the habendum. Both cannot prevail. One must overrule the other. Which takes precedence, is the question. In our opinion, the limitation contained in the habendum must be rejected, and the estates given in the premises must prevail. * * * Where there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand. * * * Where the haben-

dum is repugnant and contrary to the premises, it is void, and the grantee shall take the estate given in the premises."

In the case of *Nightingale, et al., v. Hidden, et al.,* (7 R. I., 115) at p. 118, the Court, speaking of the habendum, 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—an use merely, as the plaintiffs claim—a trust, as the defendants claim—is limited therein. * * The rules 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; that it cannot divest the grantee of the legal estate already granted him in the premises—and where by the premises the estate is granted to one, it cannot frustrate a grant complete before, or abridge, or lessen the estate granted."

In the case of *Dodwell v. Gibbs* (5 B. & Cress., 709), the premises were to A., his heirs and assigns, with a habendum for life. The King's Bench held:

> "The habendum is not an essential part of a deed and if it be repugnant to the granting part it must be rejected, stating the rule to be, if an estate be granted to the premises and that grant is expressed and certain, the habendum cannot vitiate it."

In the case of *Havens v. Seashore Land Co.* (47 Eq., 365), where the use of the habendum was be-

fore the Court, Vice-Chancellor Van Fleet, at p. 371, 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. The Chief Justice, speaking for the Court of Errors and Appeals, in Staffordville Gravel Co. v. Newell, November Term, 1889, said: '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 (the habendum), 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 the case of *Staffordville Gravel Co. v. Newell* (53 N. J. L., 412), at p. 415, Chief Justice Beasley, speaking for the Court of Errors and Appeals, 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, for 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."

Continuing, in citing how the habendum may become effective, he says:

> "If, consequently, the conclusion had been that the clause containing the effective force of the grant was uncertain as to its extent, for the reason that it first describes the interest to be passed as 'reversions and remainder,' and then designates it as all the right, title and interest of the grantor, which was an entire fee, was indefinite, such imperfection would have been deemed removed and amended by the explicit words of this habendum."

In the case of *Dickson v. Wildman* (183 Fed., 398) at p. 403, the Court, speaking of the habendum, said:

> "If it were conceded that there was repugnancy between the granting clause on the one side and the preliminary recitals and the habendum on the other, and that the conflict was such that the true intent of the grantor could not be ascertained, it is manifest that the Court must decide which part of the deed shall prevail. The rule in such case is that the granting clause determines the interest conveyed, and when it is clear and unambiguous, as in the deed in question here, it prevails over introductory recitals in conflict with it. The reason sometimes given for the rule is that a deed founded upon a valuable consideration is to be construed most strongly against the grantor, and, when the conflict is in the habendum, that the grantor in the latter part of the deed will not be permitted to deny or retract the grant previously made. The rule is very old, and it may be that it is founded on an effort to enforce the cardinal rule to ascertain and give effect to the inten-

> tion. The granting clause is naturally looked to to see what it was intended to convey, whereas recitals are often merely introductory, and are not a necessary part of the deed. The granting clause is the very essence of the contract. It is required to transfer title, but the habendum clause is not absolutely necessary to make a deed effective. Where a conflict exists, therefore, in the different parts of a deed, the true intent of the grantor as to what was intended to be conveyed is more likely to be found in the granting clause. The settled rule of construction in Alabama and in many other jurisdictions is that in case of repugnancy between the granting clause and other parts of the deed, the former will prevail."

The case of *Board of Chosen Freeholders v. Buck* (79 Eq., 472), cited by plaintiff, has no bearing in this case. In that case, the premises did not grant a fee simple title, the language being:

> "Do give, grant, bargain, sell and convey unto the Board of Chosen Freeholders, and their successors, to and for the use and purposes of building and erecting thereon public office, &c."

and the question decided was not the character of the deed, but the effect of a condition.

Section 3 of the Railroad Act of 1903 (P. L. 647) confers on every railroad company incorporated under that Act the powers granted by the General Corporation Act of 1896, among others of which were the rights to convey lands in fee. The same section 3 of the General Railroad Act specifically gives the right to hold and use real estate, and when

not necessary to accomplish the object of its incorporation, to sell the same.

Chief Justice Gummere in the case of *Camden, Atlantic and Ventnor Land Company v. West Jersey & Seashore Railroad Company* (92 N. J. L., 385), at p. 389, said:

> "It may be true, as is argued on behalf of the respondent, that the conveyance of these lands by the railroad company to third parties was a perpetual abandonment of their use for railroad purposes, and that such action was a violation of their contract as exhibited in the deed. We notice, however, that the first section of the charter of the Camden and Atlantic Railroad Company authorizes it to purchase, hold and *convey* lands necessary or expedient for the objects of its incorporation (P. L. 1852, p. 263); and it may well be that under proper circumstances a conveyance of land already acquired by it is an act done in the execution of the purposes for which the company was created." *Italics, the Court's.*

It is contended that the entire estate of the Camden and Atlantic Land Company in the lands in dispute was granted to the Camden and Atlantic Railroad Company. The premises of the granting clause of the deed shows that not only were appropriate words used for granting a fee simple, but the reversion and reversions were also granted, which constituted a grant of a fee simple absolute, and any attempted qualification of that estate thereafter in the habendum is inconsistent with it, and, therefore, null and void. If it has any force whatever, it is only the force of a covenant, which may be redressed in damages, but not by forfeiture of the

estate. *McAllister v. Atlantic City* (92 N. J. Eq., 357, p. 362).

Plaintiff contends that it is entitled to a recovery on the strength of the case of *Pipe Line Co. v. D. L. & W.* (62 N. J. L., 254). In that case, however, there was no grant of the reversions, and the opinion of the Court touching the office and the effect of the habendum was only dictum, as it was not necessary to the decision of the case. The question involved in that case was whether or not the Railroad Company was entitled to prevent the Pipe Line Co. from laying a pipe across its right of way, beneath a roadway. The Railroad Company had the deed for the land, and was in possession of the land. It, therefore, became immaterial whether the deed was a fee simple absolute or a qualified fee, and the Court of Errors and Appeals, in the case of *Camden and Atlantic Land Co. v. West Jersey and Seashore Railroad Co.* (92 N. J. L., 385) at p. 388, referring to this point, said:

> "It will be observed from the above recital that the character of the estate vested in the railroad company by the Stuart deed was not directly involved in the solution of the question determined."

So that, it is contended that this case is not an authority against the proposition here contended for.

The next case cited by the plaintiff is the case of *State v. Brown* (27 N. J. L., 13). That was a case where the question involved was whether or not Brown was such an owner of real estate as entitled him to erect a wharf in front of his property. In that case, the effect of the habendum was discussed, but it was not necessary to the decision of the case, because the character of the estate was not involved,

Brown being the owner of the fee, whether a fee absolute or a base fee, was such an owner as entitled him to erect the wharf, and the Court so held. In that case, however, there was no reversion in the deed, and the Court (at p. 20) called attention to that fact, saying:

> "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 the term specified in the grant, to-wit: 'as long as used for said canal.' "

It is submitted that the case of *New York Bay Cemetery Co. v. Buckmaster* (49 N. J. L., 449) cited by plaintiff-appellant is of no weight in this case. This was an action of ejectment concerning the burial lot, the contention of the cemetery company being that only a right of burial was granted, while the defendants contended they had a fee, but whether it was a base fee or a fee simple absolute, impressed with a restrictive covenant, was not determined.

The citation from Cyc. quoted by plaintiff may have been the law in former times, but in this State it is contradicted by the case of *Havens v. Seashore Land Co.* and *Staffordville Gravel Co. v. Newell* (*ibid*).

The case of *Berry v. Billings* (44 Me., 416) cited by plaintiff-appellant holds, as the Court will find upon examination, that 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 sufficient to declare the intention. In that case, no particular estate or words of inheritance had been mentioned in the premises.

Defendants-respondents also cite as supporting their position the case of *Camden, Atlantic and Ventnor Land Co. v. West Jersey & Seashore Railroad Company* (92 N. J. L., 385). This suit involved a deed between the same parties, but for another tract of land.

The deed itself differs in important particulars from the deed under consideration in the present suit. In the deed involved in that suit, there was no grant of the reversions. That clause is in the following language:

> "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," etc.

Chief Justice Gummere, in his opinion in the first case refers particularly to this clause in the deed (92 N. J. L. 386-7). The premises of the deed which specify the grant is all that portion of the deed preceding the *habendum* so that in the granting clause in the deed in the first case, the grant did not contain a grant of the reversions, whereas, as it will be seen in the present case, the granting clause not only grants an estate in fee simple by appropriate words but contains further a grant of the reversions of remainders, etc. Furthermore, neither the case of *Pipe Line Co. v. D. L. & W. R. R.* Co. (62 N. J. L. 254) nor the case of *Camden, Atlantic and Ventnor Land Co. v. West Jersey & Seashore Railroad Company* (92 N. J. L. 385) determine that any language in an *habendum* clause can debase or limit an estate in fee simple unequivocally conveyed in the granting clause. It will be ob-

served that in neither of the above cases was that question necessary in the decision. This fact was specifically referred to by Chief Justice Gummere in the case of *Camden, Atlantic and Ventnor Land Co. v. W. J. & S. R. R. Co.* (92 N. J. L. 385). The most that Chief Justice Gummere says with respect to the deed in that case is in the following language:

> "Conceding the soundness of the principle that where the *habendum* clause declares the grantee shall hold the land granted for a specific purpose, and not more, his estate is determined when that purpose is abandoned, this doctrine can have no application where the *habendum* in a subsequent clause negatives the idea that the words constitute a limitation upon the duration of the estate, by expressly declaring that the fee of the grantee shall continue so long as certain conditions shall remain unchanged; or until a certain event shall have happened; or during a designated period which may be either definite or indefinite in extent." *Italics, the Court's.*

II.

REVERSIONS AND WARRANTY.

Following the description, the deed contains the following covenants:

> "Together with all and singular the improvements, ways, privileges, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the Reversions and Remainders, Rents, Issues and Profits thereof."

and the concluding clause of the deed is the following warranty:

> "And the said The Camden and Atlantic Land Company, do by these presents covenant, grant and agree, to and with the said The Camden and Atlantic Railroad Company, their successors heirs and assigns, that the said Company, all and singular the hereditaments and premises hereinbefore described and granted, or mentioned or intended so to be, with the appurtenances, unto the said The Camden and Atlantic Railroad Company, their successors heirs and assigns, against the said Company, and their successors, and against all and every person or persons whatsoever, lawfully claiming or to claim the same, or any part thereof, by, from, or under them or any of them, SHALL and WILL by these presents WARRANT and forever DEFEND."

THE PLAINTIFF-APPELLANT'S PREDECESSOR IN TITLE GRANTED AN ESTATE IN FEE SIMPLE INCLUDING THE REVERSIONS AND REMAINDERS.

It is laid down in *Corpus Juris* that where the reversion and the principal estate meet in the same person, the reversion is extinguished by reason of the merger (21 C. J. 1020, paragraph 185).

It will be observed that the premises in the deed in the present case, not only grants an estate in fee simple by appropriate words, but also grants the "Reversions and Remainders."

Even if the plaintiff is right in its contention, then the estate which it takes by virtue of an alleged

breach of the condition contained in the *habendum* would be a reversion. This reversion, however, has already been granted by the plaintiff-appellant's predecessor in title to the defendant-respondent, "its successors and assigns," and merged in the estate thus granted.

It is a principal rule of construction that a grantor may not derogate from his grant. Therefore, the grantor in the present case, having granted the reversion in connection with the granting of a fee simple title, cannot be said to have retained anything in itself. The complete and entire estate passed out of it free from any limitation whatsoever.

The granting by the grantor of the "Reversions and Remainders" negatives the inference that the grant was that of a base or qualified fee. Even if the words above referred to are to be considered only for the purpose of construing the effect of the deed, their inclusion in the deed must be considered to mean that the grantor did not intend to reserve anything in itself or its assigns.

Upon a reading of the premises of the deed, particularly the granting clause, it will be observed that there is no uncertainty or ambiguity as to the estate granted, but a clear, unqualified, unambiguous grant of a fee simple estate in the most appropriate language that could possibly be used for that purpose, in addition to which there is, as we have pointed out, a further grant of the reversions and remainders, if any.

The covenant of general warranty warrants the estate in fee simple granted in the granting clause, without any limitation or reservation of any character whatsoever. It warrants the estate thus granted against any claim by the grantor or its successors and assigns. If, therefore, The Camden

and Atlantic Land Company had any claim to the land as it contends, both it and its successor and assignee, the present plaintiff-appellant, covenanted to defend the present defendant-respondent against such claim.

In connection with the effect of the covenant of general warranty, it is important and interesting to note the difference between the warranty as contained in the deed in the present case (State of Case, p. 72, l. 26—p. 73, l. 4), which is in the following language:

> "And the said The Camden and Atlantic Land Company do by these presents covenant, grant and agree to and with the said The Camden and Atlantic Rail Road Company, their successors and assigns, that the said Company, all and singular, the hereditaments and premises hereinbefore described and granted or mentioned or intended so to be, with the appurtenances, unto the said The Camden and Atlantic Railroad Company their succesors and assigns; against the said Company and their successors and against all and every person or persons whatsoever, lawfully claiming or to claim the same or any part thereof, by, from or under them or any of them, shall and will by these presents warrant and forever defend."

and the general warranty clause in the deed under consideration in the case of *The Camden, etc., Co. v. W. J. & S. R. R. Co.* (92 N. J. L. 385), which is in the following language:

> "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 succesors and assigns."

It will be observed that the language of the covenant of warranty in the earlier case is practically a special warranty whereas the warranty in the present case is a general warranty.

In the case of *Ross v. Adams* (28 N. J. L. 160), it was held:

> "Although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were intended to translate the term children."

So in the present case, this covenant and general warranty conclusively shows that the grantors were warranting to defend the estate granted, not the estate granted with any subsequent conditions.

The plaintiff-appellant criticises our citation of *Ross v. Adams* on the ground that the same was reversed by the Court of Errors and Appeals on the point argued. We respectfully submit that the criticism does not effect the applicability of *Ross v. Adams* to the present case. We never contended that the covenant would do more than apply to the estate granted, but in the present case, the estate granted is an estate in fee. The plaintiff-appellant attempts to delimit the estate in fee by the *haben-*

dum clause, but the *habendum* clause is no part of the grant. Therefore, if the estate granted is an estate in fee, the general warranty applies to that estate. Under either the case of *Ross v. Adams* (28 N. J. L. 160) or *Adams v. Ross* (30 N. J. L. 505), the warranty attaches to the estate made or created by the granting clause and not by the estate made or created by the granting clause as delimited or debased by the *habendum* clause.

III.

RES ADJUDICATA.

In 1913, the Camden, Atlantic and Ventnor Land Company instituted a suit in ejectment against the West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company for the same lands mentioned in the two suits now pending before this Court, upon the same deed that is now in question, their claim being that it conveyed a base fee, and they were entitled to possession. Judgment was entered in favor of the West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company in that suit on the 10th day of July, 1913. Defendant-respondent contends that the judgment entered in that suit is a bar to plaintiff-appellant's claim for possession in this suit.

That the question decided in the first mentioned suit is the precise question that is contended for by plaintiff in this suit appears from the postea signed by the trial Judge, and of record in the clerk's office in said cause.

In considering the question of *res adjudicata,* the Court is not confined to the formal judgment for

ascertainment of the question decided, but may and will look into the pleadings and orders in said cause leading to the final judgment.

In the case of *Radford v. Myers* (231 U. S. Supreme Court, p. 725), wherein the question was whether or not the matter before the Court had been decided in a previous suit, Mr. Justice Day, at p. 730, said:

> "To determine this issue, we examine the judgment in the former case, the pleadings filed, and the issues made, and, if necessary to elucidate the matter decided, the opinion of the Court which rendered the judgment" (citing cases).

In the case of *Southern Minnesota Railway Extension Co. v. St. Paul, &c.* (55 Fed. Rep. 690), which was on a plea of *res adjudicata,* and the question was as to the point decided, the Court held:

> "On a plea of *res adjudicata,* where the former judgment was rendered, pursuant to the findings and conclusions of a Referee, the Court may examine the entire report of such Referee, as well as the pleadings, for the purpose of ascertaining what issues were in fact raised and decided, and upon what theory the former judgment proceeded."

This rule was followed in the Court of Chancery of our State in the case of *Mershon v. Williams* (31 Atl. Rep. 778), which was a case arising upon a lease, in which case there had been an action in ejectment resulting in a verdict in favor of the plaintiff. The suit in ejectment arose under the following circumstances:

Williams, the defendant in the above suit, was the plaintiff in the ejectment suit. He leased a

farm to Mershon, the complainant in the above suit, who was the defendant in the ejectment suit. The lease was for a term of one year. It contained a provision that the lessee might have four (4) additional years upon giving written notice, &c. The defendant, Mershon, served a notice that he would occupy the farm for the following year. Plaintiff, Williams, conceiving that this was not in compliance with the provisions of the lease, brought the suit in ejectment. In the determination of that suit, the law court decided the effect of the paper notice, and held that it was not in fulfillment of the terms of the lease, and was not, therefore, an exercise by Mershon of his right to occupy the premises for an additional term of four (4) years, and gave judgment in favor of the plaintiff, Williams. Williams thereupon brought a suit to recover mesne damages. The defendant, Mershon, filed a bill in the Court of Chancery, to restrain the suit, and set up that the notice which he gave was in compliance with the terms of the lease, or, at least, should be so considered in a court of equity. Vice-Chancellor Emery, on p. 779, says:

> "In the action of ejectment, the Supreme Court held that this notice was, in effect, a notice by the tenant that he did not elect to take the farm for the further term of four years, but for a lesser term, to which the lessor had not assented, and that the tenant had not availed himself of his privilege to retain possession under the lease. *Williams v. Mershon* (N. J. Sup. 1894) (30 Atl. 619). This decision is a construction by the Supreme Court as to the effect of a notice of this character upon the tenant's option, and the respective rights of parties under a lease of this kind, which is binding in equity as well as in law; and it is,

moreover, in the present case, an actual adjudication between these parties, which settles the question of the effect of the notice between them for all purposes, so long as the judgment remains unreversed."

The Court further held:

"The defenses which were considered or admissible in the Court of Law in the action of ejectment, and which were there decided against the complainants, cannot be reconsidered here on bill for injunction to restrain the action for mesne profits."

In the present case, the record of the former suit, attached to and made part of the stipulation in this case, shows that the suit was an action in ejectment, brought by the same plaintiff, to wit: The Camden, Atlantic and Ventnor Land Company, against the same defendants, to wit: West Jersey and Seashore Railroad Company and Atlantic City and Shore Railroad Company, to obtain possession of the same lands. In that suit, there was a verdict directed in favor of the defendants.

As will appear from the pleadings and postea in the former suit, the question was whether or not the deed from The Camden and Atlantic Land Company to The Camden and Atlantic Railroad Company, which is the same deed involved in this suit, conveyed an absolute unqualified fee simple title, or whether it conveyed a base or conditional fee.

In the postea, upon which the judgment in the former suit was based, Circuit Court Judge Carrow did "Adjudge that the deed of conveyance from Camden and Atlantic Land Company to Camden and Atlantic Railroad Company, aforesaid, was a conveyance in fee, and that defendant, West Jersey

and Seashore Railroad Company, held said lands in fee simple'' (State of Case, p. 98).

The deed was, in the pleadings in the former case, an admissible document. The character of the estate conveyed thereby was in issue, and its determination was necessary for the proper solution of the case.

The finding by the Court that the deed in question conveyed a fee simple title, therefore becomes *res adjudicata* in the present case.

Whether the determination of the Supreme Court in the previous case between these parties was correct or erroneous, is of no moment in this suit. That judgment remains unreversed and in full force, and therefore, declares the law as between these parties.

In the case of *Manley v. Mickle* (53 N. J. Eq. 55), where the question was as to a decree entered in a certain mortgage matter, the Court held that a decree establishing liability in the grantee, although erroneous, was conclusive so long as it remained unreversed.

The plaintiff-appellant objects that the only thing that one can look to in determining the question of *res adjudicata* is the judgment itself. This is not so, as will appear by the cases above cited. But, if it be so, how then can the plaintiff-appellant bring into this case what was in issue in the former case? The postea upon which the judgment was entered affirmatively determined that the deed granted an estate in fee simple. There was no appeal from this determination. The real point is in determining whether or not the plaintiff should have prevailed in the former suit; Judge Carrow was required to find whether the deed conveyed an estate in fee simple or a base or determinable fee. Had he determined that the estate was a base or determinable fee, the judgment would have been in favor

of the plaintiff. He having decided that the estate created was one in fee simple, he directed that a judgment be entered in favor of the defendant. The issue decided in that suit was whether or not the deed created an estate in fee simple or a base or determinable fee. That issue must have been made by the pleadings, and the evidence adduced at the trial, otherwise the Court could not have so determined. In the further discussion of this point, let us assume that the plaintiff at the trial in the former suit proceeded upon the theory that the deed created a base or determinable fee and that the condition had been broken. The defendant replies that (1) the deed created an estate in fee simple, (2) that if it did not create an estate in fee simple, that, nevertheless, the condition was not broken.

Upon the issues thus presented, the Court must logically determine (1) the character of the estate granted (2) if the estate were a base fee, whether the condition upon which it depended had been broken. In the case tried by Judge Carrow affecting the lands in question, he determined that the estate granted was in fee simple; he was, therefore, not called upon to determine whether or not there was a breach of any condition. The plaintiff was apparently satisfied with the Court's determination for it took no appeal. The plaintiff, had it been dissatisfied with the Court's decision as to the character of the estate granted, could have taken an appeal, and if the Court of review had determined that the estate granted was a base fee, the record would have been remitted to the trial Court to determine the issue left undecided, namely: whether the condition had been broken.

IV.

PART OF THE LAND CONVEYED STILL BEING USED FOR RAILROAD PURPOSES, THERE CAN BE NO FORFEITURE OF ANY PART.

The plaintiff, in its brief, contends that the forfeiture, if there be one, extends to the entire tract and cites in support of this proposition *Baltimore, N. Y. R. R. Co. v. Bouvier.*

We protest that the case cited does not support plaintiff's contention. In that case, there was a conveyance by Bouvier's predecessor in title to the Baltimore, N. Y. R. R. Co. of an entire tract of land, of approximately three and one-half acres, the description of which showed a strip of land one hundred feet in width, extending across the land owned by the grantor, and at one end a widening out of this strip to a greater width in order to provide for the location of the railroad station. The conveyance was subject to several conditions, among which was the construction and maintenance of a two-track railroad across the land in question. The condition provided that if the railroad were not constructed, the title would revert to the owner, his heirs and assigns. The two-track railroad was not built. A suit was brought by Bouvier, the successor in title to the original grantor, basing his right to possession upon the failure of the railroad company to construct its two-track railroad in accordance with the terms of the deed. The railroad company contended that obviously, the two tracks were to be constructed over and along the 100-foot strip, and the failure to construct such two tracks

could only result in a forfeiture of the 100-foot strip, upon which the two tracks were to be located, and not to that portion of the land outside and adjoining the 100-foot strip designed for a railroad station. The Court held that the conveyance was of the entire tract of land, and the failure to perform any one of the conditions must necessarily result in the forfeiture of the entire tract of land because the condition attached not to any particular portion of the land but to the entire tract.

The situation in the case at bar is the exact converse to the one presented in the Bouvier case. In the present case, there was a conveyance of an entire strip of land. If the *habendum* clause has the effect contended for by the plaintiff, which, of course, we deny, then the grant was to the railroad company "so long as the same shall be used by said railroad company for railroad purposes."

The stipulation in the present case shows that after the conveyance to the Camden and Atlantic Railroad Company, the land was divided by a street running at right angles to Atlantic Avenue. The eastern portion of the lot thus divided was sold to the City of Ventnor, and it has now erected thereon a city hall. The westward portion continues to be occupied by a railroad track, and a railroad waiting room for passengers intending to use the cars of the Atlantic City and Shore Railroad Company, lessee of the West Jersey and Seashore Railroad Company. The track upon this land leaves the westbound track of the railroad in front of the land now owned by the City of Ventnor, and runs diagonally across the street above referred to, and upon the western portion of the lot conveyed to the Camden and Atlantic Railroad Company, and thence diagonally across this lot to a point near the northwest corner thereof, where it

forms a loop, returning to the eastbound track of the railroad on Atlantic Avenue.

In the *Bouvier* case, it was held that the condition attached to the entire lot, that is to say: that the title to the entire lot depended upon the performance of the condition. Applying that test to the present case, the title to the entire lot conveyed by the Camden and Atlantic Land Company to the Camden and Atlantic Railroad Company is conditioned upon its use for railroad purposes. In view of the fact that a portion of this land is used for railroad purposes, there has never been a failure to use the land for railroad purposes. It is manifest that the entire tract of land need not be used for railroad purposes, for in the case of *Camden, Atlantic and Ventnor Land Company v. West Jersey & Seashore Railroad Company* (the former case involving this same land), the tract of land now owned by the City of Ventnor was unoccupied either by tracks or any other railroad structures. It was obviously not being used for any other purpose except insofar as that use was evidenced by the use of the eastern portion of that lot. The division of the lot by the street established subsequent to the conveyance could not affect or change in any manner whatsoever the deed conveying the land or the title thus conveyed.

In the case of *McKelway v. Seymour, et al.* (29 N. J. L. 321), the Court held:

> "Where land is conveyed to be used for a certain purpose, with a clause of forfeiture if it cease to be used for the object specified, it is no ground of forfeiture if the land is used for other purposes, provided it is also used for the purpose for which it was conveyed."

In the above case, the land had been conveyed

for a tow path and canal, with the express condition that if it should not be used for that purpose, it revert to the grantor. The proof showed that the land thus conveyed was used for other purposes. The Court held that notwithstanding this fact, the lands were also used for the purposes mentioned in the deed, and the use for other purposes would not amount to a forfeiture.

In the case of *Camden, Atlantic and Ventnor Land Co. v. W. J. & S. R. R. Co.* (92 N. J. L. 385), the Court pointed out that it was not necessarily foreign to railroad use that the property was sold. At page 389, the Court said:

> "It may be true, as is argued on behalf of the respondent, that the conveyance of these lands by the railroad company to third parties was a perpetual abandonment of their use for railroad purposes, and that such action was a violation of their contract as exhibited in the deed. We notice, however, that the first section of the charter of the Camden and Atlantic Railroad Company authorizes it to purchase, hold and *convey* lands necessary or expedient for the objects of its incorporation (P. L. 1852, p. 263); and it may well be that under proper circumstances a conveyance of land already acquired by it is an act done in the execution of the purposes for which the company was created." *Italics, the Court's.*

Can it be said in the present case, having in mind that a large portion of the land is still being used for railroad purposes, and the remaining part of the land was sold for municipal purposes under charter and statutory power, that there has been a forfeiture of any portion of the lands so used? As-

suming for example that the land instead of being sold to the City of Ventnor was leased to that city, would the Court not hold that until the entire tract of land ceased to be used for railroad purposes that the reversioner could not dispossess the tenant even though such tenant might not be using the land for railroad purposes?

Upon this phase of the case, we submit that so long as any portion of the land is used for railroad purposes, there is no breach of any condition subsequent, nor of any provision in the *habendum* clause limiting the estate granted.

We respectfully submit that there was no error committed by the trial Court in rendering a verdict in favor of the defendant, and that the appeals in these cases should be dismissed for the reasons herein discussed.

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