

New Jersey Court of Errors and Appeals. 10

NANCY M. MILLER, Defendant in Error,	}	On Contract.
vs.		
RUTH E. DENNIS and THOMAS L. DENNIS,		
Plaintiffs in Error.		

20

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

On the 11th day of November, 1891, two written agreements were entered into by the parties to this action, exhibit A, page 28, and B, page 31 of the printed case. 30

Exhibit A being a lease, in which the plaintiff was lessor, and the defendants were lessees; by its terms a tract of land was let for the term of ten years, with the right of two renewals for a like period; the rent reserved was two hundred dollars a year, payable semi-annually, also taxes and premiums for insurance.

Exhibit B was made to protect the lessees "in regard to the terms and of said lease;" by it the lessor and her husband were given the right to alter and improve the buildings, and to cultivate portions of the 40

land, with the consent of the lessees; to own and occupy the buildings or portions of buildings erected as though the premises were not leased; that in build- or remodeling, the defendant, Thomas L. Dennis should keep an account of the work he might do and *be allowed* for it at the rate of two dollars per day, but so long as the said Nancy M. Miller remained in possession, no payment should be exacted or expected. The agreement further recited that if from any cause
 10 the property should be sold while the lessees were *still in possession*, the profits on the sale of the land, after paying the lessor her advancements, and the said Thomas L. Dennis what was due him, should be equally divided between the lessor and Ruth E. Dennis; that if the lessor should wish to dispose of the property, the lessees should have the first option to buy at a fair valuation; that in case of the death of the lessor, they should have the right to purchase; that if any differences should arise, as to the fairness or justice of any point not provided for it should be sub-
 20 mitted to arbitration.

In March, 1896, the parties entered into a verbal agreement, under which the possession of the property was surrendered; the rights and privileges contained in the above contract given up, and the rent then due amounting to about six hundred dollars, released; the amount earned by Thomas L. Dennis, amounting to \$545, was also released.

In the spring of 1901, an action was commenced by the plaintiff to recover the unpaid rent; the defense
 30 interposed and proved, was that during the winter preceding the first of April, 1896, the plaintiff becoming dissatisfied with the condition of affairs, suggested that the defendants surrender the lease, and allow her to put in other tenants; that the defendant Ruth was reluctant, because that would mean the loss to her of any profit arising from a sale, which was contingent upon her remaining in possession; that after negotiations extending over some considerable time, it was agreed between the parties that if Mr. Dennis would waive any right he had to the payment of \$545, and
 40

the defendants would abandon any claims under the contract, exhibit B, and surrender the possession of the lands, and all rights under the lease, that the plaintiff would release them from any claim which she had for unpaid rent; that acting on this agreement, the defendants surrendered the property, and all rights under the lease and contract, and the plaintiff released her claim for rent; and that no claim was made against them from that time until the commencement of this suit in 1901.

This defense the trial justice overruled and directed¹⁰ a verdict for the plaintiff, on two grounds.

First. That it was not a payment, because it was an attempt to alter the terms of a written contract by parol.

Second. That it was not an accord and satisfaction, because there was no consideration to sustain it.

We submit this ruling was erroneous.

20

I.

The compromise and surrender of mutual obligations did not vary or alter the terms of a written contract in any manner forbidden by law.

Satisfaction of an agreement under seal is often made in a manner different from that stated in the obligation; the obligee may agree to accept in satisfaction, services, merchandise or other valuable consideration; when he does so, he has in law changed his situation, and made an implied agreement not to sue on the original cause of action; the giving up of this right is a good consideration.

30

Union Locomotive Co. v. Erie R. R. Co., 8 Vr. 30.

A voluntary compromise without fraudulent representations will not be set aside.

Ackerman v. Ackerman, 15 Vr. 174.

40

The claims given up by the defendants were substantial.

First. The immediate possession of the land without litigation. The right of the plaintiff to possession, because of a breach of some of the conditions of the lease cannot be assumed in this proceeding; the defendants in order to preserve their rights, might have paid the rent claimed to be due; *they might have insisted on their right to arbitration*, or set up other defences.

Second. There would be due to the husband \$545 whenever the plaintiff parted with her possession, at any time, under any conditions, whether the defendants were in possession or out of possession, or, as stated in the next succeeding paragraph, if sold while the defendants were in possession, the sum due him was to be provided for before any division of the proceeds of sale was made as therein provided.

Third. Ruth E. Dennis would be entitled to one-half the profits of a sale of the farm, if sold while in possession.

At the time this settlement was made, this situation existed. The defendants owed the plaintiff about six hundred dollars rent. On the other side was the debt due the husband, to mature under certain conditions almost certain to exist in the future; there was the right to participate in the profit of a sale if they remained in possession; the means of ascertaining the profits was fixed, the cost of the property was to be, the advances made by the plaintiff, to which was to be added the amount earned by the husband, all above that was profit in which the parties were to share equally; there was the right to two renewals of the lease; there was the present possession, for the right of the plaintiff to possession at that time could not now be determined in this suit, there might have existed at that time a defence legal or equitable to the

right of the plaintiff to the possession. The parties meet and by agreement say on the one side, I will give, on the other side, I will accept, all of these claims in payment of the rent. Manifestly this is a settlement of conflicting claims, which the law ought to recognize unless some fraud has been practiced; it is not the settlement of a liquidated debt for less than the amount due, it is not a payment in kind, but a surrender of rights claimed on the one side, and the avoidance of possible litigation.

The rent was due from April 1, 1893, to April 1, 1896. There is no dispute but that the husband had earned five hundred and forty-five dollars, the payment of which was postponed until the plaintiff should part with her possession; the equitable amount due was small and not an unreasonable amount to be allowed in compromise for the right to an immediate possession.

We submit that the trial justice erred in his interpretation of the rule established in *Oliver v. Phelps* 1 Zab. (597) 610, when he attempted to distinguish it from the present cause upon the ground that in the *Oliver* case the parol agreement to pay otherwise than as stated in the sealed instrument was contemporaneous with the writing, for the Court in line 15, page 611, stated that this objection was made in that case, and disposes of it as follows: "We do not see that this circumstance varies the case in the least. It is the services rendered and their acceptance in satisfaction that concludes the defendant."

30

II.

The consideration for an accord and satisfaction was ample.

Any legal right or interest received or released is a good consideration.

Line v. Smalley, 9 Vr. 361.

Conover v. Stillwell, 5 Vr. 54.

40

The fact that the defendant Thomas was entitled to be paid whether in or out of possession whenever the plaintiff below went out of possession was ignored.

The payment of the amount due Thomas did not depend upon his being in possession. The trial justice took the position that (see page 28 line 15 of the printed case) "the claim for services was one which could not be enforced until a certain time if the tenants remained in possession, and the very fact of their
 10 giving up possession rendered it impossible for them to ever enforce that claim." A reading of the contract shows that it ought not to be so interpreted; it provided that Thomas should be *allowed* for his services, but that so long as the property remained in the possession of the plaintiff no payment should be exacted or expected; this is the end of the sentence. The possession of the tenants was the possession of the plaintiff, they were holding under her, and if no allowance was to be made while the tenants were in possession, nor, as the Court below held, when they
 20 were out of possession, the contract for services would have been a nullity. The next succeeding clause which perhaps influenced the trial justice does *not* say that Thomas is not to be paid unless he is in possession when the property is sold; that is a distinct clause standing by itself, having for its object to protect Ruth in her right to participate in the profits, which right only remained to her if the property was sold while she was in possession, and the payments provided for in this clause were put there in order to fix
 30 the cost of the property, not to provide for the maturity of any claim.

Here were two distinct agreements. Thomas was to work, keep an account of his work and be allowed for it whenever the plaintiff parted with her possession. The other agreement was that if the property was sold while these tenants were in possession, Ruth was to have one-half the profits on the sale, the profits being all that might be received beyond the cost as fixed in this clause.

As above stated the contract distinctly, and in a
 40

sentence standing alone, provided for the payment should the plaintiff go out of possession; this right remained whether the defendants were dispossessed or not. The agreement provided for a joint possession or occupancy of the property, the plaintiff had the right to occupy part of the land, and to erect buildings thereon, and so long as she retained possession, the debt of \$545 was not to be exacted, but that right would remain even after the tenants had left. It was a claim that could be enforced whenever the condition existed which provided for its maturity, and it was a debt which the plaintiff might want to adjust and dispose of before maturity; the settlement before maturity was a sufficient consideration for the accord and satisfaction of this claim. 10

Immediate possession was a good consideration.

We insist that the Court below was in error when it held that the landlord was entitled to such possession by the terms of the lease and by the agreement entered into at the same time. 20

We were not trying the question as to the right to possession, but whether any rent was due. That question was just as much at issue when the parties surrendered possession as it was on this trial. The court could not say as a matter of law that when this agreement was made the plaintiff was entitled to possession; her right to the possession was then disputed and was made the subject of a compromise, for however ill-founded the claim of the defendants might be, they were in possession, and the right of the plaintiff to possession was a different matter from her actual possession, and this she recognized, for assuming as we must on this argument the truth of the claim of the defendant, the plaintiff was willing to negotiate with reference to it. 30

If possession was not acquired promptly the defendants might pay the rent, and retain the right to share in the profit of a sale. To remove these tenants by legal proceedings meant delay and expense. To avoid

all this, to extinguish her liabilities, whatever they might be, the agreement was made to release the defendants from further payment of rent, and to be released from a claim possible to ripen into a right to be paid \$545.00 in the future; the agreement was acted on by the defendants and the plaintiff, and for nearly six years acquiesced in by both parties.

A parol agreement after breach may be made by way of accord and satisfaction.

10

Neldon v. Smith, 7 Vr. 156.

Herzog v. Sawyer, 61 Md. 344.

A benefit accruing to the promisor, or a loss or disadvantage sustained by the promisee is a sufficient consideration.

Day v. Gardner, 15 Stew. 202.

20 A very slight disadvantage to one party, or a trifling inconvenience to the other is a sufficient consideration.

Traphagen v. Voorhees, 17 Stew. (21) 31.

30 The surrender of the benefits of the contract waived other rights, viz: the right to two renewals of the lease; the right to have the first option to purchase; the right to purchase after the death of the lessor, at a fair valuation and appraisal; and the right to have serious differences of opinion settled by arbitration. All of these were advantages to the defendants which were given up in the compromise which was fully carried out and acted upon by both parties. The defence if believed by the jury worked an extinguishment of the plaintiff's claims, and its truth should have been passed upon by the jury.

J. J. BERGEN,

Att'y for Plaintiffs in Error.

New Jersey Court of Errors and Appeals. 10

NANCY M. MILLER, Defendant in Error, vs. RUTH E. DENNIS and THOMAS L. DENNIS, Plaintiffs in Error.	}	On Contract.	20
---	---	--------------	----

DEFENDANT'S BRIEF.

This is an action founded on the covenants of a lease to recover arrears of rent, also taxes and insurance premiums paid by the landlord.

The lease is under seal, dated November 11, 1891, 30 made by Nancy M. Miller, defendant in error, to Ruth E. Dennis and Thomas L. Dennis, plaintiffs in error.

The terms of the letting are also evidenced by a written contract under seal between the same parties bearing even date with the lease.

The lease is marked Exhibit "A," and the contract marked Exhibit "B" for the plaintiff.

The tenants were in possession of the demised premises from the date of the lease until March 1, 40

1896, when, being three years and four months in arrears for rent, besides owing considerable for taxes and insurance, the landlord demanded and obtained possession. The amount due at that date is a mere matter of calculation from the undisputed evidence of the plaintiff (p. 9) as follows:

Rent Nov. 9, 1892, to March 1, 1896, \$200 per	
10 annum	\$658 33
Remitted by landlord.....	40 00
	\$618 33
Interest, 20 months.....	61 83
Taxes, 1894, \$9.12 (1-2).....	4 56
Taxes, 1895, \$7.50 (1-2).....	3 75
Insurance paid by landlord, 1892.....	18 60
Insurance paid by landlord, 1893.....	13 88
Insurance paid by landlord, 1895.....	23 25
20	
	\$744 20

The contract (Ex. B) above referred to, provided (p. 32) that Nancy M. Miller, or her husband, should have the right to make alterations and repairs on the leased buildings with the consent of the lessees. Then follows this clause: "Also that in building or in the remodeling of buildings, of all work which said Nancy M. Miller shall direct to be done, and
 30 which the said Thomas L. Dennis shall do, an exact account shall be kept and the sum of \$2.00 per day be allowed to said Dennis; but so long as the property remains in the possession of the said Nancy M. Miller, no payment of the same shall be exacted or expected. But if from any cause the property should be sold while said Ruth E. Dennis and her husband still have possession, all moneys and money value (including the \$2,000 mortgage if the same should have been paid) furnished by the said Nancy M. Mil-
 40 ler shall first be reimbursed.

Secondly. All dues for work or money spent in improvements by said Thomas L. Dennis as in foregoing clause indicated shall be met.

Thirdly. Any amount over and above these sums shall be equally divided between the said Nancy M. Miller and the said Ruth Dennis.

At the time the tenants vacated in March, 1896, Thomas L. Dennis had done work on the buildings under the contract, amounting to \$545.00, and the 10 defence to this action is that by a parol agreement which they claim was entered into between Ruth E. Dennis and Thomas L. Dennis, the tenants, and Nancy M. Miller, the landlord, Thomas L. Dennis gave up his claim to the \$545, and he and his wife their rights under the lease and contract, and Mrs. Miller in consideration thereof canceled her claim for the \$744.20 then due her under the lease.

Was there any evidence to go to the jury that such an agreement or any agreement between these parties was entered into? 20

In this connection it must be borne in mind that the rights of the tenants under the lease and contract were partly joint and partly several. The right of possession and of renewal were joint; the right to compensation for Mr. Dennis' work, if at all, belonged to him only and the right to participate in a portion of the proceeds of the sale of the premises, under certain conditions, was in Mrs. Dennis only.

Both tenants, as well as the landlord, must therefore be parties to any such agreement. 30

Mrs. Dennis' version of the alleged agreement is found at the bottom of p. 16 as follows:

Q. Did you leave that place under any agreement with Mrs. Miller? A. Yes, sir.

Q. Will you tell what the agreement was? A. We had several conversations.

Q. Just tell the agreement? A. Mrs. Miller requested us to leave the place, and we being loath 40

at first to do so, finally agreed to leave on this condition, that as we owed her and she would have owed my husband if we had remained, we agreed if we gave up the property, gave up the contract, gave up his work that would be due if we could have remained; resigned all that, it was balanced (squared up) with what we owed her. It was not figured to a dollar, but it was put in a lump in that way, and that is the way we settled.

10

Of course this alleged agreement so far as it affected her husband's claim, and to his rights under the lease, was of no binding force unless he was a party to it, or at least concurred in it.

Is there any evidence of an agreement and assent in the minds of all the parties, including Thomas L. Dennis, to the same identical proposition?

All that Thomas L. Dennis agreed to, if anything, is stated at pages 22 and 23 as follows:

20

Q. At and about the time you and your wife were leaving the place, before that did you have any talk with Mrs. Miller with reference to the agreement under which you were to leave, and if so, state what it was? A. I did.

Q. Now state it? A. Sometime after the talks between Mrs. Miller and Mrs. Dennis as to this agreement to leave, Mrs. Miller paid a visit to Pin Oaks, as we called it, and I then spoke to her privately, and
30 asked her if Mrs. Dennis and herself had come to any arrangement with regard to our leaving there. She said it was understood. I asked her if it was not possible for me to forego my claim against her for this work, and allow us to stay somewhat longer. She said no, she could not do it; she would not do it. I said, "is this all that we are expected to get from this property, this home that we are going to leave now; is this all that we are expected to get that we are going to leave without any indebtedness to you?"
40 Well, she said, she supposed that was the way it

stood. That was the end of the conversation; I had nothing further to say.

Then on cross-examination, page 23:

Q. Were you a party to that agreement? A. A party? Only in the way I have stated.

Q. That is that afterwards you had a conversation with her as you say? A. Yes, sir.

10

This is practically all of Dennis' testimony; and it shows nothing, either in expressed terms or by implication, in the nature of a contract on his part. He certainly does not make himself a party to his wife's alleged agreement, although his attention was called expressly to that point when on the stand; he does not even show that he knew that any agreement had been entered into, for the first question he asked Mrs. Miller was, had Mrs. Dennis and herself come to any agreement with regard to their leaving.

20

He tries to induce Mrs. Miller to agree that he forego his claim for work, and allow them to stay somewhat longer, which she positively declined to do.

This is the only testimony on his part that in reality has any reference to an agreement.

There is no contract unless the parties thereto assent; and they must assent to the same thing in the same sense.

1 Parson's Cont., 7th Ed., p. 505.

30

The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions.

Do., p. 507.

1 Addison Cont., p. 15.

Admitting that an agreement, such as Mrs. Den- 40

nis has testified to is proved, can a liquidated, undisputed debt, due on a sealed contract be satisfied in that manner?

If it can, where is the safety and protection with which an obligee is supposed to be guarded by reason of the solemnity of the execution of an instrument under seal, especially where there are two or more obligors.

It is true that it has been held that an executed
10 parol agreement on a sufficient consideration may operate to discharge the stipulations of a sealed contract.

Day v. Gardner, 5 Stewart 199.

Olivers v. Phelps, Spencer 180.

Sell v. Steller, 8 Dick. 399.

Reynolds v. Silvers, 2 Harrison 279.

In all such cases, however, the parties have estopped themselves to deny the satisfaction by work and
20 labor performed, tearing the seals off the obligation, payment of money, etc., but here nothing has been done to have such effect. Neither the leases nor the contract have been surrendered or destroyed. There is no assignment by Mr. Dennis of his individual claim, nothing in fact has changed hands except the possession of the demised premises, and that was by virtue of a right established by the lease itself entirely independent of the alleged agreement.

Where the obligation to pay is still in the
30 hands of the obligee, nothing short of a technical release is a good plea in bar of the original claim.

Reynolds v. Silvers, 2 Harrison 279.

Admitting that such an agreement as Mrs. Dennis has testified to, is proved, what was the consideration moving Mrs. Miller to make the accord binding?
40

Why, they say they gave up not only the possession, but also all their rights under the contract and under the lease.

What rights did the Dennis' have in the premises in March, 1896, which they could turn over to Mrs. Miller or extinguish as a consideration for an accord and satisfaction of the rent?

The lease is dated March 11, 1891, for ten years,¹⁰ so that in March, 1896, there were five years and eight months of the term unexpired. It gave the tenants, under certain conditions, the right of renewal, and an option to purchase. The contract referred to allowed two dollars per day to Thomas L. Dennis under certain conditions, for his work on the buildings. It also gave to Mrs. Dennis, under certain conditions, a right to share in a portion of the proceeds of the sale of the premises.

20

The lease and the contract being executed at the same time between the same parties, and both relating to the same matter together, form the contract of letting under consideration.

Now, while it may be argued that the tenants' rights are not extinguished, except by actual entry by the lessor, and that at the time of the making of the alleged agreement they were still in possession,³⁰ the landlord by the terms of the lease having warned the tenants out, and thereby notified them of the exercise of her option to terminate the tenancy for failure to pay the rent, had a right to recover immediate possession, and therefore, when the tenants vacated they gave up nothing to which the landlord was not entitled. Had the lessees been in a position to pay up the back rent and hold the premises, the case would have been different, but they acknowledged their inability to do so.

40

It may be said that the non-payment of rent is a breach of a covenant only, and does not end the term. The answer is that it is a breach of covenant that authorizes the lessor to recover possession and put an end to the tenancy.

All the tenants' rights under the contract of letting, fall together if they lose the right of possession, and any conditions which they undertake to impose on the landlord before doing what they are legally obliged to do even though agreed to by the landlord, are of no binding force so far as she is concerned, because of lack of consideration.

It is the present right of the lessor to enter and not the actual entry which deprives the alleged acts and agreements of the lessees of value, and thereby form a valid consideration for a promise to cancel the rent.

20

The accord must appear to be advantageous to the creditor, and to be something to which he had before no title, otherwise it can be no satisfaction.

Note to *Cumber v. Wane* 1st, *Smith Lead Cases*, pp. 618.

To give a consideration value sufficient for the support of a promise, it must be either such as deprives the person to whom the promise was made of a right which he before possessed, or else conferred upon the other party a benefit which he would not otherwise have had.

Conover v. Stillwell, 5 *Vroom* 54.

Isham v. Therasson, 8 *Dick.*, p. 10.

Tulane v. Clifton, 2 *Dick.* 353.

What rights were the tenants deprived of by this alleged agreement?

40

They were obliged to get out whether they made the agreement or not.

If a tenant is in arrears for rent, which thereby entitles his landlord to resume possession, surely the agreement of the tenant to vacate could not be a consideration to support a promise on the part of the landlord to cancel the rent.

What benefit accrued to Mrs. Miller by the alleged agreement which she would not otherwise have had? 10 She gained nothing, and the tenant certainly lost nothing.

Had Mrs. Miller brought an action to recover possession, no rights which the tenants had under the lease could have been advanced to dispute her claim.

The payment of a less sum in satisfaction of a larger one is no satisfaction.

Chambers v. Niagara Ins. Co., 29 Vroom 216. 20
Murphy v. Castner, 5 Dick. Ch. at p. 230.

Under the plea of accord and satisfaction it cannot be considered as a payment pro tanto.

To constitute an accord and satisfaction, there must be a satisfaction of the entire debt so as completely to extinguish it.

Line v. Nelson, 9 Vroom 358. 30

The claim of Thomas L. Dennis cannot be offered under the plea of set off, because the rent is a joint debt, whereas his claim would, if ever, be due to him individually.

An agreement in a lease that the landlord will pay for buildings erected on the demised premises, or renew the lease, cannot be enforced by injunction against summary proceedings brought by the land- 40

lord for non-payment of rent; the tenant's right to compensation being dependent on the performance of his covenant.

Payne v. Trinity Church, 7 Hun. 89.

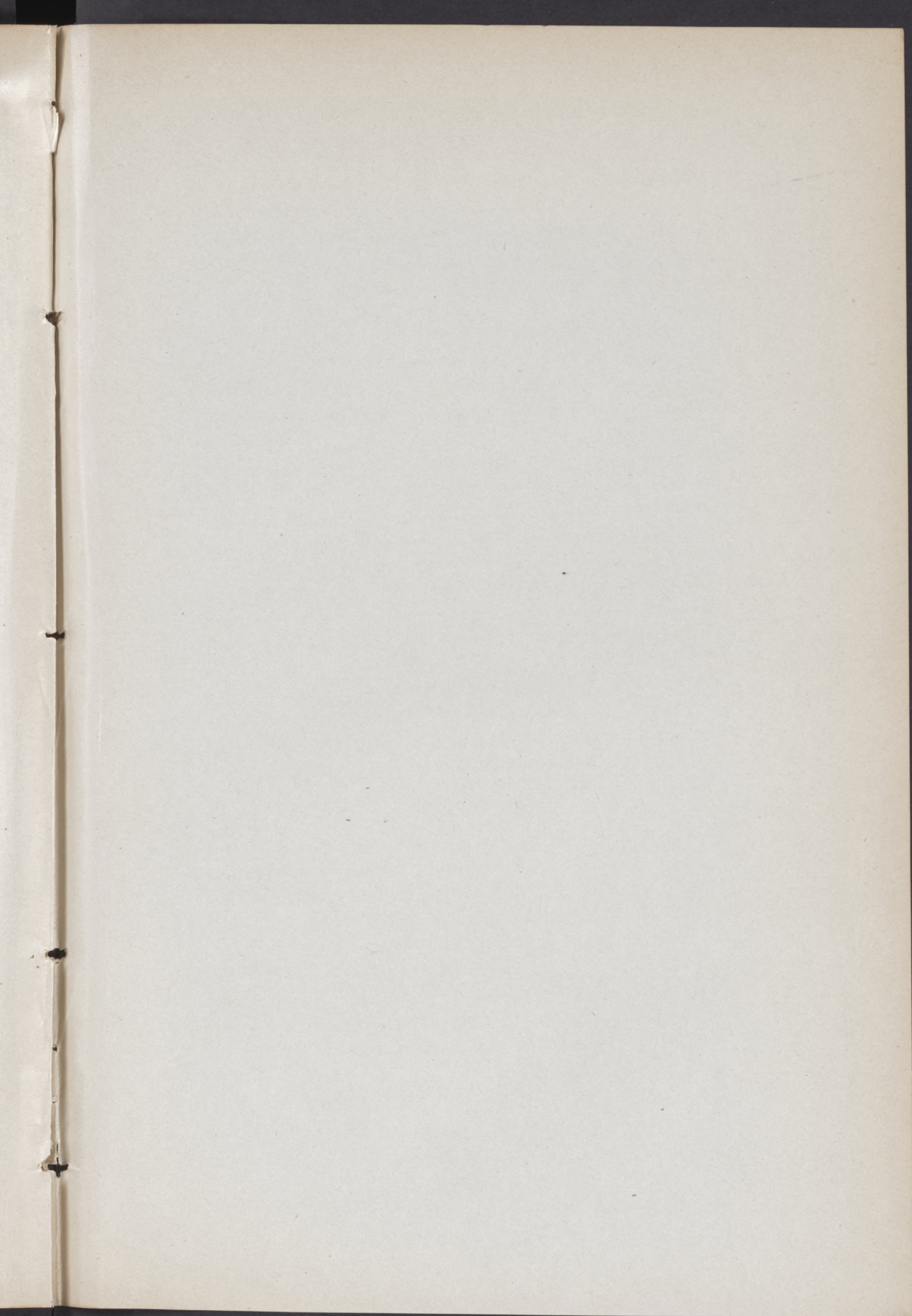
In *Day v. Gardner*, 15 Stewart 199, a mortgagee agreed to reduce his mortgage from \$900 to \$500, provided the mortgagor paid the back taxes, then 10 about five years in arrears on the mortgaged premises.

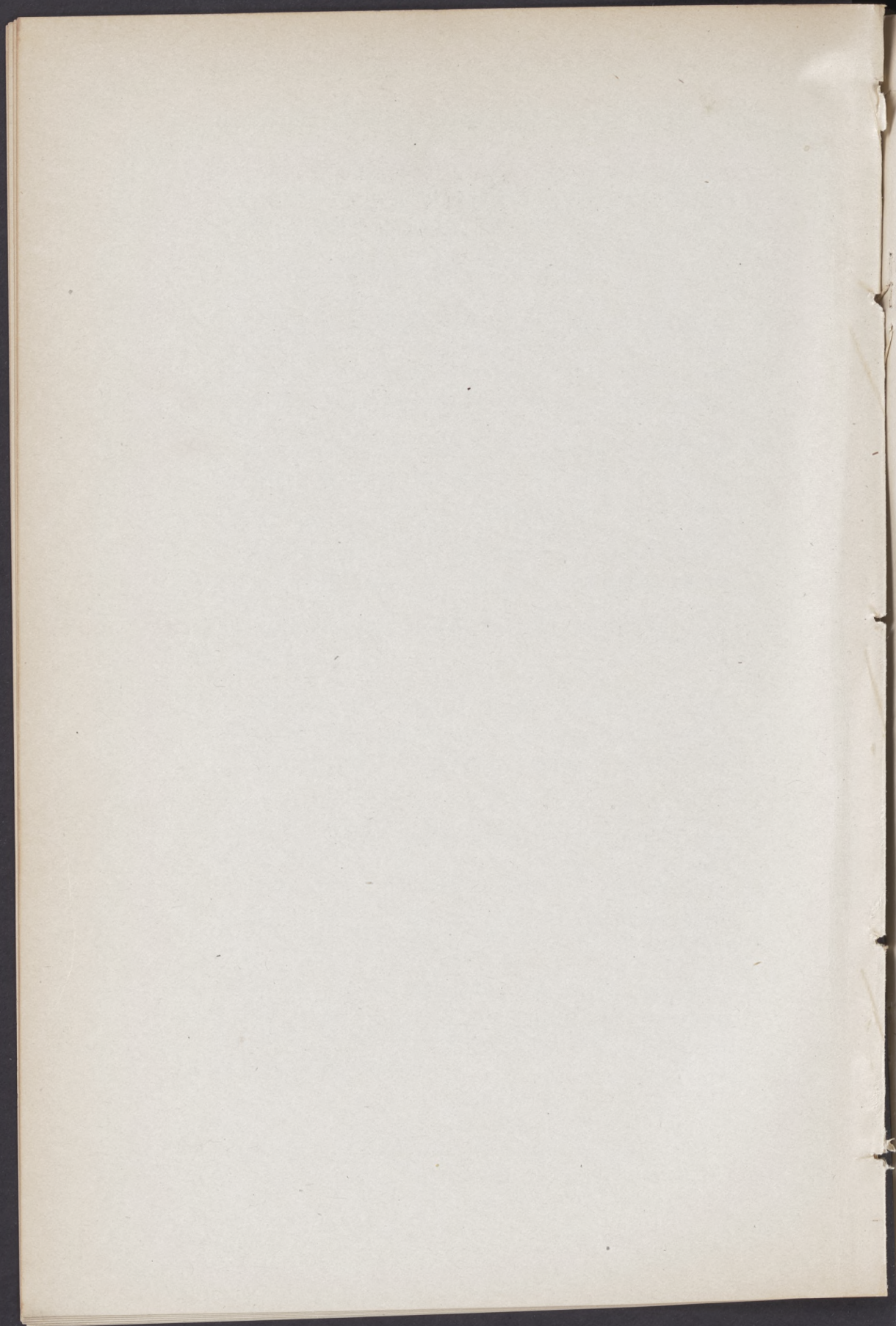
Van Fleet v. C., held that this was a good consideration because the taxes were a prior lien to the mortgage, and were not a personal debt of the mortgagor. He says (p. 203) "the payment of the taxes therefor remove liens standing prior to the mortgages and thus gave the mortgagee an additional or better security. Her debt was made more secure, a substantial benefit accrued to her from the payment 20 of the title."

This case is somewhat in line with those cases which hold that the giving of a note with additional security for a smaller sum may satisfy a larger obligation.

The New Jersey decisions follow more closely the ruling laid down in *Cumber v. Wane*, 1st Strange 426, than New York, (see *Chambers v. Niagara Ins. Co.*, above cited). Compare *Tulane v. Clifton*, 2 Dick. 30 Ch. 351, with *McKenzie v. Harrison*, 120 N. Y. 260.

Exhibit "D" for plaintiff, p. 34, as printed, may be misleading. In the original there is a space at line 10 of about an inch to permit Mrs. Miller to sign (see p. 24, line 25).





RECORD.**DECLARATION.**

Somerset Circuit Court of the first day of June,
nineteen hundred and one.

Ruth E. Dennis and Thomas L. Dennis, the defendants in this suit, having entered their appearance in this cause, the plaintiff therein, Nancy M. Miller, by H. K. Gaston, her attorney, complains for that whereas the said plaintiff on the eleventh day of November, eighteen hundred and ninety-one at Somerville, in the County of Somerset, by a written lease under seal, then and there made between the said plaintiff of the one part, and the said defendants of the other part, demised to the said defendants certain messuages and premises with the appurtenances particularly mentioned and described in said lease, situate in the Township of Bridgewater, County of Somerset and State of New Jersey, to have and to hold the same to the said defendants for a certain term of years, for and during and until the full end and term of ten years from the ninth day of November, eighteen hundred and ninety-one, yielding and paying thereafter during the said term to the said plaintiff the yearly rent of \$200 (two hundred dollars) to be paid in equal semi annual payments.

And the said defendants did thereby covenant, promise and agree to and with the said plaintiff, that they, the said defendants, would well and truly pay to the said plaintiff the said yearly rent of two hundred dollars at the several times aforesaid, and that they would, during the term thereby created, well and truly pay unto the said plaintiff, her heirs and assigns the premiums for all contracts of insurance effected by the plaintiff during said term to insure the buildings then erected on the demised premises, against loss or damage by fire. And that they would pay and discharge all taxes of whatever kind or na-

ture as should, during the said term, be imposed upon said demised premises, or any part thereof; by virtue of which demise the said defendants entered into the said demised premises with the appurtenances, and were possessed thereof from thenceforth until the first day of March, eighteen hundred and ninety-six.

And the plaintiff avers that the said defendants have not, nor have either of them performed, fulfilled or kept anything in the said lease contained on their part and behalf to be performed, fulfilled and kept according to the tenor and effect, true intent and meaning thereof.

And the plaintiff avers that after the making of the said lease and during the said term thereby granted, a large sum of money, to wit, the sum of six hundred and eighteen dollars and thirty-three cents (\$618.33) of the rent aforesaid for the space of three years, one month and three days, ending on the day and year last aforesaid, and then last elapsed, became and was due and still is in arrear and unpaid to the said plaintiff.

And the plaintiff avers that after the making of the said lease and during the said term thereby granted, and during the period ending on the said first day of March, eighteen hundred and ninety-six, she laid out and expended large sums of money in premiums for contracts of insurance to insure the buildings then erected on the demised premises against loss or damage by fire, to wit:

On the first day of July, 1892.....	\$18 60
On the first day of July, 1893.....	13 88
On the first day of July, 1895.....	23 25

Whereof the said defendants then and there had notice, and whereof said plaintiff at the time aforesaid, demanded payment of the said defendants, yet the said sums last mentioned are still due and wholly unpaid to the said plaintiff.

And the plaintiff avers that after the making of the said lease and during the term thereby granted, and during the period ending on the first day of March, eighteen hundred and ninety-six, certain taxes were imposed upon said demised premises, to wit:

Ten dollars on the twentieth day of May, 1892.

Ten dollars on the twentieth day of May, 1893.

Nine dollars and twelve cents on the twentieth day of May, 1894. 10

Seven dollars and fifty cents on the twentieth day of May, 1895.

Of which said defendants then and there had notice, yet the said defendants had not, nor either of them, paid the said taxes or any part thereof, contrary to the tenor and effect, true intent and meaning of the said lease, and of the said covenants of the said defendants by them in that behalf so made as aforesaid, to wit, at Somerville aforesaid. 20

And for that, whereas, the said plaintiff on the sixteenth day of May, eighteen hundred and ninety-four, at Somerville, in the County of Somerset, by a certain other written lease under seal, then and there made between the said plaintiff, of the one part, and the said defendants of the other part, demised to the said defendants certain other messuages and premises with the appurtenances particularly mentioned and described in said last mentioned lease, situate in the Township of Bridgewater, 30 County of Somerset, State of New Jersey, to have and to hold the same to the said defendants for a certain term of years, to wit, for and during and until the full end and term of ten years from the ninth day of November, eighteen hundred and ninety-one, yielding and paying therefor from and after the fifteenth day of May, eighteen hundred and ninety-four, during the residue of said term, the yearly rent of thirty dollars (\$30) to be paid in equal semi-annual payments. 40.

And the said defendants did thereby covenant, promise and agree to and with the said plaintiff, that they, the said defendants, would well and truly pay to the said plaintiff the said yearly rent of thirty dollars (\$30) at the several times aforesaid, and that they would, during the term thereby created, bear, pay and discharge all taxes of whatever kind or nature, as should, during said term be imposed upon said demised premises, or any part thereof, by
 10 virtue of which demise the said defendants entered into said demised premises with the appurtenances, and were possessed thereof from thenceforth until the sixth day of March, nineteen hundred and one.

And the plaintiff avers that the said defendants have not, nor has either of them performed, fulfilled or kept anything in the said lease contained on their part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof.

20 And the plaintiff avers that after the making of the said lease last mentioned, and during the said term thereby granted, a large sum of money, to wit, the sum of thirty dollars (\$30) of the rent aforesaid, for the space of one year ending on the fifteenth day of November, nineteen hundred, then last elapsed, became and was due and still is in arrear and unpaid to the said plaintiff.

And the said plaintiff avers that after the making of the said last mentioned lease and during the said
 30 term thereby granted, and during the period ending on the sixth day of March, nineteen hundred and one, certain taxes were imposed upon the last mentioned demised premises, to wit:

Five dollars on the twentieth day of May, 1894.

Five dollars on the twentieth day of May, 1895.

Five dollars on the twentieth day of May, 1896.

Of which the said defendants then and there had no-
 40 tice, yet the said defendants have not, nor has either

of them, paid the said taxes, nor any part thereof, contrary to the tenor and effect, true intent and meaning of the said lease, and of the covenants of the said defendants by them in that behalf so made as aforesaid, to wit, at Somerville aforesaid. And so the plaintiff in fact saith that the said defendants (although often requested so to do) have not, nor has either of them kept the said covenants so by them made as aforesaid, but have broken the same, and to keep the same with the said plaintiff have 10 hitherto wholly neglected and refused, and still do neglect and refuse to the damage of the said plaintiff, of one thousand dollars.

And for that, whereas, the said defendants heretofore, to wit, on the first day of February, nineteen hundred and one, at Somerville aforesaid, were indebted to the plaintiff in one thousand dollars for goods sold and delivered by the plaintiff to the defendants at their request; and in the like sum for work done and materials furnished by the plaintiff 20 for the defendants, at their request; and in the like sum for money lent by the plaintiff to the defendants at their request; and in the like sum for money paid by the plaintiff for the use of the defendants at their request; and in the like sum for money received by the defendants for the use of the plaintiff; and in the like sum for interest for the forbearance by the plaintiff at the defendant's request, of money due and owing from the defendants to the plaintiff; and in the like sum for money due from the defen- 30 dants to the plaintiff on an account stated between them; the same to be paid by the defendants when they should be thereunto afterward requested. And the same remaining unpaid an action has accrued to the plaintiff to demand and have said moneys from the defendants, and therefore she brings her suit, etc.

H. K. GASTON,
Attorney of Plaintiff.

SCHEDULE.

Rent due on first lease, November 9, 1892, to March 1, 1896.....	\$658 33
Deduction of rent agreed upon.....	40 00
	\$618 33

10 Insurance premiums paid by plaintiffs, as follows:

Premiums on policy for 1892.....	\$18 60
Premiums on policy of 1893.....	13 88
Premiums on policy of 1895.....	23 25
	\$55 73

Taxes due under first lease as follows:

20 Taxes of 1892.....	\$10 00
Taxes of 1893.....	10 00
Taxes of 1894.....	9 12
Taxes of 1895.....	7 50
	\$36 62

Taxes due under second lease as follows:

Taxes of 1894.....	\$5 00
Taxes of 1896.....	5 00
30 Taxes of 1896.....	5 00
	\$15 00
Rent due on second lease.....	30 00

Judgment will be claimed at the proper time for the amount of the above rent, taxes and insurance, together with lawful interest thereon, respectively, until entry of judgment final, besides costs of suit.

H. K. GASTON,
Attorney of Plaintiff.

PLEAS.

First—General issue.

Second—Release and discharge.

Third—Accord and satisfaction.

Fourth—Payment with notice of set off.

Plaintiff's replication in usual form.

10 **New Jersey Court of Errors and Appeals.**

NANCY M. MILLER,
Defendant in Error,
vs.
RUTH E. DENNIS and THOMAS
20 L. DENNIS,
Plaintiffs in Error.

BILL OF EXCEPTIONS,

NANCY M. MILLER, the plaintiff, sworn.

Direct Examination by Mr. Gaston.

30 Plaintiffs' counsel offered in evidence lease—
Nancy Miller to Ruth Dennis—dated November 11,
1891; contract between Nancy Miller and Ruth
Dennis, dated November 11, 1891; lease Nancy Mil-
ler to Ruth Dennis and husband, dated March 16,
1894.

Q. Are you the owner of the property mentioned
in these leases? A. Yes, sir.

Q. What have you to say as to the amount of rent
40 due upon the lease dated November 11, 1891?

Mr. Bergen. What property, lower or upper?

Mr. Gaston. That is the lower property.

Q. What rent, if any, is due upon that lease? A. \$600.

Q. Can you tell from what period it is due? A. From 1891, November, 1891, to 1896, in March, March, 1896. There was only \$200 paid; it was to be \$200 a year.

Q. So that there was \$200 paid—? A. And there 10 was \$40 that I remitted, that I gave to the party without any charge or remuneration.

Q. The rent, then, from November 11, 1892, to March, 1896, is unpaid? A. Unpaid, excepting the \$40 that I remitted.

Q. I show you two tax bills, one for 1894, and one for 1895, will you tell the jury what property is taxed by those bills. A. The two places.

Q. The upper and lower, both? A. The upper 20 and lower, both.

Q. Has that tax been paid by Mrs. Dennis or Mr. Dennis—or who paid the taxes? A. I did.

Q. Have the Denises paid you any part of it? A. They have not.

Q. No part? A. No, sir.

Q. Have you paid anything for insurance on the building on the lower property? A. I have.

Q. I show you three insurance bills. A. Yes, sir, I paid them all.

Q. Just state how much, Mrs. Miller? A. One bill 30 of 1892, is \$18.60; one bill of 1895, \$23.25, and a bill of 1893, \$13.88.

Q. Did you tell how much the taxes were? A. I did not. The tax for 1894 is \$9.12; 1895 is \$7.50.

Q. The taxes on the other place, have they ever been repaid to you by Mrs. Dennis or Mr. Dennis? A. \$15 has been repaid to me, and that is all I demanded.

Q. That was all you demanded on the upper 40 place? A. On the upper place for taxes.

Q. So these bills you say covered both properties?

A. Yes, sir.

Q. How many acres were there in the lower place?

A. Twenty-five.

Q. And how many in the upper place? A. Twenty-five—supposed to be.

Q. What amount, if any, is due upon the lease dated March 16, 1894; the little place; the upper place?

A. There was no rent paid from May 16, 1895, to
10 May 16, 1896; two years.

Q. That has never been paid? A. Never been paid.

Cross Examination by Mr. Bergen.

Q. How much money do you claim is due on what you call the little or upper place? A. The \$60 has never been paid.

Q. That is not my question, Mrs. Miller; how
20 much rent do you claim to be due? A. I claim the \$60.

Q. How much do you claim there is due on the lower lease? A. Six hundred and—I cannot remember exactly how much it is.

Q. Up to the time the parties left the place? A. Yes, sir.

Q. 1896? A. Yes, sir. until March, 1896.

Q. Mrs. Dennis and Mr. Dennis left this place at your request in 1896, didn't they? A. They did.
30

Q. At that time, you, under the contract which we have here, you owed Mr. Dennis for labor a considerable sum of money, didn't you? A. Under the contract when the lease was made I didn't owe him then—I didn't owe it to him until the place should be sold and I should have received back my money, and then he was to receive his pay.

Q. I ask you whether you didn't know this, that Mr. Dennis had done work on that place amounting
40 to nearly \$600, which by the terms of this contract,

under certain conditions, might become payable to him? A. Yes.

Q. In 1896, you wanted possession of this property, didn't you? A. Yes.

Q. You applied to Mr. Dennis to give you possession of the property, didn't you? A. In a sense I did.

Q. Didn't you then have a conversation with Mrs. Dennis, in which she told you that under the terms of this contract if she left that property and went 10 out of the possession of it, before it was sold she would not only lose the benefit that she might have of any surplus in the value of the property if you sold it, but that her husband would also have to lose this \$600 for labor which he had done there? A. No, sir.

Q. You knew of Mr. Dennis' claim, didn't you, that—? A. I did.

Q. And you admitted it was a correct statement in writing? A. I had admitted it. 20

Q. You did know if he abandoned that property at your request he would forfeit that money, didn't you? A. I did not.

Q. Did you consent that it should be credited on account of the rent? A. It was not on account of the rent, not until I got my money from the sale of the property; when I get my money from the sale of the property then I will admit it.

Q. You have sold it, have you not? A. No, sir, I have not. 30

Q. You have agreed to sell it, have you not? A. I have.

Q. And the house has burned, has it not? A. The house has burned.

Q. And you got a large amount of insurance, didn't you? A. I got sufficient insurance to pay off the mortgage.

Q. How much insurance did you get? A. \$3,600.

Q. The mortgage mentioned in this contract is

\$2,000, is it not? A. Yes, and there was a mortgage on the upper place of \$670.

Q. Did you agree with Mrs. Dennis that if she would give you up that property in order that you might put on some friends or relatives there, that you would release her from any claim there might be for back rent, provided, her husband would release you from any claim for the five or six hundred dollars that you owed him? A. Never.

10 Q. And also that the two years' rent which you claimed was due on the little place was all to be extinguished if they would give up the property to you? A. No.

Q. I show you a paper dated June 7th, 1900. Is that your signature? A. Yes, sir.

Q. It reads: "Received from Ruth E. Dennis, \$15 as rent on the little place at Somerville, Pin Oaks, being the amount due May 15th, 1900. Nancy M. Miller." Now, I show you one dated June 17th, 20 1901. "Received from Mrs. Ruth E. Dennis, the sum of \$45 on rent and taxes on property leased by me to her, located in Bridgewater Township, Somerset county, New Jersey, by lease dated May 16th, 1894. Nancy M. Miller." Is that your signature? A. Yes, sir.

Q. That was \$30 rent and \$15 you claim was due? A. Yes, sir.

Q. And that paid the rent up to that date? A. Excepting those two years.

300 Q. Excepting those two years which in your mind went with the lower place? A. Because no rent was paid on the lower place nor on the upper during those two years.

The Court. Did those first receipts cover part of those two years that are now claimed?

The Witness. No, sir.

400 The Court. There is one dated November 18, 1895.

Mr. Bergen. Yes, that reads as follows: "Received from Mrs. Ruth E. Dennis, \$15, the same being rent on little place to November 15, 1895." It was for six months back of that.

The Court. That is part of the time claimed in this suit?

Mr. Bergen. Yes, part of the time.

10

Q. With those receipts and acknowledgments of payment of this rent before you to refresh your recollection, do you now recollect that you made this agreement with Mr. Dennis and Mrs. Dennis, that you would extinguish and relieve them from any balance of rent that was due, crediting what you owed the husband—he was to give that up, the difference being probably one hundred or one hundred and fifty dollars at that time, between the two amounts, and also give up the possession of the property? A. 20
No, sir.

Q. You made no such arrangement? A. No, sir.

Q. You never made any claim to Mrs. Dennis from the time she left that farm for this rent, until you issued an attachment against her, did you? A.
Yes, sir.

Q. Did you ever send her a bill for it? A. I did.

Q. After 1898? A. I did.

Q. When? A. To Brooklyn.

Q. When? A. I cannot tell whether it was in 30
the latter part of 1896 or 1897; I cannot tell.

Q. You have a recollection of that? A. Yes, sir.

Q. Don't you recollect that the first bill you sent her was in 1901, just before you brought this suit?
A. No, sir.

Re-Direct.

Q. Was the rent on the little place from May 16th, 1894, to May 16th, 1895, ever paid? A. No, sir. 40

Q. For what period is this rent, the \$15 mentioned in the receipt dated November 18th, 1895?

Objected to on the ground that the receipt speaks for itself.

Q. Was the rent for the year from the date of the lease to May, 1895, ever paid? A. No, sir.

10 Re-Cross Examination.

Q. You testified when you were first examined, that there were two years' rent due on the little place, to May of 1896; since you have seen these receipts you say there is but one year's rent due, is that correct? A. May I look at those receipts again?

Q. Certainly, that is what they are here for (handing papers to witness). A. I have not the least
20 recollection about it, of giving that.

Q. You have no recollection of giving these receipts? A. No—

Q. Very well. A. I have. I mean I have no recollection that I gave one in 1895, but then I did it because it is there.

Q. Your recollection is not very good? A. What say?

Q. You haven't a very good recollection? A. It is very good.

30 Q. Is it? A. It is.

Q. When you testified there were two years' rent due, your recollection was bad about that, was it not? A. Yes, I admit that.

Q. If we had lost this other receipt for the other year it is possible you might have forgotten about that year, too, is it not? A. You have not.

Q. Well, you don't know yet, I am only asking. Now are you sure there is any rent due on the place?

A. Why yes.

40 Q. A year's rent, eh? A. Yes, sir.

Plaintiff's counsel offered in evidence the tax bills and bills for insurance shown this witness.

Plaintiff rests.

RUTH E. DENNIS sworn for the defense.

Direct Examination by Mr. Bergen.

Q. Where did you live between 1891 and 1896? 10

A. At Pin Oaks.

Q. On the property described in these two leases?

A. Yes, sir, I lived on the lower part; the house was there.

Q. The whole was in your possession? A. Yes, sir.

Q. You conveyed this property to Mrs. Miller, didn't you? A. Yes, sir.

Q. Was there a mortgage on it? A. Yes, sir.

Q. How much? A. Two thousand dollars. 20

Q. Do you recollect when you conveyed it to her, about the time these leases were given? A. Yes, sir; about that time.

Q. There are two leases and a contract, they were all executed and delivered about the same time, were they not? A. Yes, sir; the two leases were two or three years apart.

Q. Which was the oldest lease? A. The oldest lease is the one below the road; the one that is in dispute that the rent is claimed for. 30

Q. And the other lease is for the part above the road? A. Yes, sir, that was in 1894, the small place.

Q. When did you leave that property, the lower property? A. About March, 1896.

Q. You were familiar, were you not, with the terms of this contract, which was given, as it states, to protect you under that lease? A. Yes, sir.

Q. Do you know how much the work which your husband had done on that place amounted to? A. Yes, sir. 40

Q. How much? A. About \$550, \$545 or \$550.

Q. Had you ever talked to Mrs. Miller about that, or she talked to you? A. Yes, sir.

Q. She knew the amount? A. Yes, sir.

Q. And made no dispute as to its correctness? A. Never.

Q. When did she first ask you to leave; tell us as nearly as you can recollect? A. Well, I could not tell the exact first request from her; it ran on
10 several weeks, possibly months, before we left.

Q. You were a little behind hand with the rent? A. Oh, yes.

Q. That is, you owed her the difference between the rent and the amount claimed due your husband? A. We owed her the several years' rent.

Q. There was also at that time a claim of this money due your husband? A. We; there was this claim under certain conditions in the contract named.

20

By the Court.

Q. This amount had all accrued at the time you left the place, hadn't it? A. Yes, sir, before we left the place.

Further Direct.

Q. Did you leave that place under any agreement
30 with Mrs. Miller? A. Yes, sir.

Q. Will you tell what the agreement was? A. We had several conversations.

Q. Just tell the agreement? A. Mrs. Miller requested us to leave the place, and we being loath at first to do so, finally agreed to leave on this condition, that as we owed her and she would have owed my husband if we had remained, we agreed if we gave up the property; gave up the contract; gave up his work, that would be due if we could have re-
40 mained; resigned all that; it was balanced, squared

up with what we owed her. It was not figured to a dollar, but it was put in a lump in that way, and that is the way we settled.

Q. Do you know that your husband agreed to this also? A. Yes, sir.

Q. After this agreement was made, did you carry out your part by leaving the property? We did.

Q. And Mrs. Miller took possession of it? A. Well her people that she put in there did.

Q. Well, that was her possession? A. Yes, sir. 10

Q. From that time how long was it before you ever heard that she made any claim against you? A. When she brought this suit about it.

Q. She says that she sent you a claim in 1896 or 1897, to Brooklyn; is that true? A. I never received anything of the kind.

Q. The rent on the little place north of the road has all been paid, has it not, according to these receipts? A. Yes, sir.

Q. And you paid the taxes which she admitted 20 was the fair proportion of that property to pay? A. Yes, sir.

Cross Examination by Mr. Gaston.

Q. Why did you leave the place in 1896? A. Because Mrs. Miller wished us to leave it.

Q. Did she tell you why she wished you to leave? A. Yes, sir.

Q. Why? A. She thought that some friends of 30 hers would do better with the place; they would pay up the rent better and make it go better.

Q. How much rent did you pay up to 1896 on the lower place? A. Well, the \$200; the \$40 that she refers to, she speaks of remitting, why the rent had not begun until the next Spring, because the repairs were not commenced until next year.

Q. The lease shows that? A. Very well, then the \$240 was all that was paid.

Q. In 1896 when you left you owed all the rent 40

except \$200, and this \$40 which she gave you? A. Yes, sir.

Q. Some \$618.33, is that right? A. I have not figured it exactly, it was not a question of dollars or figures.

Q. And that is the reason why you left the place? A. What?

Q. Because you owed all that rent? A. Because Mrs. Miller wished us to leave. We could have
10 stayed longer.

Q. You said because you could not pay the rent was the reason you had to leave? A. No, because—

Q. Was not that so; didn't you tell her you could not pay the rent and therefore you would have to give up the lower place? A. It was as I say, we were not paying it.

Q. Didn't you tell her that? A. No, sir; I say I didn't need to; it was self evident.

Q. What was self evident? A. That the rent was
20 not being paid.

Q. That you could not pay it? A. Yes, sir.

Q. In March, 1896, how much work had your husband done? A. He kept the account, the number of days, which, multiplied by two, amounted to that; two hundred and some odd days.

Q. He kept his account in a book? A. Yes, sir.

Q. And he put it down? A. It was all put down.

Q. And by March, 1896, it amounted to \$545, didn't it? A. Yes, sir.

30 Q. Do you know how much the insurance Mrs. Miller had paid amounted to by March, 1896? A. I don't know exactly, no sir; we paid some insurance.

Q. Did you pay the taxes on the lower place? A. No, sir; if we paid some, I do not remember.

Q. How much did you owe Mrs. Miller in March, 1896, when you left the place; how much did you owe her altogether; insurance and taxes, and all; do you know? A. Well, I think the statement there is about correct.

Q. I make it \$958 outside of interest; is that right? A. No, sir; I think it is about \$700.

Q. According to your own statement, \$682? A. Oh, well.

Q. That is the amount you owed? A. I presume so if the figures are correct.

Q. And the work your husband did amounted to \$545? A. Yes, sir.

Q. And that contract work was not, by the terms of the contract, to be paid your husband until the property should be sold? A. Yes, sir. 10

Q. And until Mrs. Miller should get out of it all she put in? A. Yes, sir.

Q. And then if there was any over your husband should be paid for his work? A. Certainly, that is if we stayed there.

Q. This agreement that you talk about having made with Mrs. Miller, who made that agreement? A. Well, it was mutual.

Q. Who were the parties to it? A. Mrs. Miller 20 and myself and Mr. Dennis.

Q. Where was Mr. Dennis? A. When I was with her he was not with me,—when she and I talked about it; he had his own talk with her.

Q. It was a conversational arrangement, was it? A. Yes, sir, entirely.

Q. It was never reduced to writing? A. Never.

Q. There was no witness to it? A. No, not that I know of.

Q. Didn't you think that a matter of enough im- 30 portance to reduce to writing? A. Well, hardly, I trusted Mrs. Miller.

Q. You were very careful about these contracts being made and executed and the lease being put in writing? A. Yes, she was generally the one who wanted them in writing.

Q. She was? A. She wanted them down in writing.

Q. Were they not all done by your lawyer? A. Certainly, but you talk as if I was the one to always 40

suggest it; I think the suggestions came from her.

Q. The whole arrangement was made because you were being pressed by your creditors and being put out of the property by foreclosure proceedings, was it not? A. What arrangements?

Q. This very lease and arrangement? A. I don't quite understand you.

Q. You owned this property? A. Yes, sir.

Q. And you were being pressed by your creditors?

10 A. Yes, sir.

Q. And she came in and helped you? A. Certainly, she took the property.

Q. And you took her to your lawyer and had this paper drawn up? A. Certainly, I gave her the property and she gave me the lease.

Q. What was this arrangement that you say was made between you and Mrs. Miller when you left the place; just tell us that over again? A. That I would give up my claim—our claim—on the property; give
20 up our claim on the contract, and give up Mr. Dennis' work; if we would give that up then she would give up the rent and taxes or whatever it was; the few dollars more or less, \$700 or \$600, and one would balance the other.

Q. At this time all the claim you had was that your husband should be paid \$545 when the property should be sold and Mrs. Miller got her money out of it? A. Certainly.

Q. You had no further claim on the property, had
30 you?

Mr. Bergen. They had the right to the renewal of the lease.

A. I had a lease for ten years and a right of renewal for ten years more.

Q. Does not the lease provide you are only entitled to that provided you pay the rent? A. All leases say that.

40 Q. You had not paid the rent? A. No, sir.

Q. You owed over \$600? A. Certainly.

Q. Consequently you had no right in the property excepting the right your husband might have under certain conditions, to be paid \$545; is not that so?

A. Had no right in it?

Q. Yes. A. Certainly not, my right would depend on my staying and my staying would depend on my paying the rent.

Q. You could not stay any more because you could not pay the rent; is not that so? A. Well? 10

Q. You agreed to go yourself? A. The rent had been due before that; it was due a year before that, and before that; but she allowed us to stay, because it was not exactly like a cut and dried renting of a house from a person, it was more like a partnership affair; we had put the property in and she had put in repairs.

Q. Never mind about that, we have it all in writing. A. Well?

Q. Where was this agreement made that you 20 speak of; I refer now to this verbal agreement? A. It was spoken of at Pin Oaks and in New York, at Mrs. Miller's home.

Q. It was not all done at one time? A. I think not; that is, the talk was at different times.

Q. So that your notion of the agreement is an aggregation of all these different conversations? A. Certainly we had more than one conversation.

Q. There was no rounded up agreement to settle it? A. Well it was settled finally. 30

Q. By several different conversations in different places? A. She requested me several times before I would finally agree to it.

Q. She requested you what? A. To leave.

Q. And you finally agreed to leave? A. Finally agreed to go on these conditions.

Q. Didn't you agree to leave in November, 1895; didn't you tell her in November, 1895, you could not keep the place because you could not pay the rent?

A. I don't know the exact moment when the agreement was made.

Q. Did not you tell her in 1895? A. It may have been in 1895.

Q. That you could not keep the place any more? A. But she didn't wish us to leave until she had those people ready to come in.

Q. Didn't you tell her in 1895 you could not stay because you could not pay the rent? A. It might
10 have been.

Q. Was it not so? A. I cannot tell the exact time, these conversations extended over quite a time.

THOMAS L. DENNIS sworn for the defense.

Direct Examination by Mr. Bergen.

Q. You are the husband of the last witness? A. Yes, sir.

20 Q. Have you known Mrs. Miller? A. I have.

Q. You lived on the farm up there? A. Yes, sir.

Q. And are one of the persons who executed this contract, are you not? A. Yes, sir.

Q. Or assented to it. How much was due for work done on that place after Mrs. Miller became owner of it? A. Under the contract, \$545 worth of work.

Q. At and about the time that you and your wife were leaving the place, before that, did you have any talk with Mrs. Miller with reference to the
30 agreement under which you were to leave, and if so that what it was? A. I did.

Q. Now state it? A. Some time after the talks between Mrs. Miller and Mrs. Dennis as to this agreement to leave, Mrs. Miller paid a visit to Pin Oaks, as we called it, and I then spoke to her privately, and asked her if Mrs. Dennis and herself had come to any arrangement with regard to our leaving there; she said it was understood. I asked her if it was not possible for me to forego my claim
40 against her for this work and allow us to stay some-

what longer. She said no, she could not do it; she would not do it. I said, "is this all that we are expected to get from this property, this home that we are going to leave now; is this all that we are expected to get, that we are going to leave without any indebtedness to you?" Well, she said, she supposed that was the way it stood. That was the end of the conversation, I had nothing further to say.

Cross Examination by Mr. Gaston.

10

Q. How long was this before you left the place?

A. I think some time in the Fall before; just what time I do not know, whether it was late in the Fall, or just when.

Q. You think this was in the Fall before as you left in the Spring? A. Yes, as we left in the Spring; I think so; yes, sir.

Q. How long before that was this agreement between Mrs. Dennis and Mrs. Miller? A. I do not 20 know just the time; I could not state any date.

Q. Were you a party to that agreement? A. A party? Only in the way I have stated.

Q. That is, that afterwards you had a conversation with her as you say? A. Yes, sir.

Defendant rests.

NANCY M. MILLER recalled in rebuttal.

Direct Examination by Mr. Gaston.

30

Q. What have you to say as to any agreement made between you and Mrs. Dennis by which you were to credit on the back rent at the time the Dennises left the amount of work that Mr. Dennis had done? A. I never made any such agreement whatever.

Q. Do you remember in the Fall of 1895, Mrs. Dennis asking you to make some such agreement? A. I do. 40

Q. (Handing witness a paper). I show you a paper; did you ever see that before? A. I did.

Q. Where did you see that? A. Mrs. Dennis brought it to me at my house in New York, and requested me to sign it.

Q. What reply did you make? A. Said I could not, that his work was not to be paid for until the place should be sold and I had my money out of it first.

10

Plaintiff's counsel offered in evidence the paper shown the witness.

Objected to.

Objection overruled.

Defendant's counsel prayed an exception and the same was allowed.

20

Let it be sealed, and it is sealed accordingly.

Q. That paper was shown to you in the Fall of 1895 by Mrs. Dennis? A. Yes, sir.

Q. Did you make any request? A. She requested me to sign the upper statement; Mr. Dennis had already partially signed the lower and then scribbled out and wrote a little and so forth. I declined to do it on the ground that it was not a fair thing.

30

Mr. Bergen. Never mind the ground.

The Witness. I declined to sign it.

Q. Was there any other agreement presented to you at this time by Mrs. Dennis or Mr. Dennis? A. No, sir.

Q. With reference to the subject? A. No, sir; but there were statements and propositions and beginnings of agreement, etc., that never culminated.

40

Cross Examination by Mr. Bergen.

Q. When this paper was given to you, you kept it, didn't you? A. I did, for I found it amongst my papers.

Q. If you didn't intend to agree to it, why didn't you hand it back to Mrs. Dennis? A. Why, I have not any knowledge of why I didn't.

Q. It had Mr. Dennis' signature to it? A. But I didn't know that Mr. Dennis' signature was to it; I never noticed that until three weeks ago when I came across the paper.

Q. You had forgotten all about it, eh? A. I forgot all about it. I didn't forget that she had presented such a paper to me, but I forgot that his name was on it, and I don't really remember now that I knew it in the time of it, because I—

Q. That is all.

Re-Direct Examination.

20

Q. I see written here, "Mrs. D. wished me to sign enclosed which I declined." When did you put that on? A. I put that on immediately after I received the paper, but the other writing I say I didn't put on there until—

Q. This lead pencil? A. Yes,—until now.

Mr. Bergen. I object to what she put on.

30

Testimony closed.

Plaintiff's counsel moved to overrule the defense as submitted, and requested the Court to direct a verdict for the plaintiff.

Adjourned until Friday, April 18, 1902, at ten A. M.

THE COURT.—This suit is brought to recover 40

rent reserved under two leases. There is substantially no dispute that this rent has not been paid according to the terms of the lease. In November, 1891, the plaintiff made a lease to the defendant of certain property for a term of ten years at the annual rent of \$200 a year with taxes and insurance. The rent was paid for one year and then for some years was not paid at all, and in 1896 the tenants gave up possession of the premises.

- 10 The defense offered is that it was agreed between the landlord and the tenants, about the time that the tenants left the premises, that if they would give up possession, and give up some sort of a claim for services rendered by one of the defendants, the rent due would be remitted.

At the time of the execution of the lease, a contract or paper writing had been entered into between the landlord and the tenants (who were husband and wife) by which the tenant (the husband) might do
 20 some work upon the premises for which he was to be paid two dollars a day under certain conditions, those conditions being, if while the tenants remained in possession of the premises, the premises were sold and the proceeds of such sale were sufficient to pay the mortgage on the premises, and whatever the landlord had advanced, then the sum which the tenant claimed to have earned by services rendered should be paid, and if there was still a balance left, after making up all these payments, that balance
 30 was to be equally divided between the landlord and the tenants.

The first defense is that it was agreed between the landlord and the tenants that the abandonment of this claim for services and the giving up of the possession of the premises should cancel any sum due for rent.

That seems to put the defense first upon the ground of the payment of the rent.

The rent is reserved by the lease, which is in writing
 40 ing under seal, and was payable in money. The ten-

ants in this case claimed to pay it in some other way—by services rendered and by surrender of the premises. That seems to me to be a variance of a written instrument; it is changing the way in which the rent should be paid according to the terms of the instrument; it is changing the instrument by parol evidence.

I have been referred to the case of *Oliver v. Phelps*, 1 Zab.; that was a case in which the question arose as to the payment of rent in a somewhat different method from that of payment in money. There the landlord by written lease, reserved a certain rent; the tenants set up that it was agreed, when the lease was made, that the rent should be paid by crediting upon it the tuition by the tenant of the landlord's daughter. In that case the Court held that such an agreement might be proved by parol, and, to the extent that it did, might change the lease, it being an agreement which was made at the time the lease was made. 10 20

That case is referred to in the well known case of *Naumberg v. Young*, and there it is held that parol evidence may be admitted only when the writing contains only a part of the contract, or the evidence is admitted to apply the written contract to its subject matter or to establish a contemporaneous parol agreement between the parties with respect to the manner in which the rent reserved should be paid, which both parties have acted upon and carried into execution, and therefore have given the agreement the force and effect of an accord and satisfaction. 30

The agreement in this case does not purport or claim to have been made at the time the lease was executed; it was made after the rent sued for in this case became due, and it is attempted thereby to alter the contract by a parol agreement, to pay a debt which had accrued under this written contract in a way different from the way provided in the contract. 40

It seems to me that cannot be done, if it is claimed that it is payment.

On the question of accord and satisfaction, it can only be accord and satisfaction after it is carried out. On the general question of accord and satisfaction, with reference to this particular matter, accord and satisfaction can only arise on sufficient consideration. I am unable to see what consideration moved from these tenants to this landlord to give up
 10 the claims for the rent. The only consideration that can be urged is made up of two different matters; the first was the possession of the premises, but the landlord was entitled to such possession by the terms of the lease, and by the agreement entered into at the same time, and the claim for services was one which could not be enforced until a certain time if the tenants remained in possession, and the very fact of their giving up possession rendered it impossible for them to ever enforce that claim. There-
 20 fore, I cannot see any valuable consideration moving the landlord to give up the claim for rent.

On these grounds it seems to me that this defense must be overruled, and a verdict directed for the plaintiff for the amount due under the leases. That amount, I suppose, is not seriously disputed?

To the ruling of the Court, directing a verdict for the plaintiff, and overruling the defense, the defendant having prayed an exception, it is allowed and sealed accordingly.

30

A. Q. GARRETSON, [Seal.]
 Judge.

EXHIBIT A FOR PLAINTIFF.

This indenture made this eleventh day of November, eighteen hundred and ninety-one, between Nancy M. Miller, of the City, County and State of New York, of the first part, and Ruth E. Dennis and
 40 Thomas L. Dennis her husband, of the Township of

Bridgewater, County of Somerset, and State of New Jersey, parties of the second part.

Witnesseth, that the said party of the first part letten and by these presents does grant, demise and to farm, let unto the said parties of the second part, and the said parties of the second part have hired, taken and by these presents do hire and take of and from the said party of the first part, all that certain piece or parcel of land with the house and barn thereon erected, situate, lying and being in the Town- 10 ship of Bridgewater, County of Somerset and State of New Jersey, being formerly known as the Blackwell estate, and containing twenty-five acres, more or less, with the appurtenances, for the term of ten years from the ninth day of November, eighteen hundred and ninety-one, at the yearly rent or sum of two hundred dollars, to be paid in equal semi yearly payments. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then 20 it shall be lawful for the said party of the first part to re-enter the said premises and the same to have again and repossess and enjoy.

And the said parties of the second part do covenant to pay unto the said parties of the first part the said yearly rent as herein specified, also that they shall and will during the term hereby demised, well and truly pay unto the said party of the first part, her heirs and assigns, the premiums for insurance on the buildings now erected on said premises, and 30 shall at their own cost and expense make and do all the repairs in plumbing, papering, painting and carpenter work, to keep the premises in as good condition as they shall be when the sum of five hundred dollars has been expended by the party of the first part, and shall also bear, pay and discharge all taxes of whatever kind or nature, as shall during the term hereby demised be imposed upon said demised premises, or any part thereof. And that at the expiration of said term the said parties of the second part will 40

quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And the said party of the first part does covenant that the said parties of the second part on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold over and enjoy the said demised premises for the term aforesaid. And it is mutually
10 covenanted and agreed by and between the parties to these presents that if the said parties of the second part shall during the whole of said term, well and faithfully keep all the covenants and agreements herein contained on their part, the said party of the first part, her heirs and assigns, shall and will at the expiration of said term grant a new lease of the said premises for a further term of ten years to commence at the expiration of the term hereby granted, at a yearly rent of two hundred dollars, and
20 six per cent. on the amount of money that said party of the first part shall have laid out and expended upon said premises up to the date of said second lease, but not to include moneys laid out on property occupied or used by party of the first part, which said second lease shall contain like covenants and agreements as are hereinbefore contained, and shall also contain a covenant on the part of the said party of the first part that in case said party of the second part, shall during the whole of said second term,
30 keep and perform all and every of the covenants and agreements therein contained on their part and behalf, then the said party of the first part, her heirs and assigns shall and will grant one further term or lease of the said premises to the said parties of the second part for the further term of ten years from and after the expiration of the said second term, and at the yearly rent received during such second term, and six per cent. on the amount of money that said party of the first part shall have laid out and
40 expended upon said premises from the date of said

second lease to the date of such third lease—such third lease to contain the like covenants, agreements and conditions as shall be contained in said second lease.

In witness whereof the said parties to these presents have hereto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of,

10

NANCY M. MILLER, [Seal.]

RUTH E. DENNIS, [Seal.]

THOMAS L. DENNIS. [Seal.]

George V. Vander Veer as to Thomas L. Dennis.

EXHIBIT B FOR PLAINTIFF.

Whereas Ruth E. Dennis and her husband, Thomas L. Dennis have conveyed to Nancy M. Miller certain real estate situate at Bridgewater township, Somerset county, New Jersey, now occupied by said Ruth E. Dennis and her husband, and whereas, the said Nancy M. Miller has leased said real estate to said Ruth E. Dennis and her husband for ten years with a privilege of renewal, and whereas, this agreement is made to protect said Ruth E. Dennis and husband, in regard to the terms and of said lease.

Now, be it known to all men, that this agreement made this eleventh day of November, 1891, between Nancy M. Miller of the City, County and State of New York, and Ruth E. Dennis of Bridgewater township, Somerset county, New Jersey.

Witnesseth, that the said Ruth Dennis and her husband, Thomas L. Dennis, shall have the right to a home on said premises just deeded by said Ruth Dennis to said Nancy M. Miller, so long as certain payments of rental, taxes and insurance are met, the same being set forth in said lease given at even date with this instrument by said Nancy M. Miller to the

40

said Ruth Dennis and her husband. And that the non-payment of the same shall empower the said Nancy M. Miller to dispossess the said Ruth and Thomas L. Dennis, and to take full possession of the premises. Also that the said Nancy M. Miller, or her husband, Eli P. Miller, shall have the right to, or privilege of making alterations or improvements either in building upon or in cultivating portions of the land before mentioned, always subject to consultation with
 10 and consent of Ruth E. Dennis and her husband, and that the said Nancy M. Miller and her husband may own and occupy such buildings or portion of buildings as they may build or erect on said property in the same manner as though the premises were not leased. Also that in building, or in the remodeling of buildings, of all work which the said Nancy M. Miller shall direct to be done, and which the said Thomas L. Dennis shall do, an exact account shall be kept, and the sum of \$2.00 (two dollars) per day
 20 be allowed to said Dennis; but so long as the property remains in the possession of the said Nancy M. Miller no payment for the same shall be exacted or expected. But if from any cause the property should be sold while said Ruth Dennis and her husband still have possession, all moneys and money value (including the \$2,000.00 (two thousand dollars) mortgage if the same should have been paid) furnished by said Nancy M. Miller shall first be reimbursed. Secondly, all dues for work or money spent in im-
 30 provements by said Thomas L. Dennis, as in foregoing clause indicated, shall be met. Thirdly, any amount over and above these sums shall be equally divided between the said Nancy M. Miller and the said Ruth Dennis.

And further, that if the said Nancy M. Miller should wish to dispose of the property aforesaid, the said Ruth and Thomas L. Dennis shall have the first option at a fair valuation, and if they cannot
 • purchase, the said Nancy M. Miller may have the
 40 right to sell to any party or parties who will give

and take the same privileges and restrictions as set forth in the lease given by said Nancy M. Miller to said Ruth E. Dennis, and in this contract.

And upon the decease of said Nancy M. Miller and her husband, E. P. Miller, the said Ruth and Thomas L. Dennis shall have the right to purchase said property at a fair valuation or appraisal, and upon the same terms as herein provided for.

And lastly, should any serious difference of opinion arise in the future as to the fairness or justice 10 of any points not herein provided for, it is hereby agreed that the matter shall be submitted to arbitration by each party selecting one arbitrator, and if they cannot agree they may select a third, and their decision shall be accepted as final.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year aforesaid.

In the presence of

20

NANCY M. MILLER, [Seal.]

RUTH E. DENNIS. [Seal.]

The name of Ruth Dennis changed to Ruth E. Dennis before execution.

JAS. B. McDERMOTT.

I, Thomas L. Dennis, in consideration of the prem- 30
ises ratify the above agreement and hereby covenant and agree to carry the same out.

Witness my hand and seal this 11th day of November, 1891.

THOMAS L. DENNIS. [Seal.]

Witness:

GEORGE V. VANDER VEER.

40

EXHIBIT D FOR PLAINTIFF.

New York, Nov. 6, 1895.

In consideration of the fact that T. S. Dennis has done mechanical work for me to the amount \$525, on my property known and called Pin Oaks, in Somerville, N. J., I hereby acknowledge the fact and credit him with that amount, the same to be applied in payment on rent now due on the said property.

- 10 In consideration of \$525 credited to me by Nancy M. Miller for payment of rent due her property known as Pin Oaks, Somerville, N. J., I hereby relinquish all claim for work done, at whatever time or manner she may dispose of said property.

T. S. DENNIS.

COURT OF ERRORS AND APPEALS.

NANCY M. MILLER,	}		10
Defendant in Error,		In Debt.	
vs.			
RUTH E. DENNIS and THOMAS		Assignment of	
L. DENNIS,		Errors.	
Plaintiffs in Error.			

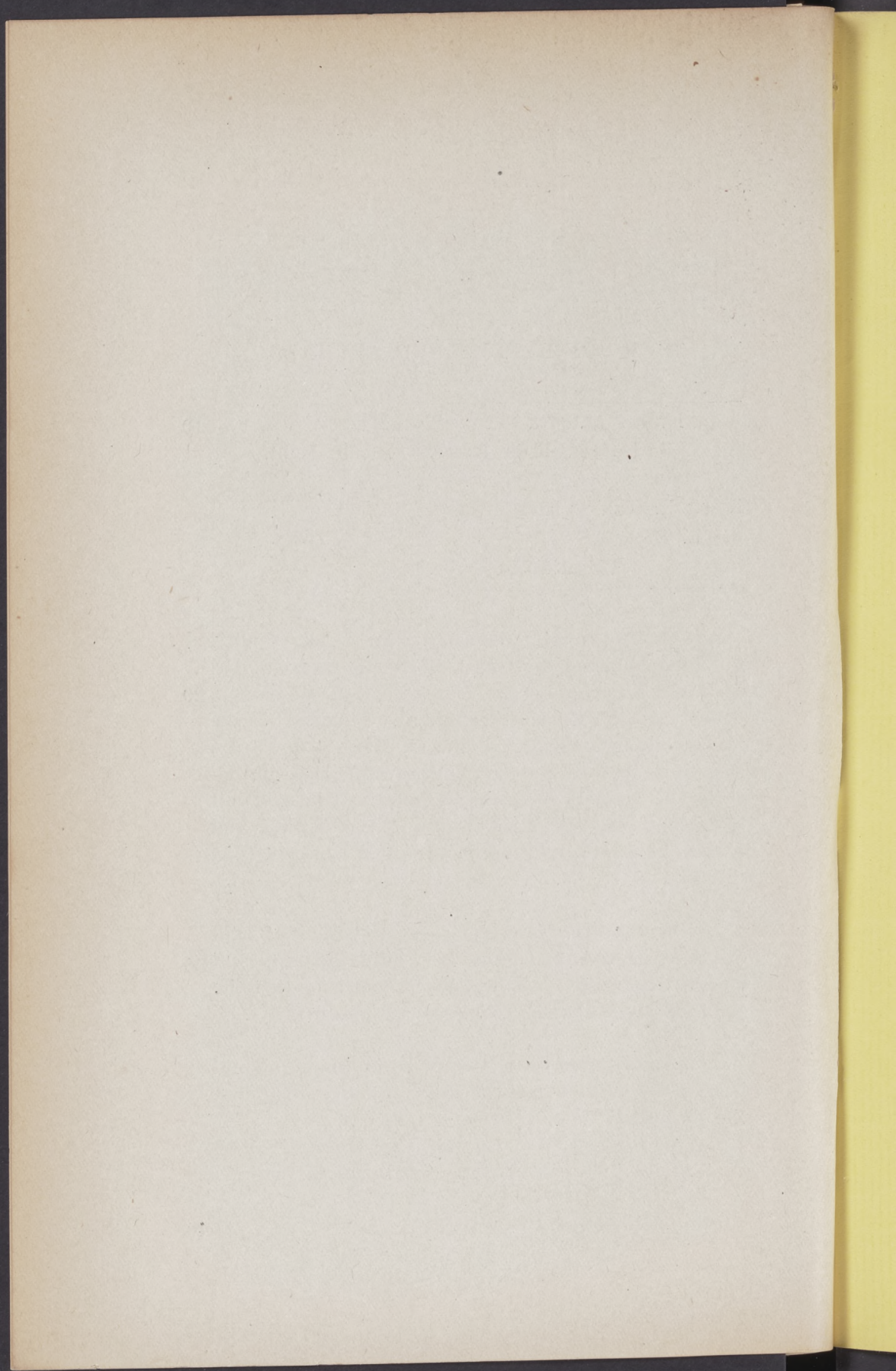
Afterwards to wit, on the thirteenth day of May, nineteen hundred and two, before the Court of Errors and Appeals in the last resort in all causes, 20 comes the said Ruth E. Dennis and Thomas L. Dennis, by their attorney, James J. Bergen, and say, that in the record and proceedings aforesaid, and also in the matters recited and contained in said bill of exceptions, and also in giving the verdict and judgment aforesaid there is manifest error in this, to wit:

1. For that the said Judge at the trial of said cause overruled the defense of the defendants and 30 directed the jury to render their verdict against the said defendants, and in favor of the plaintiff.

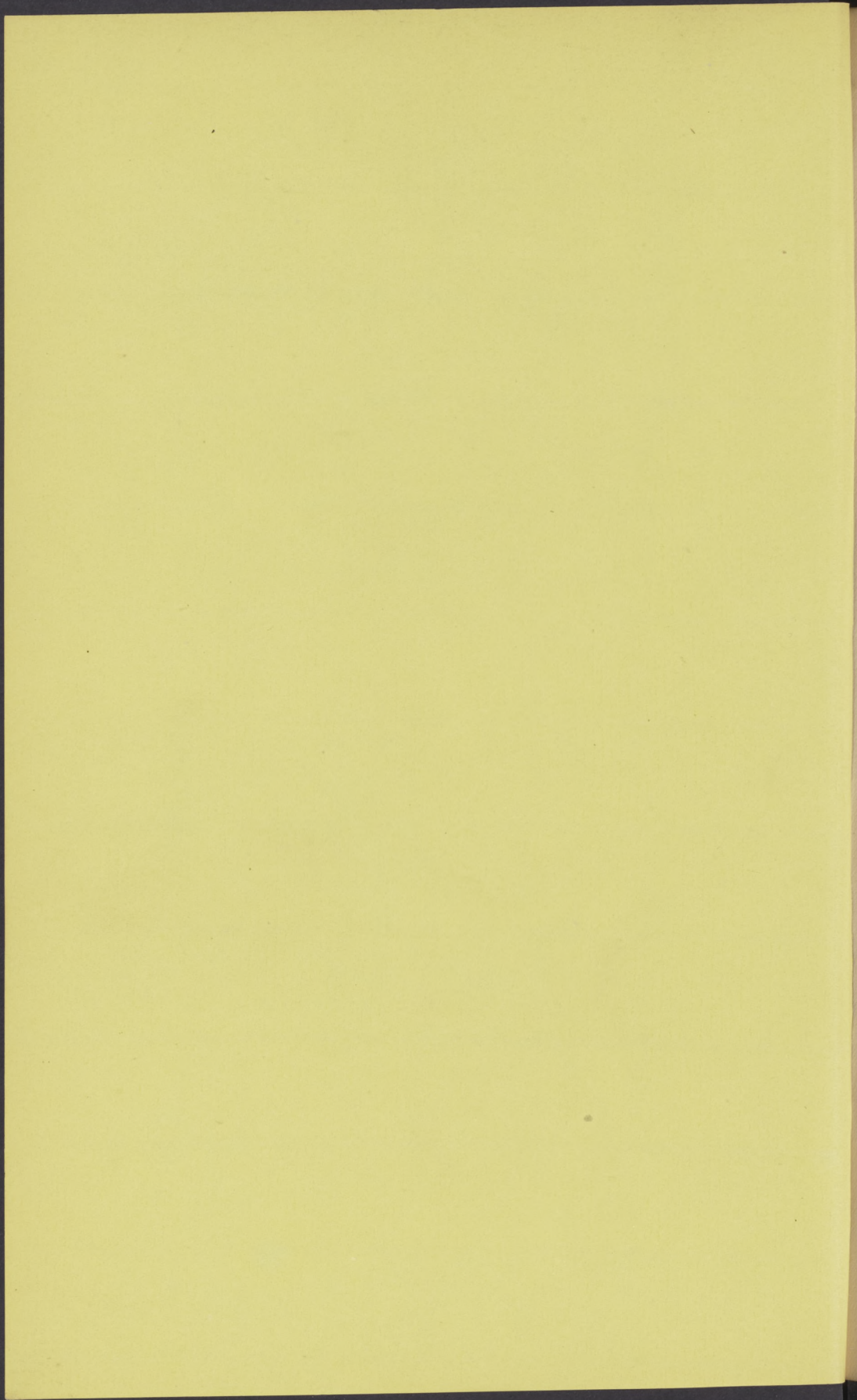
2. Because upon the same record judgment should have been entered for the defendants and against the plaintiff.

J. J. BERGEN,
Atty. for Plaintiffs in Error.

Joinder in error in usual form.







V
L

R

L
m
B