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New Jersey Court of Errors and Appeals.

CARRIE E. SAWYER,

Pltff. and Def't in Error,

vs.

CLARENCE T. VAN DEREN,

Def't. and Pltff. in Error.

*On Contract.
On Writ of
Error.*

BRIEF FOR DEFENDANT AND PLAINTIFF IN ERROR.

This record comes up on Writ of Error to the Supreme Court. The case was tried at the Essex Circuit before the Chief Justice and a jury and resulted in a verdict for the plaintiff.

The suit is for money had and received. The declaration is the common counts. The plea is the general issue. The plaintiff was a part owner, as tenant in common with one Galloway, of a property situated in Harrison, New Jersey. The property by a lease dated March 1st, 1899, had been occupied by the New Jersey Tube Company.

The defendant acted as the agent of both the plaintiff and Galloway, in collecting the rents and looking after the property. By the terms of the lease the Tube Company had the right to exercise their option to purchase the property at the expiration of the lease on March 1st, 1904, for \$25,000. It did exercise this option and bought the property. The suit grows out of the disposition made by the defendant of the moneys claimed by the plaintiff as due to her.

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The annual rent which the Tube Company paid was \$1,000 a year. The defendant collected this, paid out of it the taxes, the insurance and his commission and the balance he paid to his principals; the plaintiff's interest in the property being five ninths and Mr. Galloway's four ninths. (p. 31, ll. 10-40). The suit being for money had and received the learned trial judge (p. 72, l. 26; p. 73, l. 10) properly held that the plaintiff could only recover the amount actually collected and in the hands of the defendant after allowing all just credits.

The total thus charged to the defendant was \$15,-225.37. The possible credits were, (1) the money actually paid over to the plaintiff; (2) the taxes paid on account of the assessment by the town of Harrison for 1903, and which the plaintiff conceded to the defendant; (3) the defendant's commissions for sale of the property; (4) charges and expenses of defendant in going to Moore, Pa., to take acknowledgements of deed &c., and (5) the amount paid by the defendant to Mr. Galloway, for his share of rents still due him.

It seems that the plaintiff was in the habit of calling on the defendant from time to time for money due her from the rents collected (p. 31, l. 35) and had received more than her share (p. 35, l. 40), so that when the money paid over by the Tube Company came to be divided there were some \$365.01 still due Mr. Galloway for his share of the rents, which had in fact been paid the plaintiff at her request and which with interest thereon amounted to \$408.81.

There were several questions before the court at the trial, viz. whether the defendant had properly carried out his instructions in reference to the amount to be collected on the sale from the Tube Company for accretions of taxes: whether he was entitled to his commissions, and whether the charge for going to Moore, Pa. was proper. These were all properly submitted to the jury by the learned trial judge.

The item of \$408.81 representing the amount paid to Mr. Galloway by the defendant for his share of the rents which had been paid to the plaintiff in excess of her share was excluded from the consideration of the jury by the trial judge.

The propriety of this ruling is embraced in the exceptions taken to the charge of the court and the refusals to charge as requested. The questions of law now before the court are those thus presented.

THE LEARNED TRIAL JUDGE ERRED IN CHARGING THE JURY AS HE DID IN REFERENCE TO THE QUESTION OF SET-OFF, AND IN REFUSING THE DEFENDANT'S REQUESTS TO CHARGE.

As already appears, the plaintiff was in the habit of receiving money on account of the rents collected by the defendant from the Tube Company, and from time to time, so that during the term of the lease, the defendant had paid to the plaintiff some four hundred dollars in excess of her share of the rents. He had done this on the representations to him by the plaintiff that she had an arrangement with Mr. Galloway by which the matter was to be adjusted between them, and that she represented Mr. Galloway in the matter of adjusting the rents. When the final settlement came to be made, however, Mr. Galloway, through his attorney Mr. Goodwin, repudiated this alleged arrangement, and demanded of the defendant his share of the rents which had previously been paid to the plaintiff, and threatened to hold him responsible therefor (p. 49, ll 1 to 16).

The defendant, therefore, finding himself to have been misled by the plaintiff, and to save himself from suit at the hands of Galloway, deducted from the amount of money paid him by the Tube Company sufficient to pay Galloway for his share of the rents which had originally been paid to the plaintiff.

Evidence of all this was admitted in the course of the trial, but excluded from the consideration of the

jury by the trial judge in his charge, on the theory, as he stated, that any consideration of the question could only come up on a counter-claim by the defendant against the plaintiff in the nature of a set-off in the suit.

The charge of the trial judge on this phase of the case, to which exception was taken, was as follows:

“Well now, it may be, gentlemen, that Mr. Van Deren would have a claim against Miss Sawyer for moneys which he paid to Mr. Galloway in discharge of the obligation which I have just spoken of. But that is another matter in dispute between these parties that is not embraced in this issue. If Mr. Van Deren had a right to set-off against this amount of money an obligation which he was entitled to enforce against Miss Sawyer, arising out of his payment to Mr. Galloway, that right still exists. But he does not set that right up in this case, and therefore it is not involved in the case, and cannot be determined by your verdict; and for that reason, it is not necessary for me to express an opinion whether Mr. Van Deren has a legal claim against Miss Sawyer, or whether he has not, by reason of his having paid the claim of Mr. Galloway for four hundred and odd dollars for the rents. And so I charge you, in making up the account between the parties, Mr. Van Deren is not entitled to credit for that sum of money.”

In charging as he did, the learned trial judge seems to have failed to have observed the distinction between a defence in the nature of a counter-claim, and one which attacks the plaintiff's cause of action by showing that the plaintiff ought not to recover at all.

In *25 Am. & Eng. Encyc. of Law*, 492, it is said:

“Since set-off admits the plaintiff's cause of action, but sets up claims due to the defendant, so that the sum awarded to each party may counter-balance the other in whole or in part, it is clearly distinguishable from those common-law defences which attack the plaintiff's cause of action and show that, by virtue thereof, the plaintiff ought not to recover at all, or only part of his demands.

Upon common law principles, a defendant is, in general, entitled to retain or claim by way of reduction all payments made by him, and all just demands and allowances accruing to him in respect of the same transaction or account, which form the ground of action. These defences are clearly distinguishable from set-off; for they do not admit that the demand sued upon is just, but, on the contrary, attack the plaintiff's claim itself, and urge matter to defeat or at least reduce the plaintiff's demand, on account of some matter connected therewith."

And on p. 493, it is said:

"Likewise in an action for money had and received the defendant may show without the aid of the statutes of set-off that he is entitled to retain certain allowances out of the very sum demanded, this not being in the nature of a cross-demand, but being a charge which makes the sum of money received to the plaintiff's use so much less."

Remember that the action was for money had and received, and that the plea was the general issue, which disputed the right of the plaintiff to recover at all.

As was said in *Heck vs. Shener*, 4 S. & R., 249, p. 450:

"By the plea of non-assumpsit the defendant puts the plaintiff on proving his whole case, and entitles himself to give in evidence anything which shows that at the time the action was commenced, the plaintiff had no right to recover."

The learned trial judge properly held that it was for the jury to say whether the defendant as agent of the plaintiff was not entitled to be allowed out of the sum demanded, such items as his commissions and expenses. He should have gone further, and also left it to the jury to say whether or not the defendant ought not to have been entitled to an allowance out of the sum demanded for the money thus belonging to Galloway, and paid to the plaintiff, on what proved to be a misrepresentation on her part as to the true situation, the defendant having been led to believe that she represented Galloway in the matter.

In this connection, the defendant's first request which the trial judge refused to charge, should be considered. It was as follows: (p. 82, l. 31)

"If the defendant, at the plaintiff's request, had overpaid her any rents due her, he was justified in withholding from moneys in his hands which he collected for her account, the amount of such over-payments, and remitting the balance, and the plaintiff in this action can only recover from the defendant such amount as *ex aequo et bono* belongs to her from the defendant."

The propriety of this request is borne out by the authorities, and should have been charged. The leading case on the subject seems to be the old ^{one} of *Dale vs. Sollet*, 4 Burr., 2133 (8 Geo. 3 B. R. 1767).

In this case, the defendant, a ship broker, was the plaintiff's agent in suing for and recovering a sum of money for damages done to the plaintiff's ship, and did recover and receive the sum of £2,000 for the plaintiff's use, and paid him all but £40, which he retained for his labor and service therein, and which a witness swore he thought to be a reasonable allowance, and the jury so found. The plaintiff objected at the trial that the defendant could not give evidence in this matter of his labor and service, but ought to have pleaded it by way of set-off, or at least have given notice of it as a set-off. On the rule to show cause Lord Mansfield sustained the lower court, and said:

"This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience and equity entitled to, which can be no more than what remains after deducting all just allowances, which the defendant has a right to retain out of the very sum demanded. This is not in the nature of a cross-demand or mutual debt. It is a charge, which makes the sum of money received for the plaintiff's use so much less."

So also Waterman in his Treatise on the law of set-off (2nd Ed.) sets forth at length the foregoing case, with approval, and lays the principle down as follows: (p. 5).

“Whatever an agent is entitled to deduct from the demand of his principal for advances or disbursements, of any kind, may be given in evidence in an action brought against him without pleading to or giving notice of set-off.”

In *Moses vs. Macferlan*, 2 Burr., 1005, Lord Mansfield discusses at length the nature of an action in assumpsit and shows that it is a “kind of equitable action” and that “it lies only for money which *ex aequo et bono*, the defendant ought to refund.” (p. 1012).

These principles have been enunciated and followed by our own courts.

The case of *Dale vs. Sollet*, *supra*, is cited and followed out by our Supreme Court in *Receivers vs. Paterson Gas Light Co.*, 3 Zab., 283, p. 304, where it is said:

“Where the nature of the dealings or transactions between the parties constituted an account consisting of receipts, payments, debts and credits, the balance only was considered the real debt due the plaintiff, and he could recover no more on the general issue. Such were the cases of *Dale vs. Sollet*, 4 Burr., 2133; *Le Noir vs. Bristow*, 4 Camp., N. P. Rep., 134; and the books are full of similar cases. And such has always been the rule at common law, both in England and in this state.”

The same case was followed by our Court of Chancery in *Camden National Bank vs. Green*, 18 Stew., 546, p. 549. The case was affirmed 1 Dick., 607, and hence the ruling in *Dale vs. Sollet*, is stamped with the approval of this court.

The principle laid down in the case of *Moses vs. Macferlan*, *supra*, has also received the approval of our courts.

Dingee vs. Letson, 3 J. S. Gr., 259, was a suit on certain notes, and the defendant offered to prove that each of the notes declared on had been paid off and satisfied. To the defendant's making such proof the

plaintiff objected, and the trial court sustained the objection. Chief Justice Hornblower held that in so doing, the trial court erred, and said, p. 262 :

“But I apprehend, the counsel for the defendant in error, is mistaken, in supposing that a partial *payment* may not be proved under the general issue; the authorities cited by him, 1 Chit. Pl. 471; 2 *Id.*, 513, 514; 1 Johns R. 125; 13 *Id.*, 57; 15 *Id.*, 230; 7 Cranch, 567, only establish the doctrine, that whatever shows that the plaintiff *never* had cause of action, may be proved under the general issue; and therefore *payment* may be so proved. The difference is, between giving in evidence under the general issue in assumpsit, a *specific payment* in part; and going into a statement of mutual accounts, by way of set-off to the plaintiff's demand. Evidences of the former, shows within the principles of the cases cited, that so far as *specific*, though partial payments, have been made, the plaintiff had no cause of action when he commenced his suit. But matter of set-off, only goes to reduce the amount to be recovered by the plaintiff, while it affirms his right of action for the whole amount of the note or promise declared on.

And Judge Ford, in the same case, said (p. 263) :

“It is a great rule peculiar to actions on the case that payment may be given in evidence under the general issue, without either plea or notice. This exemption from special pleading is a liberality belonging to the nature of the action, and is not restricted to either party, but belongs just as much to the plaintiff as to the defendant. It was recognized long ago, and very fully in the case of *Bird vs. Randall*, 3 Burr., 1353, where the court says—‘that an action on the case is founded on the mere *justice* and conscience of the plaintiff's case, and that it is in the nature of a bill in equity;’ he may declare *generally*, and make out his case at the trial. And as to the opposite party, the court says, in *Moses vs. McFarlin*, 2 Burr., 1010—‘that the defendant may go into every *equitable defence*, upon the *general issue*; he may defend himself by every thing which shows that the plaintiff *ex equo et bono*, is not entitled to the

whole of his demand, or *any part* of it.' Now neither justice nor conscience will allow the plaintiff to recover both of these notes to the amount of fourteen hundred dollars, if all that is due to him (allowing him to have paid two hundred dollars on the curtailment of each note) be only four hundred dollars and the interest thereon. For the remaining four hundred dollars, he had the defendant's negotiable note, which has been assigned away, or else paid, as may be presumed from its not being sued for in the present action. If the last two notes were mere auxiliaries to the *first*, the plaintiff's demand cannot conscientiously exceed four hundred dollars and interest thereon; and evidence showing them to be auxiliaries merely, as going to the very point of his demand, was necessary to be laid before the jury, even on the liberal principle that the plaintiff himself may claim in this kind of action. But this is placed beyond all possible doubt by the privilege of the defendant as stated in *Moses vs. McFarlin*, to give *anything* in evidence under the general issue, that shows that the plaintiff is not entitled to the *whole* of his demand, or *any part* of it. The proof need not go to the *whole*, if *any part*, according to this last case, has been paid to the plaintiff, he shall never recover the *whole* in an action of this kind—and such *part* may be set up as a defence, the case says, under the general issue."

Paulin vs. Kaighn, 5 Dutch., 480, was an action on assumpsit to compel the defendant as co-surety of the plaintiff to contribute his share of the money which the plaintiff has been compelled to pay on their joint bond. Offer was made to prove that the surety before the action of contribution had converted the securities for indemnity into money, and the offer was made for the purpose of showing that the money had been so realized, and was so far an extinguishment of the liability. The offer was overruled, and this court held it to be error, and said, p. 483:

"Fraud, whether of fact or of law, is within the jurisdiction of a court of law, and, in many cases, may be considered there.

It is clear, and admitted that such surrender may be shown in equity. Why not at law? The action selected by the plaintiff is of itself equitable, and any defence is competent which tends to show that the plaintiff, in justice and equity, ought not to recover.

In *Moses vs. Macferlan*, 2 Burr. Rep., 1003, Lord Mansfield, speaking of the action of *assumpsit* as beneficial to the plaintiff, because he may declare generally, and make out his case at the trial, remarks that 'it is equally beneficial to the defendant. It is the most favorable way in which he can be sued. He can be liable no further than for the money he has received, and against that he may go into every equitable defence upon the general issue. He may claim every equitable allowance. He may prove a release without pleading it. In short, he may defend himself by everything which shows that the plaintiff *ex equo et bono*, is not entitled to the whole of his demand, or any part of it.' This was said in an action of *assumpsit* for money had and received, but the remark applies to *assumpsit* for money paid as well. It applies to matters which tend to show that the defendant was never liable, and also to such as discharged his liability."

See also the following where *Moses vs. Macferlan* has been cited and followed:

Buckley vs. Wood, 38 Vr., 583, p. 585.

Cory vs. Freeholders, 18 Vr., 181, p. 182.

Sergeant et al., vs. Stryker, 1 Harr., 464, p. 468.

So, also, in *Grainger vs. Raybould*, 9 Carr. & Payne, 229, (38 E. C. L., p. 144), the plaintiff sued for work and labor, and the defendant offered to give in evidence that he had provided the plaintiff's men who did the work, with their beer, and that the plaintiff deserved to be paid that much less, because his men had been provided with their beer by the defendant. It was objected at the trial that the evidence was not admissible, as no set-off had been pleaded. The court said:

"I think that the evidence is receivable. The plaintiff goes on a *quantum meruit*, and it may be that he will deserve to have less if the defendant supplied his men with beer, than if the plaintiff himself had supplied the beer."

Now the plaintiff and Galloway were tenants in common of the property rented to the Tube Company. If, therefore, the plaintiff had received the rents to the exclusion of Galloway, he doubtless had a cause of action against the plaintiff as his co-owner, to recover back his share.

This principle seems to have been settled in this state in the case of *Izard vs. Bodine*, 3 Stockton, 403, where Chancellor Williamson laid down the principle (p. 404) :

"Where one tenant in common actually receives the rents, issues and profits, then he may be compelled to account for such profits actually received; but this is by statute both in England and in this state, and not by the common law. (Citing cases)."

See also to the same effect:

Hammond vs. Conkright, 2 Dick., 447, p. 457.

Edsall vs. Merrill, 10 Stew., 114, p. 116.

Buckalew vs. Snedeker, 12 C. E. Gr., 82.

Barrell vs. Barrell, 10 C. E. Gr., 173, p. 176.

Rose vs. Cooley, 62 Atl., 867.

Mullone vs. Klein, 26 Vr., 479, p. 483.

Hanan vs. Osborn, 4 Paige Ch., 336, p. 343.

Peck vs. Carpenter, 7 Gray, 283, p. 284.

On the other hand, Galloway undoubtedly had a cause of action against the defendant to recover back his share of the rents which had been paid by the defendant to the plaintiff.

The defendant acted as an agent for both the plaintiff and Galloway in the collection of the rents (p. 42127). Although the plaintiff and Galloway were tenants in common, their interests in the rents were distinct.

Thus *Kent* says, in his commentaries (Vol. 4, p. 368) :

"If tenants in common join in a lease, it is, in judgment of law, the distinct lease of each of them, for they are separately seized, and there is no privity of estate between them."

So, in *Washburn on Real Property*, Vol. 1, p. 565 (Chap. 13, Sec. 3, Para. 6), it is said:

"So distinct is the interest of one tenant in common from that of his co-tenant, that if they join in making a lease, it is regarded as a demise by each of his own part."

Each co-tenant, therefore, would have a right to look to the defendant as his agent to recover his share of the rent due him on this property.

Thus, *Wharton* in his *Commentary on Agencies and Agents*, (Chap. 2, Sec. 54) says:

"Where A., the owner of parcel No. 1, and B., the owner of parcel No. 2, concur in appointing, by a single power of attorney, C. as their agent, this does not lump parcel No. 1 and parcel No. 2 together; but they must be kept separate, subject to separate instructions, and accounted for separately to the principals."

There is nothing in the evidence, however, to indicate that the plaintiff could have sustained a defence to a suit by Galloway, to recover from her the four hundred odd dollars which had been paid her in excess of her share of the rents. The interest of each party in the amount of the rent was clear. The plaintiff was entitled to five-ninths, Galloway to four-ninths. It is true the plaintiff represented to the defendant that she had an arrangement with Galloway by which she was to receive more than her share. She offered nothing to bear out the statement, however, and it appeared that Galloway expressly repudiated any such alleged arrangement and proposed to hold the defendant personally responsible.

The plaintiff therefore was not entitled to this excess of rent. She chose as her form of action one which the courts hold to be equitable in its nature. She could not recover at the outside, more than the

defendant had actually collected, nor could she recover from that amount more than she was equitably entitled to. She had no right *ex aequo et bono* to the four hundred odd dollars representing the over-payment of rents. Why, therefore, in this action, should the defendant have been required to set up this defence by a claim of set-off?

The act concerning set-off (3 G. S. 3109) is permissive and not mandatory, in its terms, and is to the effect that if any two or more persons be indebted to each other, such debts or demands "*may be set off against each other,*" Presumably, if the defendant has a proper cause for set-off, and does not avail himself of it in the suit, his remedy is to sue independently. There was no occasion in the suit at bar, however, to consider whether or not a set-off might be availed of, for the reason that the question of the right of the plaintiff to recover the four hundred dollars for the rent, was a matter of defence as between her and the defendant. The defendant, by his plea, raised the issue. Under the form of action which the plaintiff chose, the burden was on her of establishing that she was equitably entitled to the money. The question of set-off or no set-off did not figure in the situation at all.

The learned trial judge therefore erred in excluding from the consideration of the jury this matter of the rents, and in refusing to charge that the plaintiff could only recover from the defendant such amount as *ex aequo et bono*, belonged to her from the defendant.

The second request to charge which was refused by the trial judge, and on which error was assigned, was as follows (p. 83) :

"If the plaintiff had requested the defendant to pay her more than her share of the net rents accruing from the property, and such payment had been made pursuant thereto, then the defendant

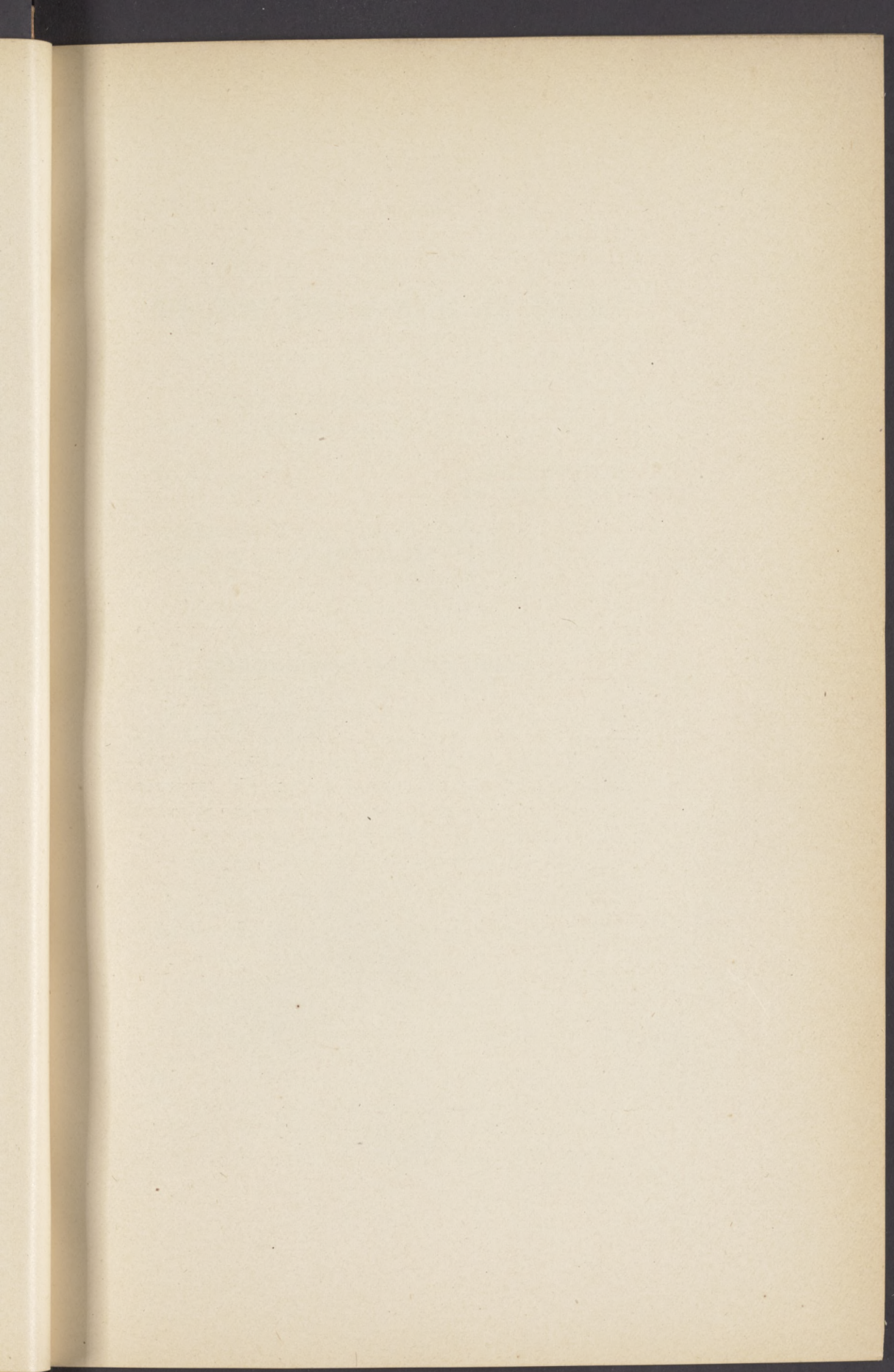
was justified in withholding from the moneys to be remitted to her upon the completion of the sale, an amount equal to such excess, with interest from the time of over-payment."

The question here is the same as that involved in the foregoing discussion, and is governed by the same line of authority.

It is respectfully submitted that there is error in the record sent up, and that the judgment of the lower court should be reversed.

McCARTER & ENGLISH,

*Attorneys for and of Counsel with Defendant
and Plaintiff in Error.*



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New Jersey Court of Errors and Appeals.

CARRIE E. SAWYER,
Plaintiff & Defendant in Error,

vs.

CLARENCE T. VAN DEREN,
Defendant & Plaintiff in Error.

Brief of Defendant in Error.

Statement of Essential Facts.

The plaintiff and one Galloway, as tenants in common, owned a factory property in the town of Harrison, Hudson County, New Jersey, which they jointly leased to a corporation known as the New Jersey Steel Tube Co. (See Ex. P 2, Case, p. 8).

The lease, dated March 1, 1899, contained an option giving the lessee the right to purchase the demised premises at any time during the term for the sum of \$25,000, of which \$10,000 was to be paid Mr. Galloway and \$15,000 to the plaintiff, Miss Sawyer. The lease was for a term of five years.

The rent reserved was \$1,000 per year.

The lessee exercised the option (Ex. P 5 & P 6, Case, pp. 94, 95) and received separate conveyances from the co-owners. (Ex. P 1, Case, p. 84).

The defendant below, Clarence T. Van Deren, acted as the agent of the owners in arranging the lease of premises to the Tube Co. and collected the rents under it; out of such moneys he paid the taxes, assess-

ments, commissions, etc., and the balance he paid to Miss Sawyer.

The defendant sent a statement to Miss Sawyer showing the final condition of the rent account just prior to the closing of the option, by which it appeared that he had overpaid her \$56.32 (Case, p. 32, lines 7-13). This amount Miss Sawyer repaid him (Case, p. 40, line 20).

It appeared that the defendant sent a similar statement of the rent account to Mr. Galloway (Ex. D 6, Case, p. 100, lines 30-34) (Ex. P 10, Case, p. 97, lines 19-24).

After some correspondence the defendant went to the residence of plaintiff, at Moore, Pa.; there she signed the deed to convey her interest in the Harrison factory property to the Tube Co., under its option, and she entrusted it to the defendant who gave her his receipt (Ex. P 3, Case, p. 89).

The deed mentioned in the receipt was only to be delivered to the purchaser, the Tube Co., on payment to Van Deren of a certified check to the order of plaintiff for the sum of \$15,319.42.

The action was brought by the plaintiff against the defendant to recover for money had and received and in the bill of particulars the defendant was charged with the sum of \$15,319.42 and credited with two items—(1) \$14,050.50 for which amount defendant, on March 7, 1904, sent his check to the order of plaintiff, and (2) the sum of \$344.89 representing the amount of taxes in arrears upon the property in question at the time of this sale chargeable to plaintiff. The plea of the defendant was that of general issue alone.

At the trial defendant introduced, by way of defense, evidence to show that the plaintiff had agreed that he should have his commissions on the sale of the property amounting to \$375.00 and made other claims for small amounts which were disposed of without exception or objection.

The evidence showed that instead of collecting \$15,319.42 the defendant received for Miss Sawyer,

upon the delivery of the deed, only the sum of \$15,189.20. The defendant at the trial *claimed* that he was entitled to an allowance or credit amounting to the sum of \$408.81, which he said he deducted from the purchase money belonging to Miss Sawyer in his hands because he claimed that he had overpaid Miss Sawyer in that he had paid her all the net rents from the property leased by Miss Sawyer and Mr. Galloway, whereas in fact she was only entitled as owner to five-ninths thereof.

The questions raised by this writ of error are set forth in the exceptions of defendant (Case, p. 79-80) and his assignments of error (Case, p. 81 *et seq.*).

I.

The gist of the question raised by the first assignment of error is the correctness of the charge of the Chief Justice, before whom the case was tried, in charging the jury that the defendant was not entitled to an allowance for the sum of \$408.81. This amount defendant claimed he should be allowed to set off against the plaintiff's demand, because he had paid all the net rents during the period covered by the lease to Miss Sawyer although in fact she was only the owner of five-ninth interest in the property.

The defendant did not file a set-off; this he should have done.

A set-off cannot be shown under the plea of general issue in an action of assumpsit.

Ball v. Consolidated Franklinite Co., 3 Vr.,
102.

4 Cyc. of Law, page 355.

1 Chitty's Pleadings, star page 473.

2 Chitty's Pleadings, star page 489.

(wherein is shown the proper form for a plea of set-off in an action of assumpsit).

The claim of defendant that he was entitled to set-off the sum of \$408.81 against the plaintiff's demand, was not supported by any proof which would entitle him to such set-off, even though his claim had been expressly pleaded, hence the error complained of, if error indeed it was, was harmless.

From the uncontradicted evidence, most of which was supplied by the defendant, it appears—that defendant collected the rents of the property leased by Miss Sawyer and Mr. Galloway during the whole term of the lease (from March 1, 1899, to March 1, 1904) a period of five years; and that defendant from time to time during such period, without objection from Mr. Galloway, paid over to Miss Sawyer the net rents, *i. e.*, the full amount of rents received after deducting his necessary outlays for taxes, assessments and commissions (Case, p. 31, lines 13-40), that just prior to the end of the term, and at about the time the sale of the leased premises was made, defendant sent to Miss Sawyer, the plaintiff, a statement showing the final condition of the rent account; that this statement showed that Miss Sawyer was "overdrawn" \$56.32 (Case, p. 32, lines 1-13); that about the same time the defendant sent a similar statement of the rent account to Mr. Galloway, the plaintiff's co-owner in the property in question, and that Mr. Galloway received such statement and sent it to his attorneys, Messrs. Gould & Wilkie; that thereupon these attorneys wrote to defendant February 16, 1904, with respect to such statement, as follows:—

"Mr. Galloway has also sent us a statement, " which we suppose was set him by you, with an " endorsement written upon it that Miss Sawyer " has sent you check for \$56.32 to balance this " account."

Excerpt from Ex. P 6, p. 100; that no claim was made by Mr. Galloway upon defendant for his portion

of the net rents at any time ; that the only reference to any claim of Mr. Galloway's in the rents in question was in a letter dated March 7, 1904, from Mr. Galloway's attorneys to defendant (Ex. D 7, Case, p. 101), which letter was written after the sale was consummated (Case, p. 22, lines 29-31) ; and presumably in the absence of Mr. Galloway and without his authority (Ex. D 5, Case, p. 99).

The burden of establishing the validity of his claim to set-off the said sum of \$408.81 was upon the defendant ; not only did he fail to substantiate the claim but he utterly failed to introduce any evidence to support it.

The defendant was an officious volunteer.

When a person pays money to the use of another, such person must show a request by the person to be charged or what in law is equivalent to a request.

There being no evidence to support defendant's claim he was not entitled to have the question as to this set-off or counterclaim submitted to the jury irrespective of the fact that it were pleaded or not.

Enstice v. Courtright, 32 Vr. 653.

Freeman v. Headley, 4 Vr. 523-540, and cases cited.

II.

The question raised by the second and third assignments of error mainly involve the same points as have already been discussed above, with respect to the first assignment of error.

It was not error for the Court to decline to charge defendant's requests, which are set forth in the Case, pp. 79-80, and which are also contained in defendant's second and third assignments of error (Case, pp. 82-83), for the reason that a trial court is not obliged to apply legal principles to a statement of facts, assumed or made by defendant's counsel,

which does not correctly set forth the situation of the case as developed by the evidence, or which does not include all the circumstances which should influence the conclusion of a jury.

Consolidated Traction Company v. Chenowith, 32 Vr., 554.

One tenant in common may receive the whole rent of a joint property until notice given to the tenant by his co-owner.

Decker v. Livingston, Johns. (N. Y.), 479.

Nor on the theory that all the net rents had been paid by mistake by defendant to the plaintiff, could defendant support his claim to have the amount of his alleged "overpayments" returned to him.

Alton v. Bank, 18 L. R. A., 144.

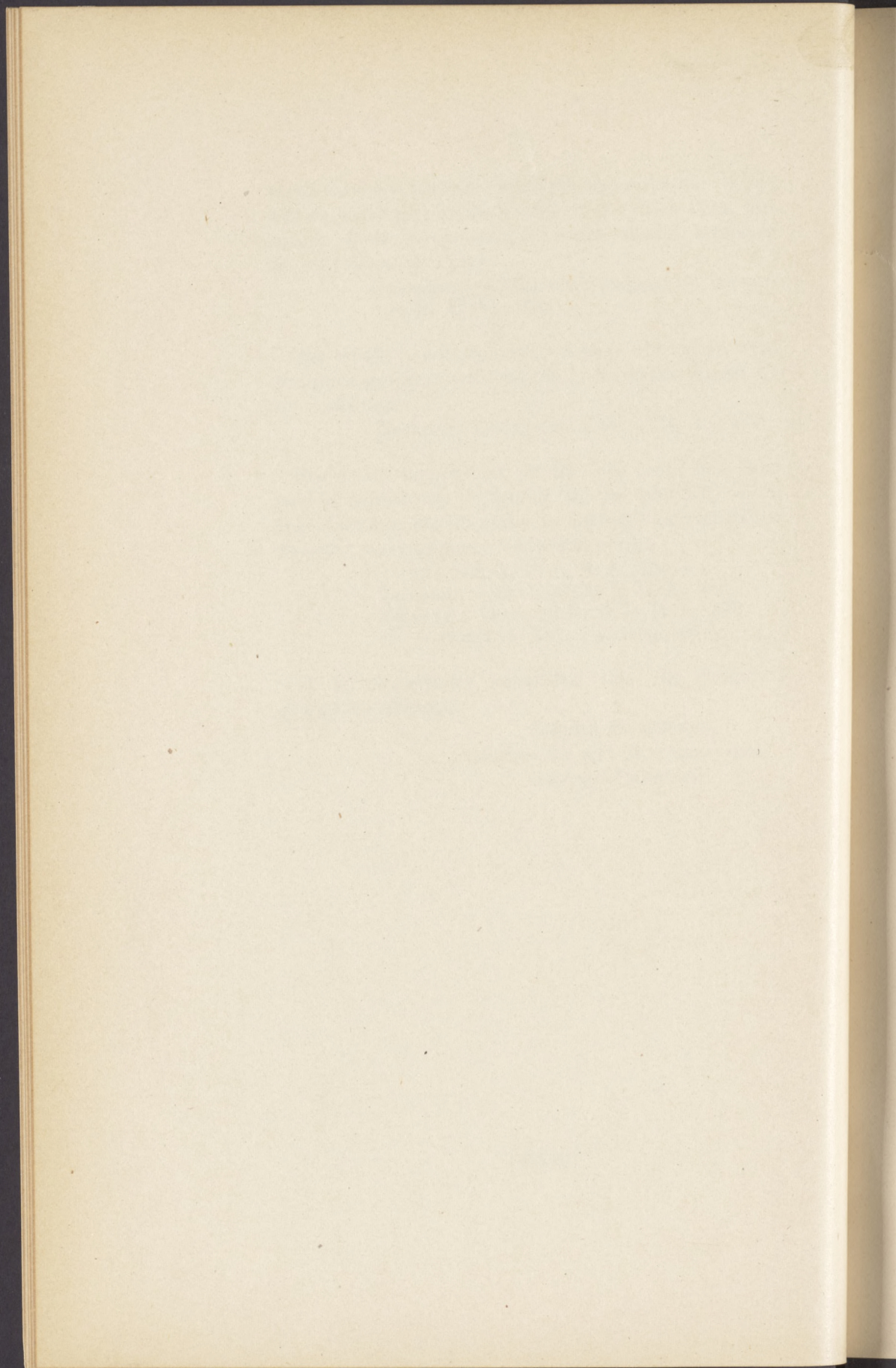
Langevin v. St. Paul, 15 L. R. A., 766.

Behring v. Somerville, 49 L. R. A., 578.
(N. J. Court of Errors and Appeals).

It is respectfully submitted that the judgment should be affirmed.

JEROME D. GEDNEY,
Attorney for and of counsel with
defendant in error.





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New Jersey Court of Errors and Appeals.

CARRIE E. SAWYER,

Plaintiff and Defendant in Error.

v.

CLARENCE T. VAN DEREN,

Defendant and Plaintiff in Error.

*On
Contract.*

10

WRIT OF ERROR.

NEW JERSEY, ss:

The State of New Jersey to the
Chief Justice, and other Justices
of our Supreme Court of Judica-
ture,

20

GREETING :

[L. S.]

Forasmuch as in the record
and proceedings, and also in the
giving of judgment in a certain
plaint, which was in our said Su-
preme Court of Judicature, be-
fore you, between Carrie E. Sawyer, plaintiff, and
Clarence T. Van Deren, defendant, in a cause on con-
tract, manifest error hath intervened to the great
damage of the said Clarence T. Van Deren, as is said;
we being willing that the error, if any there be, should
in due manner be corrected, and full and speedy jus-
tice done to the parties aforesaid in this behalf, do
command you that the record and proceedings, with
all things touching the same, to our Judges of our
Court of Errors and Appeals in the last resort in all
causes, at Trenton, on the thirty-first day of March
instant, together with this writ, you distinctly and

30

40

openly send, that the record and proceedings afore-
said being inspected, we may cause to be done there-
upon for correcting of the error, what of right, and
according to the law and custom of the State of New
Jersey, ought to be done.

Witness our Chancellor and President Judge of our
said Court of Errors and Appeals, at Trenton afore-
said, the twelfth day of March, in the year of our
10 Lord, one thousand nine hundred and six.

S. D. DICKINSON,

Clerk.

McCARTER, WILLIAMSON & McCARTER,

Attorneys.

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The answer of the Justices of the Supreme Court of the State of New Jersey within named.

The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,
C. J. (L. S.)

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&c.

New Jersey Supreme Court of the tenth day of February, in the year of Our Lord one thousand nine hundred and five.

Essex County, ss.

Clarence T. Van Deren, the defendant in this suit, was summoned to answer Carrie E. Sawyer, the plaintiff therein, in an action upon contract, and thereupon the plaintiff by Jerome D. Gedney, her attorney, complains; for that the defendant heretofore to wit, 10
on the ninth day of March, in the year of Our Lord one thousand nine hundred and four, at Newark, in said county, was indebted to the plaintiff in two thousand dollars, for goods sold and delivered by the plaintiff to the defendant at his request; and in the like sum for work done and materials furnished by the plaintiff for the defendant at his request; and in the like sum for money lent by the plaintiff to the defendant at his request; and in the like sum for money 20
paid by the plaintiff for the use of the defendant at his request; and in the like sum for money received by the defendant 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 defendant to the plaintiff; and in the like sum for money due from the defendant to the plaintiff on an account stated between them and being so indebted, the defendant in consideration thereof, then and there promised to plaintiff to pay her the said several sums of money on request. Yet the de- 30
fendant has disregarded said several promises, and has not paid the said several sums of money, nor any of them, or any part thereof, although often requested so to do, but to do so has hitherto wholly refused, and still does refuse, to the damage of the plaintiff two thousand dollars, and therefore she brings her suit, &c.

JEROME D. GEDNEY,

Attorney of Plaintiff. 40

Notice is hereby given that this action is brought to recover the amount due on an account of money received by the defendant to the use of the plaintiff of which the following is a true copy:

Clarence T. Van Deren to Carrie E. Sawyer, Dr.

March 1, 1904. To amount received from
N. J. Tube Co. in consideration for
deed from said Carrie E. Sawyer to
certain lands in Harrison, N. J..... \$15,319.42

10

Cr.

March 7, 1904. By check..... \$14,050.50

By amount paid by Van
Deren on account of taxes
of 1903, upon lands sold
by Carrie E. Sawyer to N.
J. Tube Co.....

344 89

14,395.39

\$924.03

20

March 7, 1904. Interest on \$15,319.42 from
March 1, 1904, to March 8, 1904.....

17.87

\$911.90

30

40

NEW JERSEY SUPREME COURT.

CARRIE E. SAWYER,

v.

CLARENCE T. VAN DEREN.

} *On Contract.**PLEA.*

And the said defendant, by McCarter, Williamson
 & McCarter, his attorneys, comes and defends the
 wrong and injury, when, etc., and says that he did
 not undertake or promise in manner and form as the
 said plaintiff hath above thereof complained against
 him, and of this he puts himself upon the country, etc.

McCARTER, WILLIAMSON & McCARTER,

Attorneys of Defendant.

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NEW JERSEY SUPREME COURT.

CARRIE E. SAWYER,

v.

CLARENCE T. VAN DEREN.

Contract.

Transcript of shorthand notes of testimony taken in above stated cause, upon the trial thereof, at the courthouse, Newark, N. J., December 18, 1905.

10 Before Hon. William S. Gummere, Chief Justice, and a jury.

Jerome D. Gedney for plaintiff.

McCarter, Williamson & McCarter for defendant.

Mr. Gedney opened for the plaintiff.

Mr. Gedney: I first wish to offer in evidence a certified copy of a deed from Carrie E. Sawyer to the New Jersey Tube Company.

Same marked Exhibit P 1.

CARRIE E. SAWYER sworn for the plaintiff.

20 *Direct examination* by Mr. Gedney.

Q You are the plaintiff in this case?

A I am.

Q And in the year 1904 were you the owner of certain property in Harrison?

A I was, yes.

Q Did you sell this property?

A I did. As I was not the entire owner of the property, I sold my portion of it.

Q You were part owner of the property?

30 A Five-ninths.

Q And you sold this property to whom?

A The New Jersey Tube Company.

Q Did you have any dealings with the defendant, Clarence T. Van Deren, with respect to the sale of this property?

A It was through him that the sale was contracted.

Q (Showing witness paper.) Is that a certified copy of the deed that you gave to the New Jersey
40 Tube Company?

Mr. McCarter. We admit that.

Q Did you make the delivery of this deed yourself?

A I made the delivery of it to Mr. Van Deren.

Q And where?

A At our home, my home, in Moore, Delaware County, Pennsylvania.

Q Do you remember the date you gave that deed to him? 10

A The last day of February.

Q What year?

A 1904.

Q And was he acting as your agent?

A He was, yes; I supposed he was.

Q And you delivered the deed to him on the 29th day of February 1904; did you take a receipt?

A I did.

Q For that deed? (Showing witness paper.) Is that the receipt? 20

A That is the receipt; yes, sir.

Q Do you know the signature at the bottom?

A Yes.

Q Was it written in your presence?

A It was.

Q The New Jersey Tube Company had been in occupation of the premises, had they not?

A Yes.

Q The premises conveyed by your deed, which is in evidence, prior to the sale to them, had they not? 30

A Yes, sir.

Q Under a written lease?

A Yes, sir.

Q (Showing witness paper.) Is this the lease?

A I presume so.

Q Well, look at it, please.

A Yes, sir; that is the lease.

Said lease offered in evidence and marked Exhibit P 2.

Q Under this lease they had an option to purchase your interest in the property on or before March 1, 1904, did they not?

A Yes, sir.

Q Did you, at the time you delivered the deed, give any instructions to Mr. Van Deren other than are contained in the written receipt which is offered in evidence?

10 Said receipt offered in evidence and marked Exhibit P 3.

A The only instructions were, he was to settle on the basis of the receipt, and no other way.

Q And if he could not settle was anything said what he was to do?

A If he could not settle the deed was to be returned to me the next day; if he could not settle by noon the next day, according to the receipt, he was to return it to me at once, and the deal was to be declared off.
20

Q Did you tell Mr. Van Deren so?

A Yes, sir.

Q After the delivery of that deed when did you hear from Mr. Van Deren again?

A On the 7th or 8th of March, I am not positive as to the date.

Q Did you see him then, or was it a communication by letter?

30 A Just a communication.

Q (Showing witness letter.) Is this the letter?

A Yes, that is the letter.

Said letter offered in evidence and marked Exhibit P 4.

Q With this letter there came a check, did there not, for \$14,050.50?

A Yes, sir.

Q Have you ever received the balance?

40 A No, sir.

Cross examination by Mr. McCarter.

Q How long had you owned this property, Miss Sawyer, or rather partially owned it?

A I had been interested in it, for, I can't say just exactly how long, but for five years I had been.

Q How long before the lease was made to the tube company?

A It was in, I think, in 1897; I am not positive as to the date.

Q Did you own it any length of time previous to the lease, a year or two? 10

A I think in 1897 it came into my—

Q The lease is dated 1899, March 1st?

A I think the date was in 1897 when it was deeded to me.

Q Then you owned it a year or two before you leased it to the tube works?

A I think it was in 1897.

Q You had a co-owner, Mr. Galloway? 20

A Yes, sir.

Q And your interest in the property was how much?

A Five-ninths.

Q And his interest was the balance?

A Four-ninths.

Q Were you acquainted with Mr. Galloway before you jointly acquired this property?

A I was not.

Q And under this lease that you signed—I suppose you signed this lease, of course? 30

A Yes, sir.

Q In connection with Mr. Galloway, to the tube works?

A Yes, sir.

Q And by the terms of this lease the tube works were to pay a thousand dollars a year?

A Yes, sir.

Q This ran for the five years that they leased the property, that is right, isn't it? 40

A Yes, sir.

Q Now, who collected the rents on the spot, for the owners of that property under this lease, from the tube works?

Objected to.

The Court. I do not see the materiality of it, Mr. McCarter.

10 *Mr. McCarter.* I won't pursue that line, then, just now.

Q Now, Miss Sawyer, Mr. Van Deren, the defendant in this suit, acted as agent in the negotiation of the lease, and represented you in the consummation of the sale provided for in the lease, did he not?

A I supposed he was representing me, but he didn't seem to be, when he paid me so much short.

Q Well, he was your agent here?

A He was my agent.

20 Q Part of the difference between the check which you received, and the share which you were to get, consists of his commissions—

Mr. Gedney. I object.

Mr. McCarter. Let me finish the question.

Q Consists of his commissions, does it not?

30 *Mr. Gedney.* I object on the ground that this is a matter of defense, and, if so, he must have a contract in writing, under the statute of frauds; he cannot charge the plaintiff under an oral admission of this character.

The Court. I think the objection should prevail.

Q I show you a letter dated Moore, Delaware, Pennsylvania, March 14, 1904, addressed to Mr. Van Deren, and purporting to be signed by you; please look at it and see if you wrote that to Mr. Van Deren? That is your writing, isn't it?

40 A Yes, that is my writing.

Q Without reading the entire letter now, I notice that at the end of it, which is all that refers to this particular topic, you say, "I enclose statement memorandum of the transaction between us, and sincerely hope I will receive an early explanation and settlement. Having no disposition to appear arbitrary, but to simplify the matter as much as possible, I concede taxes paid 1903, \$344.89, and your commissions, \$375. This shows balance due me of \$559.31, on the only lines of settlement you are authorized to make." Now, of the sum that is a difference between the amount that you say Mr. Van Deren received, and the amount that he remitted to you, there are two sums named by you in this letter, are there not, namely, \$344.89, taxes due in 1903 on this property, which he paid, and commissions \$375 which you admit in this letter he earned; am I right? 10

A He was to receive the \$375 if he carried the sale through as the agreement in the receipt. He did not do it; and even then, if he had settled the balance, I was willing to concede commissions, just as I state in the letter; but he did not even do it then. 20

Q You have not answered my question. Read it, Mr. Stenographer.

Mr. Gedney. I object to the question. I do not think proper foundation has been laid for it. I object to it on the ground that he cannot show by that letter a contract whereby the defendant can legally claim the right to withhold these commissions. 30

The Court. Why?

Mr. Gedney. For this reason, that the statute requires that the amount, and rate per dollar, must be expressed.

The Court. I overrule the objection.

Q (Previous question read.) Do you understand the question? 40

A I do; I have answered.

Q I ask you if the difference between the amount of the check which you have received, and the amount of the check which Mr. Van Deren received for you, does not consist, at least partially, of two sums, one of which is the taxes for 1903, amounting to \$344.89, due from this property to the Town of Harrison, and the other \$375 which Mr. Van Deren claims as his commissions; is that right?

10

Mr. Gedney I think that is a conclusion.

The Court. She may make the conclusion, if she is able.

A It was, according to my letter.

Q Now, I show you a letter dated 2-18-'04, purporting to be signed by you, and addressed to Mr. Van Deren; please look at it and see if you wrote that?

20

A Yes.

Q I notice in this letter, which was before the matter was closed, being on the 18th of February, you say "The amount due you for commissions I will send to you direct by check at the sum which I presume will be satisfactory to you." So that when you wrote this letter you expected to have Mr. Van Deren paid commissions, did you not?

A Certainly, if he carried through the deal as I expected he would.

30

Q Now, the deed was handed you by Mr. Van Deren, and the settlement made by him to you on March 6th or 7th, I think?

A The deed was not handed to him by me at that time, no.

Q The settlement was made on March 6th or 7th by him?

A I don't know when it was made; he didn't report to me until about the 8th, and it was to be settled on the first of March.

40

Q You received a check on the 6th, 7th or 8th, somewhere around there?

A Yes, sir.

Q And this letter I refer to was written on March 18th, in which you state you would allow him his commissions?

A It seems to be.

Q Now, who drew the deed which you signed? Who actually prepared the deed which you signed?

A Mr. Van Deren, I believe.

10

Q And he claimed, did he not—

Mr. McCarter. There was a statement accompanied the letter, and I think it ought to be offered with the letter. I think the statement which is referred to in the letter, and made part of it, should be offered with the letter.

The Court. If it should have been offered, it was not, and I cannot compel counsel to offer it, and the letter was not objected to without the statement.

20

Q I refer you to a statement which your counsel hands me, and ask you if that accompanied the letter of March 7th, from Mr. Van Deren?

A Yes.

Q I notice that in that statement he has an item, "Services drawing deed and expenses, \$10;" that also forms a part of the difference between you and him, does it not?

A I believe it does, yes.

30

Q Now, on the 29th, I think you said, of February, Mr. Van Deren came to Moore, Pennsylvania, to see you about this. Moore, Pennsylvania, is where, in reference to Philadelphia?

A South, southwest.

Q How far?

A About nine miles.

Q Nine miles beyond Philadelphia. You state that the receipt does not state everything that was said at the time it was delivered. For instance, you have

40

testified that at the time it was delivered he was to settle by noon the next day, and if he did not settle by noon the next day the whole deal was declared off?

A Yes, sir.

Q Who prepared this receipt that you have produced?

A Mr. Van Deren dictated it, and I wrote it, and he signed it.

Q Mr. Van Deren dictated it?

10 A Yes, sir.

Q Why didn't he write it?

A I don't know, unless I was sitting at the table ready to sign the deed.

Q You did not compose that receipt?

A No, sir; Mr. Van Deren did.

Q Now, didn't you say at the time that the receipt was delivered to Mr. Van Deren, that he was, if possible, to close the deal for this property in Harrison on the theory that the purchaser of the property would pay so much additional of the taxes as had been put
20 upon that property, as you claimed arose from the fact that the purchasers, during their lease, had improved the property, by buildings and machinery, and that Mr. Van Deren said he would do his best on that line?

A No, sir.

Q Nothing of that kind said?

A Not that way, no, sir.

Q How was it, please?

A I said he was to close the deal on the exact
30 terms in the receipt, or not at all, by noon the next day.

Q You knew you had already agreed to sell the property for a given sum by the lease, didn't you?

A Yes.

Q You also knew that there was nothing in that lease that bound the purchaser to pay any taxes on the property, didn't you?

Objected to as a conclusion of law.

The Court. He is not asking her what the lease contained; he is asking her what she knew of its
40 contents.

A I understood from the lease that they were not to do anything to increase the taxes.

Mr. McCarter. I move that that answer be stricken out.

The Court. Yes, that is not responsive.

Q Answer the question; I repeat it to you. You knew that this lease, which contained an option signed by you, agreeing to sell this property for a given sum, did not require the purchaser to pay any taxes, didn't you; you knew that? 10

A Not as the property was then.

Q Well, did you know it, or didn't you know it?

A Well, I don't—I am answering you as I understand your question.

Q Did you or did you not know that there was not a word in that lease, from beginning to end, which required the purchaser of that property to pay the taxes on it?

Objected to as irrelevant. 20

Objection overruled.

A There was nothing in the lease.

Q Now, your effort was, was it not, Miss Sawyer, to somehow or other, if possible, require the purchaser of this property, before the option named in the lease was carried out, to become in some way responsible to you, and your co-owner, for some increase in taxes that had arisen upon that property, as you claimed, because the property had been improved by the lessee during the possession? 30

Objected to as irrelevant.

Objection overruled.

Exception to plaintiff.

A It was.

Q Did you ever meet personally anybody connected with the tube company, so far as the closing out of the sale is concerned?

A No, sir.

Q Mr. Van Deren was the only person who, on your behalf, treated with the tube works, to endeavor 40

to get them to agree to pay some, if not all, of the taxes that you claimed had been thus increased, was he not?

A Well, I had written them, I had not met them.

Q Whom did you write to?

A I think a Mr. Klose is the name, I am not positive.

Q Did you get any letters from Mr. Klose?

A I did.

10 Q Have you got them here?

A I think they are here.

Q Mr. Klose did not ever agree to pay those increased taxes to the full amount you claimed, did he?

A No, he never said he would pay them.

Q Now, as a matter of fact, Mr. Van Deren, on your behalf, and Judge Harris on behalf of the owners, the tube works, did reach a conclusion by which a sum of money aggregating \$340.50—"

20 *Mr. Gedney.* That is objected to on the ground that it is not proper cross examination, is a matter of defense, if any of it is proper in the case, and that this witness cannot know what agreement they did reach.

The Court. Proceed, Mr. McCarter.

Q —Should be paid by the tube company in settlement of your claim that they should pay these taxes?

A I don't know what agreement they came to.

Q Was no statement ever made to you of that by Mr. Van Deren?

30 A A statement was made by Mr. Van Deren, yes.

Q Just turn to the letter which you produced, and say what he says about it?

A I know what he says about it, but I know nothing from the tube company.

Q What do you understand from Mr. Van Deren was the arrangement which he made?

The Court. I suppose the letter states.

40 *Mr. Gedney.* It is in the statement, and in the letter also.

Q Is it not true that you claimed that the full amount of extra taxes occasioned by improvements which the tube company had put upon that property pending the lease, and in anticipation of their purchase, amounted to \$480; that Mr. Van Deren reported to you that he had received from Judge Harris, on that account, \$340.50, isn't that a fact?

A According to the statement; I can't carry the figures in my mind.

Q Well, you may look at the letter, and look at the statement and see if that is not right? 10

A The statement, I think, does not show the amount that I claimed.

Q I refer you to that statement; did you ever give that to Mr. Van Deren? (Handing witness paper.) Those are your figures, aren't they?

A Yes.

Q Now, you claimed that in 1899—by this statement which you gave Mr. Van Deren—that in 1899 the tube company had increased the taxable value of that property \$1,000? 20

A Yes.

Q In 1900 \$4,000?

A That is my statement.

Q In 1901 \$4,000?

A Yes.

Q In 1902 the same, \$4,000?

A Yes.

Q And in 1903, \$5,000?

A Yes. 30

Q You added, by this statement which you gave him, the tax rate upon that increase, and concluded that, somehow or other, this tube company owed you the gross amount of the additional taxes due to that alleged increase, with interest at six per cent., making a total of \$488.34, did you not?

Objected to as immaterial and irrelevant.

The Court. I don't quite follow the line of cross examination; what is the object of it? 40

Mr. McCarter. The object is this. The receipt admittedly does not express all that was said at the time, and my purpose is to see whether the witness has given all that occurred, or whether it was not——

The Court. Let me see the receipt. (Receipt handed to the Court.)

10 *Mr. Gedney.* Now, on this question all that counsel is talking about was gone over before this receipt was given, so what difference does it make how that sum of \$15,319.12 was made up? That is my objection. I do not think it is any of the agent's business how it was made up.

Mr. McCarter. My point is this, your Honor sees that this lease, which contained in it the option, had in it, in the first place, not a word in regard to taxes.

20 *The Court.* But, as I understand it, this was the amount that was received, was it not, \$15,319.42?

30 *Mr. McCarter.* No, sir; it was the amount which she said he was to receive. There was nothing in the lease, or the option clause, that required the tube company to be responsible for any taxes; they were to pay a flat \$15,000; this lady conjured up the idea that, because of the fact that during the lease the tube company had improved the property, they were under obligation to pay the additional tax on those improvements; and the principal difference between these parties in this suit is whether or not Mr. Van Deren was justified in delivering the deed, and getting as much of that extra as the tube company were willing to pay.

The Court. I think you said the tube company were willing to pay \$340.50?

40 *Mr. McCarter.* They were; they were not willing to pay \$480.

The Court. I will hear it.

Q (Previous question read as follows: "You added, by this statement which you gave him, the tax rate upon that increase, and concluded that somehow or other this tube company owed you the gross amount of the additional taxes due to that alleged increase, with interest at six per cent. making a total of \$488.34., did you not?") and that is the statement that you handed to Mr. Van Deren just before the matter was closed out? 10

A Yes.

Q You also claimed a rebate for insurance policies, and crediting Mr. Van Deren with those rebates, and with your share of the tax for 1903, claim that the balance due was \$319.42, the sum named there?

A \$319.42 above the selling price of \$15,000.

Q That is how the sum of \$15,319.42 is reached in the receipt?

A Yes, sir.

Q Now, Miss Sawyer, you knew you were under an obligation to sell, didn't you? You knew you had to sell for the sum named in the lease? 20

A If they took the place within the time; yes, sir.

Q And if they did not agree to pay the extra taxes that you thought they should, you could not escape, if they took the property promptly, from taking the sum named in the deed; you knew that, didn't you?

Objected to on the ground that it calls for a conclusion.

Objection sustained. 30

Q Do you mean to say you did not tell Mr. Van Deren that he should get as much as he could on account of these taxes?

A No, sir; I never told him so.

Q Do you mean to say you were willing to stand a lawsuit on your obligation to convey that property, if they would not pay all those extra taxes?

A I would; yes, sir.

Q You were not very anxious to sell this property anyway, were you? You thought it had gone up? 40

A I was anxious to sell if the agreement could be kept.

Q Namely, that you should sell for \$15,000; that was the agreement, wasn't it?

Mr. Gedney. It states for itself.

Q And you were anxious to sell for \$15,000?

A I wasn't anxious to sell.

Q You gave Mr. Van Deren that deed which he drew and brought over to you in Moore, Pennsylvania, and you told him he wasn't to give that deed up under any circumstances or conditions, unless he got the full amount of the taxes claimed by you?

A Unless he got the \$15,319.

Q The figures stated in that receipt?

A Yes, sir.

Q Otherwise you were willing to stand a lawsuit?

A Yes.

Objected to.

Q Did you ever talk with your associate owner, Mr. Galloway, about that, who owned four-ninths of this property?

A No, sir; I never talked with him.

Mr. McCarter. I would like to have this statement and memoranda marked for identification, also these two letters.

Same marked D1, D2, D3 and D4 for identification.

Redirect examination.

Q You have been asked if you were anxious to sell the property at the time this option was expiring, and you gave the deed to Mr. Van Deren for the purpose of delivering it under the contract; at that time did you conceive that the property was of greater value than the amount which you were required to deliver it for under your option?

A It was improved; yes, sir.

Q In other words, you considered it of more value?

A Yes, sir.

Q Now, in regard to these taxes about which so much has been said, you made no claim, did you, against the company for taxes on the lands and buildings as they were when you rented them?

A No, sir; none at all.

Q But is it not a fact that they put other buildings on there?

Mr. McCarter. Please don't lead her.

Q Was anything done to the premises leased after the lease was signed? 10

A The buildings were extended.

Q Did they have your permission so to do?

A No, sir.

Q And was the extra assessment, by reason of these buildings that you have just spoken of, that you claimed should have gone to them?

A Yes, sir.

Recross examination.

Q How did you reach the amount of the so-called extra assessment in this receipt which I have shown you, a thousand dollars for one year, \$4,000 for three years, and \$5,000 for another year? 20

A By the increase in the bills for taxes.

Q How often did you visit this plant after the lease and before the purchase?

A I can't say how often; I was there several times, and also to the tax office.

Q Don't you know there was a natural increase in property over there; taxes went up, valuations were raised? 30

A No, I don't.

Q You don't know they were not, do you?

A No.

ELWOOD C. HARRIS, sworn for the plaintiff.

Direct examination by Mr. Gedney.

Q Judge Harris, you represented the New Jersey Tube Company in the transaction by which they received a conveyance from Carrie E. Sawyer? 40

A Yes, sir; I represented them.

Q And Charles T. Galloway for property in Harrison?

A Yes, sir; I represented them at the time the lease was made, and also at the time of the purchase.

Q Is this the lease, Exhibit P 2?

A Yes, sir.

Q Now, under this lease the New Jersey Tube Company had a right, which was called an option, to
10 buy the premises leased on or before the first day of March, 1904, did they not?

A They had.

Q Was that transaction consummated, that is, did the New Jersey Tube Company receive the deed, and pay the consideration, on or before March 1, 1904?

A Not before March 1st; a few days after March 1st. The arrangements were all made before the first of March, but there was some delay in carrying it out.

Q Well, what arrangements do you mean? Did
20 Miss Sawyer, one of the owners, ever consent personally to have it go over, postponed, go beyond the first day of March?

A I don't know anything about that. All I know is that we were all prepared, before the first day of March, to take the title; but there had to come together the representatives of Mr. Galloway in New York.

Q You don't answer my question.

A I had nothing from Miss Sawyer except through Clarence Van Deren, over the 'phone.

Q And the deal was consummated when, please?
30

A The deal was closed on the 5th day of March, 1904.

Q You received the deed on that day, did you not?

A The deeds, one from Galloway and one from Miss Sawyer.

Q You took the acknowledgment to the Sawyer deed, I see, on that day?

A Sawyer?

Q Yes. You took it as—took the proof of Van
40 Deren as the subscribing witness?

A Oh, I didn't see Miss Sawyer.

Q No, took it of Van Deren, as subscribing witness, on the 5th of March?

A That was the day it was settled at Mr. Van Deren's office, because I filled out one check at that time in his office.

Q How much did you pay Mr. Van Deren on Miss Sawyer's account for this deed?

A I can't say what I paid Mr. Van Deren on Miss Sawyer's account. I paid Mr. Van Deren on account of the purchase of the premises, \$14,590.56. 10

Q How did you arrive at that figure, please?

A The consideration for the whole purchase was \$25,000; the contract, or option, called for the payment of \$10,000 of that amount to Mr. Galloway, and \$15,000 to Miss Sawyer. A short time before this date, at the request of Mr. Van Deren, I had requested my clients to send a thousand dollars to Mr. Van Deren, on account of the purchase, that the parties might know that we intended to carry it out. 20
So that when we came together that day there remained \$24,000 to pay on account of the purchase. The attorneys of Mr. Galloway, Gould & Wilkie, of New York, arranged with me that they were to have Galloway's deed there, and wanted to receive \$9,750 by certified check, and upon the delivery of that the deed would be delivered. I had my check certified on March 4th for that amount to the order of Gould & Wilkie, attorneys, and had it with me at that time.

Q (By Mr. McCarter.) Just state there how that \$9,750 was reached? 30

A I don't know, Mr. McCarter.

Q Commissions?

A That is only a guess, I know nothing about it.

Q (Further direct.) So you then had paid \$1,000 to Mr. Van Deren before the deal was actually closed?

A That left \$24,000 to pay of consideration.

Q And whether that was paid on the Sawyer deed, or the Galloway deed, you don't know; you simply paid him a thousand dollars? 40

A Oh, the first thousand, I don't know where it went.

Q Those were two separate deeds?

A Yes, sir.

Q And two separate contracts?

A No, there were two separate deeds, but only one contract. I would not take from one of these people without the other.

10 Q A certain sum was to be paid to one co-owner, and a certain sum to another?

A Yes, sir.

Q Do you know whether you paid that \$1,000 on Galloway's interest, or Sawyer's interest?

A I don't know.

Q But you were to pay \$10,000 to Galloway weren't you?

A Yes, sir.

Q Well, you only paid \$9,750.

20 *The Court.* How does he know that?

Mr. Gedney. What do you mean, if your Honor please?

The Court. How does he know that he didn't pay \$10,750; he paid \$1,000 to somebody?

Q Then you paid \$9,750 to Gould & Wilkie, attorneys of Galloway?

A They wanted that much more to deliver—

Q Well, you paid that?

A Yes, sir.

30 Q (By the Court.) You paid altogether \$25,340.56?

A Yes, sir.

Q (Further direct.) Of that amount \$10,000 was payable to Galloway, wasn't it, under the contract?

The Court. Why? Not under the contract?

Mr. Gedney. Under the option.

The Court. Yes, and \$15,000 to your client; but that does not account for the other \$340, unless that was to go to Mr. Van Deren?

Q Well, do you know how that \$340.56 was made up?

A Yes, sir.

Q Will you state it, please?

A The claim was made by—it came to me through Mr. Van Deren—that the tube company should pay for the increased taxes on the property subsequent to the making of the lease. I made careful inquiry as to what and when improvements had been made, Mr. Van Deren gave me—either told, or gave me—
10 a memorandum of a larger claim than that which I allowed; I presume it was the claim presented here this morning; \$1,000 for the first year, \$4,000 for the next three years, and \$5,000 for the last. I found that the tube company, the first year they were there, had not added any buildings or improvements—added any buildings at least—but that it had become a growing concern—

Q Just one moment. Who did he say made this claim?
20

A I don't know that I can distinguish between Galloway and Sawyer, whether it was one, or either, or both.

Q Didn't he say?

A I don't remember, Mr. Gedney.

Q (By the Court.) Did he represent both parties?

A Well, I suppose so, except in so far as Gould & Wilkie sent their deed over on that day, and would only deliver it on their payment to them. I found that
30 there had been no buildings put on in the first year, but there had been an increase in the assessment of a thousand dollars; and at the same time that it was not due to any addition to the premises by these people, but putting up of the taxes, as is constantly done in these city properties. The next year they did make some improvement on the property, and then there was a further increase, I think, of \$3,000 in addition to the \$1,000, and then the last year there had been some additional buildings. So I said: "That
40

first increase of \$1,000 I do not think is due to any improvements which you have put on the property, but I do believe that, as a matter of equity, you should pay for what increase has been occasioned by your buildings." And I figured that out \$3,000 in 1900, 1901, and 1902, and \$4,000 in 1903, and made these figures, and I got the tax rate, and I added six per cent. from, I think, the 20th of December, I forget just what the date was, just the time when the taxes were payable, and those four years, with interest, made \$340.56.

Cross examination by Mr. McCarter.

Q Are the figures which you see before you, the statement D 2 for identification, the figures that Mr. Van Deren presented to you, endeavoring to get the increase?

A Well, I can't swear, Mr. McCarter, that that was the paper; but I do remember that we conceded what was claimed, except the first year's increase of a thousand dollars, and took that off of each year of her claim, because I said that—

The Court. You stated that, Mr. Harris.

Q You did not see Miss Sawyer in this transaction at all did you?

A No, I did not.

Q And any claim that was made on account of getting additional allowance on account of this alleged increase of value, was made on behalf of the owner or owners, through Mr. Van Deren, to you, was it not?

A It was.

Mr. McCarter. Now, I don't care whether you call this cross examination or direct examination; I don't want to keep Judge Harris, but I want to ask him this question, and then he may go, as far as I am concerned.

Q Did you consider, and did you advise your clients, that they were under any legal obligation to pay a cent on account of this alleged increase in valuation?

Objected to.

The Court. I don't see the materiality of it.

Q You, of course, were familiar with the lease itself, and the option clause in it?

A I was.

Q Did you conceive that there was any obligation, legal obligation, on the part of the tube company, to pay anything on account of this alleged increase of taxes upon that property? 10

Mr. Gedney. By reason of the new buildings. I object to the question.

The Court. I do not see the materiality of Judge Harris's opinion of the legal obligation, because he has already said he considered they were equitably required to pay, and so advised them, and they did. 20

Q Who first brought to your attention a claim that there was something to be paid on account of these extra taxes?

A I think Mr. Van Deren.

Q Do you know whether or not the two or three days delay that occurred was due to the inability to get Gould & Wilkie's deed?

Mr. Gedney. I object to the question on the ground that it has nothing to do with our transaction. 30

The Court. I do not think the delay has any materiality in this case. The legal obligation on both of the parties to this lease was to deliver a deed, not on any particular day, but to deliver a deed within a reasonable time after the lessees notified the owners of their intention to avail themselves of the option. They had to give that notice within the time fixed by the lease, but the 40

lease did not require that the option should be exercised, and the transaction consummated within that time.

CARRIE E. SAWYER recalled for the plaintiff.

Direct examination by Mr. Gedney.

Q (Showing witness paper) Did you receive this from Judge Harris?

A I did.

10 Mr. Gedney. It is a letter dated February 22, 1904, from Elwood C. Harris.

Q This refers to the closing of the transaction between you and him?

Mr. McCarter. It speaks for itself.

Said letter offered in evidence and marked, Exhibit P 5.

Q (Showing witness paper). And I show you this paper, have you ever seen that before?

20 A I think it came in a letter or with that letter; I have seen it, yes.

Q You received it?

A I received it through the mail.

Q And did it accompany this letter of Judge Harris?

A I think it did.

Q At any rate you received it about the date on which it bears date?

A Yes, sir.

30 Q And it is dated February 22, 1904, and signed New Jersey Tube Company, James Klose, president, is it not?

Mr. McCarter. It speaks for itself.

Said paper offered in evidence and marked Exhibit P 6.

Cross examination by Mr. McCarter.

Q Why didn't you appear in Newark at the time suggested in these letters to close this transaction out?

40

A My recollection is that I had not been well, and I was waiting to hear from Mr. Van Deren.

Q So Mr. Van Deren came over to see you?

A About a week after that, yes.

Q A week after what?

A After these letters.

Q After the day named in those letters?

A Yes, sir.

Mr. Gedney. After the date of the letters.

10

Q One moment. You say he came over a week after the day named for the settlement in those letters?

A After the date of the letters.

Q That is, he came over to you about the time it was suggested by Judge Harris that you should come to Newark?

A Just let me see the letter, please. (Letter shown to witness.) Well, I don't see that they say what date.

20

Q Well, Saturday.

A Saturday, yes.

Q Seems to be the 27th of February? Now, he was over there apparently on the 29th, which was Monday?

A Well—

Q Well, look at the 29th, look at the receipt, he was over there the 29th, wasn't he?

A Yes, sir.

Q 2-29, was that the day he was over there?

30

A Yes, I think that was on Friday.

Q 1904. Well, the calendar will speak for itself. How did he come to come over there? Did you request him to come, or did he come?

A No, I don't know that I requested him to come. I said the settlement could be made through my bank.

Q Then you didn't propose to avail yourself of this suggestion and come to Newark, did you?

A I didn't see that it was necessary.

40

Q Never mind whether you thought it was necessary or not; you didn't come, did you?

A No, sir.

Q And didn't expect to come?

A No.

Q And refused to come?

A No, I didn't refuse to come.

Redirect examination.

10 Q What did you do?

A I said I would come if necessary.

Q Did you write a letter in answer to this communication?

A Yes, sir.

Mr. McCarter. To Judge Harris?

Mr. Gedney. To Judge Harris, yes; I have a copy of it here if Mr. McCarter will admit it.

20 Mr. McCarter. No, I don't know anything about it.

PLAINTIFF RESTS.

Mr. McCarter opens for the defendant.

CLARENCE T. VAN DEREN sworn for the defendant.

Direct examination by Mr. McCarter.

Q How old are you?

A In my forty-seventh year.

30 Q Where do you live?

A Harrison.

Q How long have you lived there?

A Forty-two years.

Q What is your business?

A Real estate and insurance business.

Q Are you at present officially connected with the government in Harrison?

A I am—

Objected to.

40 The Court. Proceed.

A I am a member of the Common Council, and have been so six years.

Q How long have you been in the real estate business?

Q When did you first become acquainted with Miss Sawyer?

A Why, I think about a year, maybe a year and a half prior to the making of this lease.

Q Did you have anything to do with the negotiation of this lease?

A I had all to do with the negotiation of it. 10

Q I notice it is proven before you, I think?

A Yes, sir.

Q After the lease was made, and the tube company entered into possession, who collected the rents?

A I did.

Q Who paid the taxes and other charges against the property during the lease?

A I did for Miss Sawyer and Mr. Galloway.

Q And rents that you remitted were net rents over and above the charges on the property? 20

A Yes.

Q Now, state under what circumstances and conditions the rents were remitted by you and to whom?

A During the term of the lease the rents were paid to me at the rate of \$1,000 a year, out of which I paid the taxes, the insurance and the commissions. Miss Sawyer, on her way from Moore, Delaware County, Pennsylvania, to New York, with a Mr. Durland, would stop in the office, and would ask how much I had, or as to the account; I would show them, and she would ask for a check for \$50, or \$100, or \$150, and I would give it to her. She would also write and ask during the five years, for a statement at different times, which I always furnished as soon as possible; and upon receipt of that she would write and ask for a check for \$50 or \$100 or \$150, which I would send to her. And sometimes the account would be overdrawn, or, in other words, I would pay her more than I had on hand, and she would send me a check to balance the account. 30

Q When you finally made a statement which accompanied the letter—I observe the statement, which is marked D 1 for identification, and which you mailed her, as she says, has, on the debtor's side "Overdrawn, \$56.32."

A That is right.

Q Does that mean that at the time you rendered the statement, she had overdrawn from you money in the way of rents in excess of what was due her, amounting to \$56.32?

10

A Yes, sir.

Q So that situation existed when you closed up?

A Yes, sir.

Q Now, the time came for the closing of the option. What was the first that you had from her in regard to that—while you are thinking about it I will ask you this question: how did you get first into communication with Gould & Wilkie, the representatives of Mr. Galloway?

20

A By notifying Mr. Galloway that the tube company, on the 17th of February, 1904, had paid me a thousand dollars in exercising the option that was given them to purchase this property any time within the term of the lease, and asking him if he would kindly send me over any or all papers in connection therewith, provided he was desirous of having me draw up a deed for him and Miss Sawyer to sign.

Q Did you then receive a letter from Mr. Galloway in reply (handing witness a paper)?

30

Objected to as immaterial.

The Court. Well, I will hear it.

A Yes, sir. That is just prior to receiving the check; but I notified them that the company was going to send me a check on that date.

Said letter offered in evidence and marked Exhibit D 5 and read.

Q Now, did you get in touch with Mr. Goodwin of Gould & Wilkie?

40

A I did.

Q And did you receive this letter dated February 16, 1904 from Gould & Wilkie?

A I did.

Said letter offered in evidence and marked Exhibit D 6 and read.

Q Well, without going over the details of what ensued between you and Mr. Wilkie immediately, I will ask you if you received this letter dated March 7, 1904, from Mr. Goodwin of Gould & Wilkie?

A Yes, sir.

10

Said letter offered in evidence.

Objected to as irrelevant and immaterial.

The Court. I will dispose of it at the close of the case.

Exception to plaintiff.

Said letter marked Exhibit D 7 and read.

Q After getting in communication with Gould & Wilkie did you go over to Moore, Delaware County?

A I did.

20

Q How did you happen to go over there?

A I think the question arose between Mr. Goodwin and myself, or the firm of Gould & Wilkie, as to whether Miss Sawyer would join with Mr. Galloway in a deed. I said that I couldn't say, and I thought if he would write Miss Sawyer she could answer that question which I could not. I am under the impression that Mr. Goodwin, of the firm of Gould & Wilkie, did write to Miss Sawyer.

Objected to.

30

The Court. Yes

Q Never mind that. Did you receive a letter from Miss Sawyer, which I now show to you, date 2-18-'04, already marked for identification D 4?

A Yes, sir.

Said letter offered in evidence.

Objected to as irrelevant and immaterial.

The Court. I will receive it and pass on its materiality later.

40

Said letter offered in evidence and marked D 8 and read.

Q Now, that is dated on the 18th; did you write her, or did you go over there on the 29th?

A I went over on the 29th.

Q Had you prepared the deed in the meantime?

A I had.

Q Whom did you see?

A I saw Miss Sawyer and Dr. J. H. Durland.

10 Q Did you receive from her a letter dated the 27th of February before you went over?

A I did.

Said letter offered in evidence.

Objected to on the same ground.

The Court. I will receive it.

Said letter marked Exhibit D 9 and read.

20 Q Now, Mr. Van Deren, I notice that she suggests that you bring the check over before you had the deed executed, of course, you could not do that?

A No, sir.

Q So you went over?

A I went over.

Q You have already stated that you saw her and this Dr. Durland; tell us the conversation that you had?

A I went to Miss Sawyer's residence with the deed—

30 Q How long does it take to go there?

A I think I was in the neighborhood of three hours from the time I left Jersey City before I arrived at her residence in Moore, and I think I was there probably an hour and a half, or thereabouts. I had the deed with me; Miss Sawyer signed it; I heard her acknowledge it to be her hand and seal for the uses and purposes therein expressed, and I was to prove the deed as a subscribing witness. I said it was impossible to carry out the instructions in her letter to bring a certified check to her order before the deed

40

was executed, that no one ever did business in that way or manner. We talked over the question of the taxes, the difference in taxes, and I never could arrive at any conclusion or get any evidence from her upon what basis she based the claim for increased valuations.

Q Go on.

A She said that it was owing to the fact of improvements having been made on the property, and extensions and additions. I said, "Miss Sawyer, we haven't got any proof that that has been the case, that the assessor of the town of Harrison has increased the value of that property over and above the amount it was assessed at, prior to, or at the time of making this lease." I said to her, "There has been a natural increase in property in Harrison." I said to her further that the County Board of Equalization of Taxation had been after the assessor of the Town of Harrison to increase his valuations. And I said, on those grounds, I said, "I will do, or undertake to do, whatever it is possible to collect, if any, and if any claim that I can maintain for collection on the increased valuation of the taxes."

Q What did she say to that?

A She said "That is perfectly satisfactory, you have looked out for the interest of the factory, of both parties, during the past five years, and whatever you have done, and all you have done, has met with my approval, and I presume the approval of the other party in interest." I said, "That is the only way I endeavor to represent people."

Q Now, was anything said while you were there in regard to the lease?

A I said to Miss Sawyer that inasmuch as I had paid over to her all the rents, over and above the expenses, that is to say, after the payment of the taxes and the insurance and the commissions, that all the rents that I had collected had been paid over to her, and that I would be expected to pay the four-ninths

share of the net receipt of the rents to Mr. Galloway; and Dr. Durland said, "We have made visits to that property, we have looked out for, and taken care of the interest of Mr. Galloway, I have gone to great expense, and I am going to charge Mr. Galloway with the expense that I have gone to, and for my services." I asked them both then, if they had authority to represent Mr. Galloway in looking out for and taking care of his interest in reference to the receiving and the paying over the rents of the property; they said they had.

Q I observe this receipt that was signed that day; please give us the circumstances of the making and the signing of that receipt? This conversation you have just recited was before the receipt was signed, I think?

A Before the receipt was signed.

Q Go on.

A In reference to the receipt, Miss Sawyer having delivered to me the deed after she had executed it, and had acknowledged it to be her hand and seal, so that I could make an affidavit as subscribing witness in proving the execution and validity of the deed, she wanted a receipt for it, a statement that she had prepared—you will find it in lead pencil—which showed \$488.34, being \$442.40 principal, and \$45.94 interest, making \$488.34, that she claimed that I must collect if it was possible, from the New Jersey Tube Company, on the ground that the valuation had been increased, that the total amount of taxes had been increased over and above that which it was in 1903—or prior to the making of the lease. There was \$39.86 return premium on policy that was written in January, and figuring that the net premium, or in other words, that inasmuch that I was the writing agent of this company, and having written this policy in January, that it could be cancelled in full, and the company get nothing for the time that the policy was running. She figured it \$39.86, and July, the return

premium of that, \$8.26, and five-ninths of the foregoing taxes, which was \$488.34, \$271.30, made \$319.42, with a total of \$15,319.42 that she wanted under all circumstances if it was possible for me so to do, to collect. The receipt was written by her and signed by myself; and before and at that time, and after the receipt had been signed, it was understood—

Q Not what was understood, what was said.

A That I was to do the very best I could, and if I was unable to collect the \$488.34 to collect all that I could collect. 10

Q But if you could not get the insurance wiped off without anything, what were you to do?

A She insisted that I should return her her full five-ninths of the share of the premium of that insurance policy that was drawn in January, and to be cancelled in March, because I was the writing agent. And I said "That I can't do, because I would be defrauding the company out of two months premium that would be due them under that policy. 20

Q Who composed that receipt?

A She did.

Q Who signed it?

A I signed it.

Q Under those circumstances?

A Under those circumstances.

Q Now, when you came back, what occurred?

A Well, just prior to coming back I want to state that I stated—

Mr. Gedney. I object to the witness volunteering. 30

The Court. What is the ground of your objection?

Mr. Gedney. Well, I object that it is not material.

The Court. I don't know whether it is or not. Proceed.

A In reference to the taxes I would like to say 40

that I said to Miss Sawyer, and to Dr. Durland, that I could not legally make any claim for the share of taxes which she claimed the tube company should pay, because there was no proof that because of the improvements made to the—

The Court. You have already told us that.

Q Now, was anything more said except that before you left?

10 A Before I left it was understood—

The Court. No, not what was understood, what was said.

The Witness. When I left what was said was this, for me to do everything I possibly could—

The Court. You have already said that.

Q Now, you came back and saw Mr. Harris?

A I came back and notified, or saw Mr. Harris, yes.

20 Q Were you able to get anything more than the amount you did get?

A I was not.

Q What amount did you get? The amount Mr. Harris testified to?

A The same amount Mr. Harris testified to, I think \$340.56.

Q Did you receive from her, after your return, a letter dated—I show you a letter dated 3|4|'04, signed by Miss Sawyer; did you receive that after your re-
30 turn?

A I did.

Said letter offered in evidence and marked Exhibit D 10.

Q Are they the policies that you have been referring to in your conversation, in which she wanted you to get the rebates?

A Yes.

Q So that she did not have them with her when
40 you were over there, and she did not send, one of them,

until the 4th of March, and the other until later, if at all, is that right?

A Yes.

Q Did Gould & Wilkie and you finally meet Judge Harris?

A Yes, sir.

Q Who represented Gould & Wilkie?

A Mr. Goodwin.

Q And did you receive certain moneys, and render a statement to Miss Sawyer of the sum of money that you had received? 10

A I did.

Q What day was the settlement made, Mr. Van Deren?

A On the 5th of March, Saturday.

Q What time?

A Between ten and half-past twelve; it took that length of time.

Q The next day was Sunday?

A The next day was Sunday.

Q Now, you then sent Miss Sawyer a check for a given sum, and a letter which I hand you, and a statement, did you? 20

A I did.

Q Will you please tell the jury how you reached the sum that you sent her and of which—well, the check dated March 7, 1904, certified check to the order of Carrie E. Sawyer, was the remittance?

Mr. Gedney. I object to the question on the ground that the statement is already in evidence, and unless he wants to show something apart from the statement I think it would be improper; and I object on the further ground that we have come to the crux of the case; I think it is improper. 30

(Question read.)

Mr. McCarter. Scratch that part out about the check.

Q (Question read as follows: "Will you please tell the jury how you reached the sum that you sent her?") 40

The Court. I will admit that question.

A By the terms of the lease there was \$15,000 to be paid Miss Sawyer—

Mr. Gedney. What are you reading from?

Witness. Reading from my statement.

Mr. Gedney. I object to his reading from his statement.

10 *The Court.* He may refresh his memory by referring to the statement, if he sees fit, or, if he has no recollection of the occurrence, after he looks at the paper, he may testify from the paper what the situation was.

Q Now, there was \$15,000 due Miss Sawyer?

A By the lease, as consideration for her five-ninths share in the property.

Q Now, tell us all about how you reached the sum you sent her?

20 A Miss Sawyer sent me on the 5th of February a check for \$56.32 that she owed me; the account was overdrawn on that day to the amount of \$56.32. She sent me that on the 5th of February, for which I have credited her account, \$15,000 due her as her five-ninths interest of \$25,000 according to the lease, and gave her credit for \$189.20, being five-ninths of taxes collected by me from New Jersey Tube Company, total amount collected \$340.56. In the statement the account was overdrawn \$56.32 which I charged her with;
30 I paid out for her \$344.89, being five-ninths of \$620.80, being the total amount of taxes on the property in question for 1903.

Q Were they still unpaid?

A They were still unpaid.

Q And due?

A And due.

Q Go on.

40 A I charged in the statement to Miss Sawyer \$10 for drawing deed, services and expenses drawing deed, taking up a day to go to Moore, Delaware county, and

back, and I think the carfare there was \$2.74, and \$2.74 back, I think that is what I paid in carfare. Share of commission two and a half per cent. on \$15,000, \$375. Four-ninths of rents March 1, 1899, to March 1, 1904, less expenses, \$365.01, and interest, two years, \$43.80, claimed by and due C. T. G., which means Charles T. Galloway, \$408.81, and on the 7th of March I sent a check for \$14,050.50, making a total of \$15,245.52.

Q (Showing witness check.) Is that the check you sent? 10

A That is the check.

Said check offered in evidence and marked Exhibit D 11.

Q Did you subsequently receive from Miss Sawyer a letter dated the 10th of March which I show you?

A I did.

Said letter offered in evidence.

Mr. Gedney. I object to the admission of this letter, unless they admit they are liable for the rebates; there is no charge in the declaration for the rebates. 20

The Court. I will receive the letter.

Same marked Exhibit D 12.

Q Did you receive a letter from Dr. Durland dated March 11th—

Mr. Gedney. I object to this, because it has not been shown that Dr. Durland is interested in the property. 30

Q —which I show you?

A I did.

Q And is he the gentleman who was present at the interview between Miss Sawyer and yourself when you talked the proposed deal over?

A Yes, sir.

Q Is he the gentleman who was also with Miss Sawyer from time to time when they came to New 40

York by way of Harrison and stopped to see you to get \$40 or \$50?

A He was.

The Court. I cannot see how this gentleman can bind Miss Sawyer by letter written by him, unless you show some authority. The fact that he was a friend of hers, and was present at an interview where business matters were discussed, is hardly enough to charge her with the letter.

10 Said letter marked Exhibit D 13 for identification.

Cross examination by Mr. Gedney.

Q After all your talk with Miss Sawyer, in regard to taxes and rebates on premiums of fire insurance, and as to the taxes that were to be paid, you gave this receipt, did you not?

A I did.

20 Q Why didn't you carry out the terms of it, which required the same, speaking of the deed, to be delivered to the said company upon payment by them of a certified check to her order, for the sum of \$15,319.42?

A Because I couldn't do it.

Q Then why didn't you return the deed?

A Because I hadn't any right to.

Q Who were you acting for?

A I was acting for Miss Sawyer and Mr. Gallo-way.

30 Q Why did you think you didn't have any right to return the deed?

A Because the counsel for the tube company demanded that the taxes for that year be paid before settlement, for the reason that the deed was not a warranty deed.

40 Q I am talking about delivering back the deed; what did the counsel to the tube company have to do with the delivering back of this deed by you to your principal if you did not get a certified check as required by this receipt? Why didn't you return the deed?

A Because I couldn't get the certified check for that amount, because that amount wasn't due.

Q Why didn't you return the deed?

A I hadn't a right to.

Q Why didn't you have a right to?

A Because I was there to do justice to all parties in interest.

Q You thought you represented all parties there?

A I did.

Q And you took it upon yourself to do what you thought was equitable and just, contrary to instructions? 10

A No, sir; I didn't.

Q What were your instructions? Weren't they to get a certified check to the order of Miss Sawyer, for \$15,319.42?

A If I could.

Q Does it say so in this receipt?

A No, sir; it was said so afterwards, verbally.

Q Why didn't you change the receipt then, afterwards? 20

A Because I thought I was dealing with people who knew what they were demanding.

Q It was after this receipt was signed, you say?

A I do.

Q That is the reason that you took it upon yourself to do as you thought was equitable and just in representing all parties?

A Oh, no.

Q That is what I want to know, the reason you varied from the terms of this receipt, which were your instructions? 30

A I will tell you the reason, because Miss Sawyer and Dr. Durland told a falsehood; I didn't then have only to pay their five-ninths share of the taxes of 1903, if I paid it for them, the company would be unable to claim it from them, because the deed given was a bargain and sale, and not a warranty. Second, the claim for the taxes, the excess taxes had no basis which I knew of, that she figured on, and which I, as trying to be her representative, could prove. 40

Q Why, it had all been figured out before you, hadn't it?

A Her figures, not mine.

Q Yes, but after all these figures were made out you signed this receipt, didn't you?

A That is very true, but at the same time, and with the understanding, you must understand, that this receipt was given by me to them, which I claimed that I had given, and could demand on that ground, 10 and on those grounds, a certified check for that amount of \$15,319.42, to make up the taxes, five-ninths of her share of 1903, which I was to pay for her, which she was to remit to me, and which Mr. Harris, representing the tube company, would not close unless those taxes were paid; and that is the reason why the matter was closed at my office, it being simply across the street.

Q Why didn't you take a certified check for her interest to her order?

20 A I couldn't do it.

Q Why not?

A Because there wasn't that amount of money coming to her.

Q Why didn't you take it for a less amount?

A Because Mr. Harris gave the check so I could pay the taxes.

Q Couldn't you have gotten two checks?

A Not certified, because it was after twelve o'clock and the bank was closed on that day.

30 Q You could have demanded, as you very often do, I am sure, in your real estate transactions, a certified check to the order of Miss Sawyer for her interest in the property, and I ask why you didn't do it?

A Because I knew Judge Harris and have known him for years, and knew that any check he put his name to, whether certified or not, was good.

40 Q (By the Court.) Because Judge Harris was good, was that any reason why you should disobey your instructions, and take a check to your own order, instead of to the order of your principal?

A May it please your Honor, it was after twelve o'clock, and the banks were closed, and it was a Saturday, and his check was on a Newark bank.

Q Was that any reason why the check should not be made out to your principal, Miss Sawyer's order? The provision was the check was to be made to her, wasn't it?

A It was with the understanding—

Q I am talking about the written paper?

10

A Yes, sir.

Q Well, why wasn't that done?

A Because Judge Harris would not close the matter unless I paid the five-ninths share of the taxes for 1903.

Q Well, that meant for five-ninths share of taxes; why wasn't the check for the balance given to her order?

A Because Judge Harris, representing the tube company, would not agree to pay \$488.34 as their share of the taxes claimed by Miss Sawyer.

20

Q So you say, but why wasn't the check for the balance made out to her order, \$14,050.50?

Mr. McCarter. There wasn't any arrangement that it should, as I understand.

The Court. Then I have misread the paper. There isn't any suggestion that the payments which were to come to her should be handled by the agent.

Mr. McCarter. No, sir, and there wasn't any suggestion that if that receipt could not be carried out, he was not to get the balance and remit to her.

30

The Court. Proceed, Mr. Gedney.

Further cross examination.

Q Now, Mr. Van Deren, didn't you think very much about this claim of Miss Sawyer's against the tube company for rebate on the taxes which she was

40

compelled to pay, they having put new buildings, or additional buildings on the land leased?

Mr. McCarter. I object to the question, "think very much about that claim."

Mr. Gedney. As to its validity, I mean, or fairness.

10 Q Didn't you think the claim of Miss Sawyer against the tube company for a rebate, or division of the taxes, during the period of the lease, by reason of their putting additional buildings on the leased property, a fair one?

A No, I didn't.

Q (Showing witness a paper.) Is that your signature?

A That is my signature; yes sir.

Q All the matter of these taxes had been gone over before you wrote out this receipt, hadn't it?

A What receipt?

20 Q The matter of her claim against the company for a portion of these taxes had been gone all over at that day, in Moore, Delaware County, Pennsylvania, before the receipt was written?

A Gone over by Miss Sawyer.

Q Yes, and you?

A No, by Miss Sawyer.

Q Well, the result of her going over it, that was part of the item you have got there?

A The total was, yes.

30 Q And she had been down to see you about that very thing, hadn't she? It was a matter of long standing, wasn't it?

A She sometimes, when she called, spoke in reference to the taxes.

Q That that was a thing which must be adjusted at the conclusion?

A No.

Q She did insist upon it being adjusted at the conclusion, when the sale was made to them?

40 A So far as I was able.

Q Now, how much did you receive as rebates on these two policies of insurance?

Objected to as immaterial.

The Court. No, it is not in the case.

Mr. Gedney. Then that rules out the letter with everything that refers to it.

The Court. I am not certain that it is not in. Perhaps I have a wrong idea of the matter, but I understand that Miss Sawyer's position is this: being notified that the tube company proposed to avail itself of the option to have a conveyance from her of \$15,000 she insisted that they ought to make certain payments on account of taxes, and rebates on account of insurance, but wasn't this \$319 made up of insurance and taxes?

10

Mr. McCarter. Yes, sir; your Honor is right.

Q How much of that was taxes?

A She claimed \$48.12, and the amount due her is \$36.17.

20

Q As her share of that?

A As her share. She claimed as her share of the return premiums on policies in question \$48.12.

Q And you claim it is \$36.?

A \$36.17. The difference is the earned premium; that was on the long policy.

Q Why didn't you show that in this statement?

A Because the statement was rendered prior to receiving the policies of insurance and cancellation.

30

Q Have you paid it since?

A No, sir.

Q You received the rents of that property for five years?

A I did.

Q And paid them all over to Miss Sawyer, whatever balance there was, in payments, as you said, of \$50 to \$100, as they came down?

A Yes, sir.

40

Q Without objection from Mr. Galloway at all, didn't you?

A No, except at the latter part of the last year.

Q Isn't it a fact that you paid all of the moneys, the net rents, to Miss Sawyer, that you received during the five years?

A Yes.

10 Q And up to the time that the sale was consummated, or arranged for, there was no objection of any kind, was there? Until the 29th of February, 1904, had there been any objection?

A Yes, prior to that.

Q There had?

A There had.

Q Then you didn't state the fact when you said a few moments ago that it was because she told you a falsehood on the 29th of February, that you took the things into your own hands; just explain that, please.

20 A I don't just exactly understand the question.

Q No, I know you don't. You stated here a few moments ago that the reason you took this matter into your own hands, to manage for all parties, equitably and in justice, was because she stated a falsehood to you in regard to these rents on the 29th day of February, and I have just now asked you whether you had paid the rents, without objection from Galloway, up to the 29th of February, and you said no, that they had objected; now, what was the falsehood she told you on the 29th of February?

30 A The falsehood she had made on the 29th of February was true, because prior to that time Mr. Galloway said that she, nor no one else, represented him in reference to the collection of his four-ninths share of the rents, and she said that she was.

Q Oh, did you recall that to her then, what Mr. Galloway said to you, on the 29th of February?

A He didn't say that to me on the 29th of February.

40 Q Before that he said it to you?

A He said that I had no right under any circumstances whatever to send his four-ninths of the rent to Miss Sawyer.

Q That was before the 29th of February?

A That was before the 29th of February.

Q Did you say anything to her on the 29th of February, at your meeting, with regard to the rents that you intended to hold out?

A I didn't say anything about intending to hold out.

Q But you did intend to hold out that day, didn't you?

10

A Not until they were demanded of me by Mr. Goodwin of the firm of Gould & Wilkie representing Mr. Galloway.

Q But you had it in mind that you had possibly made a mistake in regard to the payments of rents to Miss Sawyer, on the 29th of February?

A I did.

Q Did you tell her that?

20

A I did.

Q And what did she say?

A She said that she, in the presence of Dr. Durland, had gone and visited the property, that the doctor had a bill against Mr. Galloway for expenses and for services, and they had represented, and had the right to represent Mr. Galloway, and they would settle with Mr. Galloway the questions of the rents.

Q Did you tell her and him then that Galloway had said they did not have the right to do so?

30

A That was told to them after I had told them what Mr. Galloway had said to me, that I had no right to remit to her his four-ninths share of the rents, and I said the reason I did that was because they claimed they represented him.

Q They did claim they represented him in that transaction?

A Yes, sir.

Q And you sent them the rent for the five years?

A The net rents.

40

Q And they apprised you that they had a claim against Galloway?

A Yes, sir.

Q And notwithstanding that, without authority from Miss Sawyer, you paid this money?

A Yes, sir.

Q \$488?

A Yes, sir.—no, not \$488.

Q \$408.81?

10 A Yes, sir, that is right; that is two years, four-ninths of the net rents.

Q In your letter of December 31, 1900, referring to the question of taxes, which evidently then had arisen, you say "I think the position you take in the matter is very fair and just, and that they should pay the increased taxes caused by them in building;" now, what position did you refer to, and what property, in that letter?

20 A The position was that if the value was increased by these extensions and additions, and the building or buildings erected on the property. That was the position that I took; but we had no proof.

Q In your management of this property did you ever see Mr. Galloway?

A Several times.

Q Where?

A In New York.

Q Is it not true that the property, from the time that it was acquired by Miss Sawyer, and Galloway,
30 was under her supervision?

A No, sir.

Q Over yours?

A No, sir.

Q It was not?

A No, sir.

Q Well, when did you see Mr. Galloway after the leases were signed?

A I think I saw him—

Q I don't want you to "think," Mr. Van Deren;
40 if you cannot state—

A I could not give you the month, week, day and hour. I saw Mr. Galloway several times; I couldn't state exactly when, month, week, day and date, and hour.

Q Well, the lease was signed in 1899, wasn't it?

A Yes, sir.

Q And Miss Sawyer and Mr. Galloway had had the property for two years, isn't that true? About two years?

A I presume so; it is by their deed. 10

Q Now, you say you saw Mr. Galloway two or three times, now, when did you see him two or three times?

A Well, I saw him several times during the five years.

Q Let us hear when they were, to the best of your recollection?

A Well, six months after signing the lease; a year thereafter, probably, a year or fifteen months after that, probably; about three years after that, when I went for Dr. Durland to him. 20

Q (Showing witness paper.) Is that your signature?

A Yes, sir.

Said papers marked P 8 for identification.

Q You sent this letter to Miss Sawyer?

A Yes, sir.

Q You had no written contract for the sale of this land, did you?

A With whom? 30

Q With Miss Sawyer.

A Why, I would so consider that I did by her own letters.

Q Well, what letters were they; what letters do you refer to?

A Letters referring to the fact that she would send me a check for the commission, and also send me a check for five-ninths share of the taxes for 1903.

Q That is the only contract which you had with her, such as is expressed in those letters? 40

A I think that is all.

Q I mean there was no formal agreement?

A No formal agreement, but always understood, in the presence of witnesses.

Mr. Gedney. That is all.

10 *Mr. McCarter.* I offer in evidence the letter from Miss Sawyer to the defendant dated March 14, 1904, which has already been marked D 3 for identification.

Mr. Gedney. I have no objection to that, only so far as it may be intended to charge the plaintiff with commission on the sale of this land; otherwise it is not objectionable.

Said letter marked Exhibit D 14.

Mr. McCarter. That is our case.

20 *The Court.* I do not understand there has been any evidence that the plaintiff agreed to pay Mr. Van Deren his commission; has there? Was there any arrangement between them? Has there been any evidence on Mr. Van Deren's part that he should be paid a commission?

Mr. Gedney. Only as shown in the letters.

Mr. McCarter. I suppose the letters in which she conceded his right to commission—

30 *The Court.* I suppose the right to commission would arise out of the contract, and I have not observed that any contract was proven. It may be that a real estate agent who brings about the sale of land, has a moral right to be paid for his services, but he has not any legal right, in the absence of a contract.

Mr. McCarter. If he makes a claim on the party for commissions, and she writes back and says, "I allow it," I thought that was sufficient.

40 *The Court.* I do not say it is not, I am only calling your attention to the fact that, so far as I have followed the evidence, it is not suggested

that anything that Mr. Van Deren did entitled him to a commission, or that there was any agreement that he should have a commission. It is not suggested that he brought about this sale, or did anything, except to go down to this place with the deed.

CLARENCE T. VAN DEREN recalled for the defendant.

Direct examination by Mr. McCarter.

10

Q Was anything ever said between you and Miss Sawyer in regard to your having a commission for the sale of the property?

Mr. Gedney. I object to this question on the ground that such a contract or agreement must be in writing, and signed by the party to be charged, in accordance with the statute of frauds.

The Court. I will hear the testimony.

20

Exception to plaintiff.

A There was.

Q What was said and when?

A That if the sale was concluded, that I, having brought the parties together to hire the factory, and not only to lease the factory, but agree to buy it for \$25,000, that when the sale, if they agreed to accept of the option, and take the property at \$25,000, she would only be too willing and too glad to pay me my commission of 2½ per cent. on \$15,000, which was \$375.

30

Q When was that?

A That was at the time the leases were executed, because it was through me that the whole work was done. I got these people, and I talked with them for weeks, and went to them, and went to New York. And the further agreement was made in reference to the payment of commissions, that if Mr. Galloway would agree to take \$10,000 for his share, being a thousand dollars less than what he was entitled to by the in-

40

terest he had in this property, that that would also more entitle me to my commissions than otherwise.

Q And did he agree to that?

A He did.

Cross examination by Mr. Gedney.

Q Are you quite sure that they mentioned two and a half per cent. commission on the selling price?

A I am very sure.

10 *Mr. Gedney.* I renew the objection to all that testimony. It was not for any services; it was for selling the property, and comes directly under the statute of frauds.

Mr. McCarter. That letter is in evidence which speaks of being willing to allow the commissions, Exhibit D 14.

20 I have overlooked three letters, two from the plaintiff to Mr. Van Deren, one dated the 24th of February, the other the 27th, whose execution, I presume, will be admitted, and which I would like to offer in evidence.

Mr. Gedney. There is no objection, except that objection which has already been stated, that it does not give any claim to the commission, which is sought to be recovered by the defendant.

Said letters marked Exhibits D 15, D 16, and D 17.

DEFENDANT RESTS.

30 Owing to the death of a member of the family of the fourth juror, counsel for both parties agree that the trial of the case may be continued with eleven jurors.

VIOLA M. SAWYER sworn for the plaintiff in rebuttal.

Direct examination by Mr. Gedney.

40 Q You are the sister to Miss Carrie E. Sawyer, the plaintiff?

A I am.

Q And were you present at any time while Mr. Van Deren was at your home in Moore, Delaware County, Pennsylvania?

A I was.

Q On the 29th of February? Were you present when this paper which I show you was written (Exhibit P 13)?

A Yes, sir. 10

Q To the best of your—the best you can, will you detail the circumstances surrounding the writing of that paper?

A I went in the parlor just about the time they began dictating the receipt.

Q Who dictated it?

A Mr. Van Deren sat at the table with some statements in his hand, and dictated from the statements; my sister sat at the table and wrote the receipt; after it was written Mr. Van Deren took it and read it over, made the correction here near the last, and signed it. 20

Q What correction do you speak of there?

A "My order," and he changed it to "her order."

Q Struck out the word "my" and put over the word "my" stricken out the word "her?"

A Yes, sir.

Q And did he write the correction, or did your sister?

A He wrote it.

Q And then what was done; did he sign it? 30

A Yes, sir.

Q Was there anything said about the—

Mr. McCarter. Let her say what was said.

Q What was said there after that?

A He went soon after that. There was some conversation in regard to settling the matter, and sister said he was to settle upon this basis, or not at all.

Q Did he speak of any change in the instructions? 40

A Not any at all; and then he said, "You would rather the whole thing would fall through than take any less than this?" She said, "I positively would."

Q Anything further said?

A Nothing further of any account.

Q Were you there when he went out?

A Yes, sir.

Cross examination by Mr. McCarter.

10

Q Who else was there?

A My sister and Dr. Durland.

Q Is that the doctor there?

A Yes, sir.

Q Were you there at all the conversation before the paper was dictated?

A No, sir.

Q The paper was actually being composed and written when you went in?

20 A No, sir; I went in just before they began dictating the receipt.

Q Do you know how long Mr. Van Deren had been there before you went in the room?

A Yes, sir; he had been there some little time; I couldn't say just how long.

Q Half an hour?

A Oh, yes, I presume longer than that.

Q Are you familiar with your sister's affairs?

A Not altogether.

30 JOHN H. DURLAND sworn for the plaintiff in rebuttal.

Direct examination by Mr. Gedney.

Q Were you present at the home of Miss Carrie E. Sawyer, February 29, 1904, when Mr. Van Deren called?

A I was.

40 Q Mr. Van Deren has testified that after the paper was signed, this paper before you, I think, the receipt given by Mr. Van Deren, a change was ordered—

Mr. McCarter, Oh, no, no.

Q Mr. Van Deren testified that after that was signed Miss Sawyer told him to do the best possible, that is the way I recollect it, in regard to these taxes; were you present and did you hear any such conversation?

A There was no such conversation.

Q Did you see it signed by Mr. Van Deren?

A I did.

Q What was said, if anything, after the paper was signed? 10

A Well, after the paper was signed, when Mr. Van Deren was going out, he seemed loath to give up the idea that he could not carry the point he came for, and when he got out of the parlor into the hallway, just before the door was opened, he said: "Now, Miss Sawyer, is your decision final, would you rather this sale would fall through than to take less than the claim," or "not to waive," I think it was, "not to waive those back taxes," she said: "I would rather it would fall through," and I seconded it and said, "Yes, we would all prefer it would fall through than to waive one iota." 20

Cross examination by Mr. McCarter.

Q You live at this house?

A I do.

Q And you are interested in this property?

A I am not.

Q Why did you say then "we would all rather?" 30

A I spoke of it as the family interest, naturally.

Q Are you a member of the family?

A I am, and have been more than twelve years.

Q Related to Miss Sawyer?

A No, I — no.

Q Living with her?

A Living with her? What do you mean?

The Court. Living in the house?

Q Living in the house with her? 40

A I am living with her parents, yes, and it has been my home for many years.

Q And you said, "Yes, we would all rather lose it?"

A Yes.

Q You knew Miss Sawyer had obligated herself to sell that property for \$15,000, her share, did you not?

10 A Well, you may term it "obligated," from my standpoint she had agreed to sell it, yes, and had given an option upon it.

Q Well, I suppose they mean the same thing?

A Well, if they do all right.

Q You knew that?

A Yes, sir.

Q And you knew there was nothing in that option, or lease, which she signed, which authorized her to add some alleged increase in taxes to the amount of the purchase money, didn't you?

20

Objected to as immaterial and irrelevant.

The Court. Well, you may answer it.

Q You knew that?

A I knew the wording of that lease; yes, sir.

Q And you thought it judicious for her to fail in her obligation, rather than receive the amount of money that she had agreed to take for the property?

A Under the circumstances; yes.

30 Q Now, Doctor, you acted for Miss Sawyer in this matter a good deal, did you not?

A I did very considerably.

Q I show you a letter which has been marked for identification, which is signed "J. H. Durland," please look at it and see if that is your signature?

A Yes.

Q And tell me if, before you sent that letter, you showed it, or read it, to Miss Sawyer?

40 A I did not; she does not know that it was ever written.

Q Then you assumed to write that letter to Mr. Van Deren without any authority from her whatever, eh?

A I assumed it, yes.

Q What?

A If you put it that way; I wrote that letter; yes, sir.

Q Without any authority whatever?

A No specific authority, no.

10

Q Answer my question; did you write this long letter to Mr. Van Deren without any authority whatever?

A Without specific authority.

Q Without any authority whatever?

A I think I have answered it.

Q Did you write that letter?

A I wrote that letter.

Q Without any authority whatever?

A Without specific authority to write that letter, yes.

20

Q To write any letter; did you have authority to write the letter?

A I have answered your question, I think.

Q Did you have any authority to write any letter?

A Yes, I did.

Q You really represented her in the matter, did you not?

A I did, yes.

Q And she stood by what you did in the matter?

30

A She did, yes.

Q Now, I notice in this letter you say—

The Court. It seems to me that this is a mere conclusion on the part of the witness, as to whether he had authority to represent her generally. It is a legal conclusion which must rest upon the facts.

Q What is the basis, Doctor, of your—

Mr. Gedney. Is it proper on this part of the case to go into that?

40

The Court. Perhaps it is a little irregular, but I won't stop it on that account.

Q What is the basis of your claim that you had general authority to write this letter?

A Well, because of my specific relation to the family, and the habit of consulting with me, and of having me do, as I was willing to do, matters of business that was inconvenient, or unpleasant, for a lady to do, I always agreed to do; and it was just simply a home
10 affair, and never questioned what I did; that is, I never would bind her in any way, but I would act for her, as I did all through this transaction in many ways, and made many visits here in the interest of that very transaction.

Q Did you see the letters that Miss Sawyer wrote to Mr. Van Deren before they were written, which have been offered in evidence here to-day—I mean, after they were written?

A Well, usually at some time, perhaps not immediately, but I would at some time. If I was away, as
20 I frequently am, and any correspondence that—she has been in the habit for years of consulting me in business matters, and matters where I have taken any part, she would show me what she had done since I had been away.

Q As a matter of fact, isn't it true you saw each of the letters in her handwriting that are in this package, after they were written and before they were sent?

A No, I couldn't say that; I could not identify a
30 series of letters. I do sometimes, and sometimes I don't; it is quite frequently I do not, because I wasn't always there when she would send a letter.

Q She showed you, did she not, the statement and letter of March 7th which Mr. Van Deren sent to her, before you wrote this letter I have in my hand?

A Yes, that is her final statement of the settlement.

Q Yes?

A Yes, of course.
40

Q Did you have any interest in this thing?

A None direct.

Q Well, indirect.

Mr. Gedney. What sort of interest do you mean?

A Do you mean financial interest? Is that what you mean by "interest"?

Q Yes.

A If not that, I might say I have an interest; interested in anything that is for the family welfare, as one naturally would be in his own home. 10

Q I notice in this letter you say "Where is our interest; why were you not protecting our rights?"

A Yes.

Q Had you interest and rights?

A "Our," I spoke that word in that place in the sense of "our" as a family; I am one of the family, identified; everything that pertains to that family I am interested in, because it is my home. I think most any man would do that, and that is the sense in which I used "our." 20

Q Now, do you say it is not true that at the interview on the last time, the only time, Mr. Van Deren was ever over there, it was not stated that the Galloway interest—

Mr. Gedney. It is not proved that that was the only time that Mr. Van Deren was there.

Q Is it not true that on the 29th of February, when Mr. Van Deren was at your home, that you, or Miss Sawyer, in your presence, stated to him that the Galloway interest in those rents had all been arranged between the Galloways and Miss Sawyer? 30

A No, not in that way.

Q Well, what way was it, Doctor?

A It was a way that Mr. Van Deren has known for himself. Mr. Galloway—

Q No, answer my question.

A Well, what is it? 40

Q Don't start to answer any question if you don't understand it. (Question read as follows: "Well, what way was it, Doctor?")

A It was in reference to an amount overdrawn from Mr. Galloway's account, that he was—it was repeated to him just as it had often been outlined to him before, in previous years, as a matter resting between Miss Sawyer, myself and Mr. Galloway, and if it was objected to he was to immediately wire, stop negotiations right where they were in proceedings, wire us immediately, and we would come over.

Q You would come over, too?

A Yes, sir; certainly.

Q Look at that letter and see if at the bottom you do not state this: "The Galloway matter you were to have nothing to do with beyond saying, if it was referred to by them, we would report to him according to agreement between him and us, and settle the point between ourselves;" that was said, was it not?

20 A That also was said.

Q So it was agreed—

A Yes, sir. The gist there was—

Q One moment, listen to me; was or was it not agreed between Galloway and you, on behalf of Miss Sawyer, that this should be fixed up between you and them?

A The matter that caused that overdraft, yes, sir.

Q But the overdraft had not been paid up, Doctor?

A It had not.

30 Q Had not?

A No, sir; had not; there was some \$400 that was not accounted for, and there was a reason for it, if you want to know it.

Q What agreement did you have with Mr. Galloway in regard to the overdraft?

Objected to as immaterial.

The Court. I don't see that it is immaterial; it may be material to show what was said between the parties in relation to it.

Q State all the conversation on that day when Mr. Van Deren was over there; you did not recite this; just got it out of you at last. Now, what else was said.

Mr. Gedney. I object to that remark.

Q Tell us all that was said that you can recall of this visit; how long was he there?

A Oh, an hour, perhaps more.

Q Have you told all that was said? 10

A Oh, no, a great deal was said.

Q What was said about the Galloway matter?

A Oh, in regard to that, perhaps I can't say it in exact words, but the purport was, alluding to the amount of deficiency as it were, or overdraft from Mr. Galloway's account—

Q Mr. Galloway's account?

A Yes; it appears as against his side of the account.

Q That is to say you had had more than your share of the rents, is that right; is that what you mean? 20

A Yes, yes, with that division as you put it, yes, sir.

Q Now, with regard to that?

A Well, with regard to that, it is merely saying to him "You are aware of how that matter stands as between Mr. Galloway and ourselves; if there is any question arises you telegraph us, stop where you are, and we will come over at once;" that is, if he was not willing to waive the point that way for adjustment, or leave it open. We had always felt, as the matter had stood between Mr. Galloway and ourselves, that we were safe with each other. 30

Q Did you not say "there is an agreement between him, Mr. Galloway, and us;" you told him that, did you not?

A Yes.

Q In regard to these back rents?

A No, sir. 40

Q In regard to the overdraft?

A No, sir; in regard to certain works that we were doing for him, for which he had pledged us the reimbursement.

Q In other words—

A In other words we had been acting for him for years, and doing work which was material and under his pledge, under his invitation, he asked us if we could, and we accepted the commission? We dealt
10 with Mr. Galloway in a frank, offhand manner, and he, knowing I was comparatively at leisure, and would do a good deal of the running about for Miss Sawyer, "Can't you do this, Doctor, and look after it for Miss Sawyer?" and I said I would. Now, then, for years Miss Sawyer and myself did all the detail work pertaining to that factory property; we were brought together, that is, by force of circumstances.

Q What sort of circumstances brought you together?

25 A It was foreclosure of that property, and sale, and we came together as bondholders having an interest, and that brought us together.

Q Brought whom together?

A Mr. Galloway and us; and from a certain point in the proceedings—

Mr. Gedney. When was that? Just let me interrupt you a moment?

Mr. McCarter. Just kindly let me continue the examination.

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Q Go on.

A When we had finally got out of the legal squabble and got where the properties had been deeded over to them, to Miss Sawyer and Mr. Galloway, we found there was a great deal to do, and as he was a very busy man, he said "Can't you look after those details, and whatever you do in the interest of both I will bear my share of the expenses, and will make it right with you for the personal troubles you are put to." "That is a matter" we said, "we will
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leave open, Mr. Galloway, that is for mutual adjustment." And it simply went on that way for years. Miss Sawyer and myself, or, Miss Sawyer, I should say, for, understand, my connection with this property is synonymous with hers. For years I have cared for that property, and Miss Sawyer. Now, if they were not willing, whoever should represent them— I don't think Mr. Galloway himself would have objected, but perhaps his attorneys did, I infer, from what I have heard— if there was any question raised as to why we had kept back this sum of money, it was about \$400, if I remember right "Just halt where you are and wire us, and we will take the next train;" and further we said, "If your dispatch comes so late at night that we would be likely to have to stay over night there, we will not come at night, but will take the first train in the morning."

Q And the agreement that you speak of between Mr. Galloway and yourself was that somehow or other you were to be reimbursed for this work that you claim you and Miss Sawyer did?

A It wasn't to be "somehow" reimbursed, it was to be reimbursed; it was a plain business transaction.

Q That was the agreement?

A That was the agreement.

Q Was it you, or Miss Sawyer, or both of you?

A He said it to both of us repeatedly.

Q And it was that work you were to be reimbursed for?

A Yes, sir.

Q And that was spoken of that day Mr. Van Deren was over there?

A That was spoken of, yes, sir, and he knew why that was held back, but he betrayed us.

Q Did you or did you not have any interest in this thing yourself?

A I have explained what interest I had in it.

Q Were you not interested in this property?

A Only in the way I have explained.

Q Did you or not have any financial interest in this property?

A No, sir.

Q What you have done, all these trips you have taken, have been out of pure friendship for this lady?

A And her family; yes, sir.

Q Did you say "none then" or "none at all;" I am told you answered the question "No interest then;" have you any interest now?

10 A None now.

Q Did you have any interest while the matter was under way?

A I have been identified with it in this way: I did at one time appear in a way that has been construed as being interested, and has led to a good deal of confusion; and where it does not lead to that, the interested parties seem to make it turn that way. There was the original—if it is in order to explain it.

20 Q I want to know whether you are interested or not?

The Court. I should think it was possible to say whether he had any interest or did not.

Q Had you or had you not any interest in this property?

A No, not direct.

Q Well, indirect; what was your interest?

A I cannot define that without explaining it.

Q You are a doctor of medicine?

30 A Yes.

Q Are you? Are you a regular licensed doctor of medicine?

A I am not a practicing physician at the present time.

Q Are you a regular licensed doctor of medicine?

A I am a regular physician; yes, sir.

Q Are you a regularly licensed—

A I am not, because I am not practicing.

Q Were you ever licensed?

40 A Yes.

Q Where?

A What has that to do with it?

Mr. Gedney. I object to the question.

The Court. He may answer it.

Q Where?

A Canada.

Q In Canada; what school of medicine are you a graduate of?

A Allopathic. 10

Q Where?

Mr. Gedney. I think he has gone far enough.

The Court. I think that is enough.

Witness. I have not been in medicine for many years, and I do not pose as a medical doctor.

Q I assume you know enough, however, Doctor, of general affairs, to be able to tell us what your indirect interest in this property was.

A Well, I have explained it as well as I can, without going back and telling how I became connected with it. 20

Q Didn't you own some or all of the bonds for which this property was taken?

A No.

Q None of them?

A No.

Q No interest in them?

A No.

Q Do you know a lawyer in Philadelphia by the name of Tustin? 30

A I do.

Q Were you ever the defendant in some proceedings taken criminally against you, Doctor?

A Yes.

The Court. I don't suppose that is competent.

Mr. Gedney. I object to it.

Q Were you convicted—

Objected to. 40

Mr. McCarter. I think I have a right to show that this witness was convicted of crime.

Q Were you not convicted of crime in Philadelphia?

A No, not of crime.

Q What do you call it, Canadian crime, perhaps; what do you call it if it wasn't a crime?

A Well, I suppose it was, it came under the head of misdemeanor, I suppose.

10 Q Well, if you prefer to call it that; when was that?

A Oh. some years ago.

CARRIE E. SAWYER recalled for the plaintiff in rebuttal.

Direct examination by Mr. Gedney.

Q Miss Sawyer, after that receipt was signed in your home in Moore, Delaware County, was there
20 any change made in the instruction as contained in it with respect to the delivery of the deed by Mr. Van Deren.

A None whatever.

Q You have heard him testify and say that you said he was to do as best he could, or as much as possible, in regard to getting the taxes, and that it was to be left to him; did you so instruct him?

A The only instruction was that it was to be settled upon the basis of this receipt.

30 Q Was anything said as to what he was to do if he failed to carry out that; what disposition he was to make of the deed?

A I don't understand you.

Q If he failed to carry out your instructions as contained in the receipt, was there anything said as to what disposition he was to make of the deed?

A If he failed to carry out the instructions as given in the receipt, the deed was to be sent back to me immediately; I would not agree to settle on any
40 other terms.

Q (Showing witness letter) Did you receive this letter, P 7 for identification?

A I did.

Q From whom did you receive that letter?

A Mr. Van Deren.

Said letter offered in evidence.

Q And did you receive this letter also?

A I did.

Said letter offered in evidence and marked Exhibits P 9 and P 10. 10

Cross examination by Mr. McCarter.

Q You followed Mr. Van Deren to the door, did you not, the day he was at your house?

A Yes, sir.

Q The others did not?

A They did.

Q All three?

A Yes, sir. 20

Q The whole crowd went to the door with him?

A All three of us.

Q The Doctor?

A Yes, sir.

Q Your sister?

A Yes, sir.

Q And yourself?

A Yes, sir.

Q All went to the door with him?

A Yes, sir. 30

PLAINTIFF RESTS.

TESTIMONY CLOSED.

Counsel summed up.

Adjourned until Tuesday, December 19th, 1905,
at ten o'clock, A. M.

NEW JERSEY SUPREME COURT.

CARRIE E. SAWYER

v.

CLARENCE T. VAN DEREN.

Newark, N. J., December 19, 1905.

Continued pursuant to adjournment.

Appearances as before.

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The Court charges the jury as follows:

GUMMERE C. J.

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Gentlemen of the Jury: The issue which the pleadings in this case present is a narrow one, one which does not embrace all of the matters in controversy between the parties, arising out of the leasing and the subsequent sale of the Harrison property to the New Jersey Tube Company, and, therefore, your verdict cannot settle all of those matters; it can only settle the matter which the parties have brought here to be tried. I say this, because a good deal of the testimony which was submitted yesterday covers matters which are not within the issue presented by the pleadings, due, perhaps, to my failure thoroughly to appreciate just how narrow the issue was. Now, let me point out to you just what the matter is which you are to settle. The plaintiff sues the defendant for money had and received by the defendant for her use. That is the general character of her declaration, which sets out her cause of action. And she annexed to her declaration what lawyers call a bill of particulars; that is a schedule showing with particularity just exactly what it is she claims she is entitled to have from the defendant. Now, this is what she says: "Notice is hereby given that this action is brought to recover the amount due on account of money received by the defendant to the use of the plaintiff, of which the following is a true copy. Clarence T. Van Deren to Carrie E. Sawyer, Dr., March 1, 1904. To amount received from New Jersey Tube Company in consideration for deed

from said Carrie E. Sawyer to certain lands in Harrison, New Jersey, \$15,319.42." That is, she says, "You have in your hand moneys which you received from the tube company as payment for the deed which I made to them of lands in Harrison, and which you delivered to the tube company as my agent; you received from the tube company \$15,319.42, and it was all mine; you started with that amount of indebtedness." Then she goes on with her account and says, "I credit you with your check of \$14,050.50 which you sent me, and I also credit you with an amount which you paid on account of taxes on the property, for the year 1903, amounting to \$344.19." Then she says, "Giving you credit for these two amounts you still owe me on account of that purchase money \$924.03." Then she says, "Because you have failed to pay over that balance which you owe me, you ought to pay me interest, the law entitles me to recover interest on that amount, \$924, from you, and the interest is \$17.87; I want that from you also." Now, that is her claim. Mr. Van Deren, by his pleadings, says, "I don't owe you the money you ask for;" and that is all. Now, the burden was on Miss Sawyer, of course, to prove before you, the claim that she made; so far as she fails to prove it, so far she must fail in her right to have a verdict at your hands. She undertook to prove that the amount of the purchase money which Mr. Van Deren received from the tube company was \$15,319.42, by producing a receipt signed by him the last of February, 1904, in which he agreed that he should not deliver that deed to the tube company for less than the sum which she now seeks to recover, that is, \$15,319.42. Mr. Van Deren disputes her claim that he had no right to deliver the deed for anything less than that amount; he says that his powers were somewhat elastic; that he was to do the best he could, and that the best that he could do was to get \$15,000, which was the original amount of consideration money agreed on, and \$189.20 which Mr. Harris, you will remember, allowed him for the increase in the taxes

which had been assessed on the property, and which the tube company agreed to pay. That is, Mr. Van Deren says, "I delivered this deed for a consideration of \$15,189.20;" and that is not disputed. Now, one of the questions in dispute between these parties is whether Mr. Van Deren violated his instructions received from Miss Sawyer, and delivered that deed for a sum less than he was authorized to do by her. But that is one of the matters in dispute that the issue in this case does not present. It may be that Miss Sawyer is entitled to hold Mr. Van Deren responsible for the difference between the moneys which he actually received as a consideration for the delivery of the deed, and the moneys which she says he should have received under her instructions. But, as I pointed out to you in the beginning of my charge, this case only presents the question of how much Mr. Van Deren actually received, and how much, if anything, he still retains. That is, in this suit she is suing him for the money he had collected for her, not for any damages he owes her, by reason of his improper conduct while acting as her agent. As I pointed out to you, she makes a special statement of her claim in the bill of particulars. She says, "I am suing you for so much of the purchase money of this property as was received by you actually, and as you still retain." So that, in stating this account between the parties, because that is practically what you must do as a jury in order to determine the right of the matter which is submitted to you, you start by charging Mr. Van Deren, not with the amount that she sets out in her bill of particulars, \$15,319.42, but \$15,189.20; that is all that he got, and that is all she is entitled to have him account for in this suit, except one item which I will speak of now. It appeared yesterday, during the taking of the testimony, that there was some discussion between Miss Sawyer and Mr. Van Deren as to her right to have a rebate allowed to her on insurance which she had been carrying on the property; and Mr. Van Deren so arranged matters with

the insurance companies finally, that he received for her as a rebate \$36.17, and he says that he is willing in this suit to account to her also for that sum. So that, in addition to the \$15,189.20 with which you charged Mr. Van Deren, you add this \$36.17, and that makes the sum for which Mr. Van Deren must account to Miss Sawyer, \$15,225.37. Mr. Van Deren admitting that he is chargeable with that amount, seeks to discharge himself by showing here certain payments made by him, and certain deductions which he claims he had a right to make. He says, "I first deducted from this \$15,225.37, \$344.89, which was five-ninths of the annual taxes assessed upon this property by the town of Harrison for the year 1903. Those taxes were a lien on the property—" I don't remember whether he said just this on the witness stand, but that is what he said inferentially—"those taxes were a lien on the property; I paid all the tax out of the purchase money; I charged four-ninths against Mr. Galloway's share, and five-ninths against your share, Miss Sawyer." And Miss Sawyer says, "I recognize the propriety of that action; you are entitled to that credit; it was my debt, and should be paid out of the purchase money; I have nothing to say to that, except in approval." Then he says, "I have also deducted a commission of two and a half per cent. on the amount of the purchase price, \$15,000, for my services as agent in bringing about this sale;" he says, "I had charge of the original negotiations looking to the leasing of this property to the tube company, and after a good deal of labor I persuaded them to have put in the lease a provision looking to the ultimate sale of the property, and I did this work upon a promise from you, Miss Sawyer, that if what I did should finally result in a sale to the tube company I should have the commissions of an agent for bringing about the sale, two and a half per cent., and you said you would pay me that amount out of the purchase money, and so I have deducted it." Miss Sawyer does not deny that such an arrangement was made, but an-

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10 swers that claim by saying, "I stand on my strict legal
 rights so far as that commission is concerned." The
 legislature of New Jersey has put upon the statute
 book of the state an act entitled "An Act for the pre-
 vention of frauds and forgeries," and one of the pro-
 visions of that act is that a real estate agent who
 brings about the sale of a property shall not be enti-
 tled to commissions for his services, unless his au-
 thority to make the sale is reduced to writing, and the
 20 writing is signed by the owner of the property, and
 unless that writing also contains within it a state-
 ment of the amount that he is to be entitled to receive
 as his compensation, or as his commission. She says,
 "Without admitting or denying that I made any such
 promise, I say you are not entitled to the commission
 that you have deducted, because you have not any
 written authority, you never had any written author-
 ity from me to make this sale, and you had not any
 25 written agreement on my part to pay you any com-
 mission; so that if I made a promise, it is void under
 the statute of frauds; you cannot enforce it; my agree-
 ment amounted to nothing, did not entitle you to re-
 ceive a dollar, and I stand on that right." Well, if
 Mr. Van Deren was trying to collect from Miss Saw-
 yer this commission, her position would be impregna-
 ble, he would have no legal claim against her. But
 he is not. Although it is true that Mr. Van Deren, on
 account of his not having any writing, had no legal
 claim against Miss Sawyer for his commissions which
 30 he could enforce, there is no reason why Miss Saw-
 yer should not recognize the moral obligation which
 rested upon her to perform her promise, if she made
 it, notwithstanding the statute of frauds. She had a
 right to put her hand in her pocket and produce the
 \$375 and hand it to Mr. Van Deren, and say, "Mr. Van
 Deren, here is the money that I promised to pay you;
 you have earned it, and you shall have it, without re-
 gard to whether you had any writing or not." And if
 she had done that, that transaction would have been
 40 closed, and the statute of frauds would not have fig-

ured in the case. This provision of the statute of frauds was passed for the protection of purchasers; they may avail themselves of it if they see fit; they may waive its protection, if they see fit. If Miss Sawyer had done what I have suggested, there can be no doubt that Mr. Van Deren would be entitled to retain the money that she had actually given to him. The same situation exists, so far as the rights of these parties are concerned, if, having received the purchase money from this tube company. Mr. Van Deren deducted his commissions from it, and then, after deducting other proper items, turned over the balance to Miss Sawyer, and she then said to Mr. Van Deren, "Your deduction of the commission was proper, you were morally entitled to it, you earned it, and I acquiesce in your retention of that money, it is yours, keep it." Such a situation would have transferred the title to the money which Mr. Van Deren kept in payment of his commissions from her to him. It would have been just the same as if she had actually made the payment out of moneys in her hands, and would entitle him to retain the commission. Now, does the testimony which has been submitted on both sides justify you in saying that Miss Sawyer ratified the act of Mr. Van Deren in retaining this commission. Did she, in effect, say, "You are entitled to have it, keep it," by the letters which have been submitted in evidence? If you can find in the correspondence between the parties, or in the testimony which has been given on the witness stand, a ratification by Miss Sawyer of Mr. Van Deren's retention of this money, and acquiescence in his doing so, he is entitled to be credited that amount. But if you cannot, if Miss Sawyer has done nothing which is a waiver of her right to stand on the statute, if she has not said to him, in effect, "You may keep the commissions which you have deducted," she is entitled to have that money paid back, no matter whether you may think it is hard that Mr Van Deren should be compelled to work for nothing or not. That is the law. He did not have a written

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contract which authorized him to make the sale, and fixed his commissions. He was not entitled to be paid a dollar for his services, except by the grace of Miss Sawyer. If she has paid him, or acquiesced in his paying himself out of the fund, she cannot have the money back now. But if she has not paid him, and has not acquiesced in his retention of this money, she is entitled to have him pay it over to her.

- 10 Now, another item is the small one of \$10 which Mr. Van Deren has charged Miss Sawyer for going to Moore, in Pennsylvania, to execute a deed and receive final instructions. Whether he is entitled to that, it seems to me, may depend somewhat on what you find with relation to the question of commissions to which I have just been directing your attention. If he cannot recover any commission, and it was not intended by Miss Sawyer that he should have any commission, the question is whether he was not asked to come there on an implied promise by Miss Sawyer that if he did
- 20 she would pay him his expenses, and what his services were worth in doing so. He fixes them at \$10. It is for you to say whether she did not, by implication, when she asked him to come, agree to pay him that amount, if you say that is reasonable. But if he is entitled to his commissions—if he is entitled to be discharged, I mean, from any liability to return his commissions—in other words, if she has paid him his commissions, then it is a fair question for you to consider whether those commissions do not embrace every-
- 30 thing which he was required to do, as an agent, not only to bring about the sale, but to close the transaction, and whether the preparation of the deed and coming down to see her for final instructions was not a part of the duty which he owed, as an agent entrusted with the sale of the property. I do not say that it is; I do not say that my suggestions on this item ought to be followed in determining the question; it is for you to say. It may be that he is entitled to commissions and the \$10; it may be he is entitled to
- 40 neither. It is a question of fact for the jury. I am

only pointing out what seems to me to be material matters in determining whether or not he ought to be allowed this \$10.

There is one other item which he claims to be entitled to allowance for, and that is a sum of \$408.81, which he says he deducted from the purchase money belonging to Miss Sawyer in his hands, and paid over to Mr. Galloway. And he excuses himself for that by saying, "During all of the period covered by the lease I collected the rents of the leased premises; those rents belonged jointly to you, Miss Sawyer, and to Mr. Galloway; you were entitled to five-ninths, and he was entitled to four-ninths, as owners; but I paid them all over to you, with the understanding that you would settle with Mr. Galloway. Now, you did not do that; Mr. Galloway, when this transaction was closed, came on me and said he was going to hold me responsible for all his part of the rent, because he had had none; and, that being so, I, to relieve myself from responsibility, so far as he was concerned, took the \$408 out of your share of the purchase money, because you had that much more out of the rents than you ought to have had." Well, now, it may be, gentlemen, that Mr. Van Deren would have a claim against Miss Sawyer for moneys which he paid to Mr. Galloway in discharge of the obligation which I have just spoken of. But that is another matter in dispute between these parties that is not embraced in this issue. If Mr. Van Deren had a right to set off against this amount of money an obligation which he was entitled to enforce against Miss Sawyer, arising out of his payment to Mr. Galloway, that right still exists. But he does not set that right up in this case, and therefore it is not involved in the case, and cannot be determined by your verdict; and for that reason, it is not necessary for me to express an opinion whether Mr. Van Deren has a legal claim against Miss Sawyer, or whether he has not, by reason of his having paid the claim of Mr. Galloway for four hundred and odd dollars for the rents. And so I charge you, in making up

the account between the parties, Mr. Van Deren is not entitled to credit for that sum of money. These are the items for which he claims credit, and this is the way the account stands. In the first place, Mr. Van Deren is to be charged \$15,225.37, and he is to be credited with \$344.89 that Miss Sawyer admits; he claims to be entitled to a further credit of \$375 for commissions you are to determine, under the rules that I have laid down to you, whether that claim is well founded or not; if you say it is not, you strike it off from his side of the account; if you say it is, then you also deduct that amount from the \$15,225.37. He also claims \$10 for going down to Moore and delivering the deed. If you say he is entitled to that credit, you deduct that amount; if you say he is not, you do not deduct it. The other item you reject, that item of the rent, and you make up your verdict by deducting from the \$15,225.37 the credits which you find he is entitled to have: one, certainly; perhaps two, perhaps three, and the balance should be your verdict, with this added to it, interest at six per cent. on the balance from the 8th day of March, 1904, until the third Tuesday of next February. The reason I say the third Tuesday of next February is this; the suit is brought in the Supreme Court down at Trenton; that court has no facilities for trying jury cases, so whenever a suit brought before it reaches an issue, the Supreme Court, by its mandate, sends it down to the county where the parties live, with an instruction to the presiding Judge of the courts in that county to have a jury try, and have the rights of the parties ascertained, and a verdict rendered, and then to report the action of the jury to the Supreme Court. So when you render your verdict I shall send it down to the Supreme Court, and when the Supreme Court meets at its next term, which will not be until the third Tuesday of next February, they will then receive that

Tuesday of next February, they will then receive that report, and enter judgment on it; and it is because the plaintiff is entitled to interest until he gets his judgment that I say you calculate your interest up to the third Tuesday in February, which is the date when the judgment shall be entered.

I find that I omitted one other important credit which the defendant is entitled to have you make him; that is the check of fourteen thousand and some dollars which he paid. I think I did mention it in the beginning of my charge. When he sent the statement to Miss Sawyer he sent her a check of \$14,050.50. Of course he is entitled to be credited with that, as well as the other items which you may find he is entitled to be allowed. 10

(The jury retired.)

Defendant's counsel requests the Court to charge that if the defendant, at the plaintiff's request had overpaid her any rents due her, he was justified in withholding from moneys in his hands which he collected for her account, the amount of such over-payments, and remitting the balance, and the plaintiff in this action can only recover from the defendant such amount as *ex aequo et bono* belongs to her from the defendant. 20

The Court declined to charge as requested.

Defendant's counsel prays exception to the refusal of the Court to charge as requested, and the same is allowed, and signed and sealed accordingly. 30

(SEAL)

WM. S. GUMMERE,

C. J.

Defendant's counsel also requests the Court to charge that if the plaintiff had requested the defendant to pay her more than her share of the net rents accruing from the property, and such payment 40

had been made pursuant thereto, then the defendant was justified in withholding from the moneys to be remitted to her upon the completion of the sale an amount equal to such excess, with interest from the time of over-payment.

The Court refuses to charge as requested.

10 Defendant's counsel prays exception to the refusal of the Court to charge as requested, and the same is allowed, and signed and sealed accordingly.

(SEAL)

WM. S. GUMMERE,

C. J.

20 Defendant's counsel prays exception to that portion of the charge in which the Court said that by reason of the failure of the defendant to have filed a plea of set-off, the jury were debarred from considering the legal question, which the Court did not feel called upon to determine, namely, whether or not, in view of the over-payments to the plaintiff, the defendant was justified, in the emergency which confronted him, in withholding the amount thereof from the plaintiff.

The exception is allowed, and signed and sealed accordingly.

(SEAL)

WM. S. GUMMERE,

C. J.

Verdict for plaintiff for \$508.30.

Afterwards, to wit, at a Circuit Court holden at Newark, in and for the County of Essex, before his Honor, William S. Gummere, Chief Justice of the Supreme Court of the State of New Jersey, on the nineteenth day of December in the year of our Lord one thousand nine hundred and five, according to the statute in such case made and provided, comes as well the said plaintiff as the said defendant, by their respective attorneys within mentioned, and the jurors of the jury, between the parties aforesaid, in the plea aforesaid, being summoned, also come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath that the said defendant Clarence T. Van Deren did undertake and promise in manner and form as the said plaintiff Carrie E. Sawyer hath in her said declaration alleged; and they assessed the damages of the said plaintiff, by reason of the not performing said promises and undertakings, over and above the costs and charges by her about her suit in this behalf expended, at the sum of five hundred and eight dollars and thirty cents, and for those costs and charges six cents. Therefore it is considered that the said plaintiff do recover against the said defendant her said damages by the jury in form aforesaid found to five hundred and eight dollars and thirty cents, and also forty-one dollars and eight cents, for her costs and charges aforesaid, by the Court now here adjudged to the said plaintiff, and with her assent, which said damages, costs and charges in the whole amount to five hundred and fifty dollars and eighteen cents.

Judgment signed the twentieth day of February, A. D. Nineteen hundred and six.

WM. S. GUMMERE,

C. J.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

CARRIE E. SAWYER,

Plaintiff and Defendant in Error,

v.

CLARENCE T. VAN DEREN.

Defendant and Plaintiff in Error.

*On Contract.
On Writ
of Error.*

10

ASSIGNMENTS OF ERROR.

Afterwards, that is to say, on the thirty-first day of March, nineteen hundred and six, in the New Jersey Court of Errors and Appeals, comes the said Clarence T. Van Deren, by McCarter & English, his attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

20

First. For that the said Justice before whom the said action was brought, at and upon the aforesaid trial of the issue joined between the parties, committed error in his charge to the jury, and in particular in charging them as follows: "There is one other item which he claims to be entitled to allowance for, and that is a sum of \$408.81, which he says he deducted from the purchase money belonging to Miss Sawyer in his hands, and paid over to Mr. Galloway. And he excuses himself for that by saying, 'During all of the period covered by the lease I collected the rents of the leased premises; those rents belonged jointly to you, Miss Sawyer, and to Mr. Galloway; you were entitled to five-ninths, and he was entitled to four-ninths, as owners; but I paid them all over to you with the understanding that you would settle with Mr. Galloway. Now, you did not do that;

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10 "Mr. Galloway, when this transaction was closed,
 "came on me and said he was going to hold
 "me responsible for all his part of the rent, because
 "he had had none; and, that being so, I, to relieve
 "myself from responsibility, so far as he was con-
 "cerned, took the \$408 out of your share of the pur-
 "chase money, because you had that much more out
 "of the rents than you ought to have had.' Well, now,
 "it may be, gentlemen, that Mr. Van Deren would
 20 "have a claim against Miss Sawyer for moneys which
 "he paid to Mr. Galloway in discharge of the obliga-
 "tion which I have just spoken of. But that is an-
 "other matter in dispute between these parties that
 "is not embraced in this issue. If Mr. Van Deren
 "had a right to set off against this amount of money
 "an obligation which he was entitled to enforce
 "against Miss Sawyer, arising out of his payment to
 "Mr. Galloway, that right still exists. But he does
 20 "not set that right up in this case, and therefore it is
 "not involved in the case, and cannot be determined
 "by your verdict; and for that reason, it is not neces-
 "sary for me to express an opinion whether Mr. Van
 "Deren has a legal claim against Miss Sawyer, or
 "whether he has not, by reason of his having paid the
 "claim of Mr. Galloway for four hundred and odd
 "dollars for the rents. And so I charge you, in mak-
 "ing up the account between the parties, Mr. Van
 "Deren is not entitled to credit for that sum of
 "money."

30 *Second.* There is error also in this, to wit, for that
 the said Justice, before whom, etc., at and upon the
 said trial, although duly requested thereto by the de-
 fendant, refused to charge as follows: "If the defend-
 "ant, at the plaintiff's request, had overpaid her any
 "rents due her, he was justified in withholding from
 "moneys in his hands which he collected for her ac-
 "count, the amount of such over-payments, and re-
 "mitting the balance, and the plaintiff in this action
 "can only recover from the defendant such amount as
 40 "*ex aequo et bono* belongs to her from the defendant."

Third. There is error also in this, to wit, for that the said Justice before whom, etc., at and upon the said trial, although duly requested thereto by the defendant, refused to charge as follows: "If the plaintiff "had requested the defendant to pay her more than "her share of the net rents accruing from the prop- "erty, and such payment had been made pursuant "thereto, then the defendant was justified in with- "holding from the moneys to be remitted to her upon "the completion of the sale an amount equal to such "excess, with interest from the time of over-payment." 10

Therefore the said Clarence T. Van Deren prays that the judgment aforesaid, by reason of the afore- said errors, and of other errors appearing in the record and proceedings aforesaid, be reversed, an- nulled, and for nothing holden, and that the said Clar- ence T. Van Deren may be restored to all things he has lost on occasion of the said judgment, and that the said Carrie E. Sawyer may rejoin to the said er- rors, etc. 20

McCARTER & ENGLISH,
Attorneys for and of Counsel with
Defendant and Plaintiff in Error.

Common joinder in error filed.

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EXHIBIT P 1.

Abstract of Deed from Carrie E. Sawyer to New Jersey Tube Company, dated February 29, 1904, and recorded in the office of the Register of the County of Hudson in Liber 865 of Deeds, on page 134, etc.:

10 THIS INDENTURE made the twenty-ninth day of February, in the year of our Lord one thousand nine hundred and four (1904) between Carrie E. Sawyer (unmarried) of the Borough of Moore in the County of Delaware and State of Pennsylvania, of the first part, and New Jersey Tube Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and of the Town of Harrison in the County of Hudson and State of New Jersey, of the second part.

20 WITNESSETH that the said party of the first part for and in consideration of the sum of one (\$1.00) dollar lawful money of the United States of America, to her in hand well and truly paid by the said party of the second part at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the first part, therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed by these presents doth give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part and to its successors and assigns forever.

30 All the right, title and interest of, in and to all those tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the Town of Harrison in the County of Hudson and State of New Jersey, said lots of land and premises being more particularly bounded and described as follows. to wit:

(Here follows description by metes and bounds.)

40 BEING a part of the same premises heretofore conveyed by the National Conduit and Cable Company

to Carrie E. Sawyer and Charles T. Galloway as tenants in common by deed dated the 19th day of August, one thousand eight hundred and ninety-seven, and recorded in the Register's office of Hudson County, New Jersey, in Book 681 of deeds at page 237;

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining. ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the first part of, in and to the same and of, in and to every part and parcel thereof; 10

TO HAVE AND TO HOLD all and singular the above described land and premises with the appurtenances unto the said party of the second part, its successors and assigns to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set her hand and seal the day and year first above written. 20

CARRIE E. SAWYER [SEAL]

Signed, sealed and delivered

in the presence of

CLARENCE T. VAN DEREN.

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

BE IT REMEMBERED, That on this fifth day of March
 in the year one thousand nine hundred and four, be-
 fore me, a Master in Chancery of New Jersey, per-
 sonally appeared Clarence T. Van Deren, who, being
 duly sworn on his oath, saith that he saw the above
 named Carrie E. Sawyer sign, seal and deliver the
 above instrument as her voluntary act and deed, and
 10 that deponent at the same time signed the same as
 subscribing witness.

CLARENCE T. VAN DEREN.

Subscribed and sworn to before
 me the day and year aforesaid.

ELWOOD C. HARRIS,
Master in Chancery of New Jersey.

Received in the office and recorded March 5, 1904,
 20 at 12 noon. No. 1153.

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EXHIBIT P 2.

LEASE FROM CARRIE E. SAWYER AND CHARLES T. GALLOWAY TO NEW JERSEY STEEL TUBE Co.,

Dated March 1st, 1899.

Leases the factory and property in Harrison, which is the subject of the suit, for the yearly rent of one thousand dollars, payable quarterly in advance. The said lease contains, among other things, the following:

"And the said party of the second part doth hereby agree to pay to the said party of the first part, their heirs, assigns, agents, or attorneys, the said yearly rent of one thousand dollars, at the time and in the manner aforesaid. 10

And the said party of the second part doth further agree to keep the premises in good repair (wear and tear arising from a reasonable use of the same and damage by the elements excepted); and at the expiration of said term to yield up the peaceable possession thereof in good tenantable condition to the said party of the first part, their heirs, assigns, agents or attorneys. 20

And the said party of the second part doth further agree to pay to the Town of Harrison the water tax assessed upon said property, additional to the rent aforesaid.

And the said party of the first part doth further agree with the said party of the second part to give to the said party of the second part the option of purchasing the premises described in this lease at any time during the term of this lease for the sum of twenty-five thousand dollars, to wit: the sum of ten thousand (\$10,000) dollars to be paid to Charles T. Galloway for his interest in said property, and the sum of fifteen thousand (\$15,000) dollars to Carrie E. Sawyer for her interest in same, and upon receiving written notice of the desire of the party of the second part so to purchase, that the said party of the first part will make, execute and deliver a good and 30

sufficient conveyance or conveyances to vest in the party of the second part the title to said premises in fee simple, free from all claims of all other persons, such conveyances to be delivered at such time as the party of the second part may appoint during said term upon payment in cash of said sum of twenty-five thousand dollars upon delivery of the deed or deeds of conveyance.

10 And it is further agreed by and between the parties to these presents that the said party of the second part shall keep the premises hereby leased in good repair and tenantable condition, and to make all repairs of whatsoever kind and nature at their own expense without any costs whatever to the party of the first part.

20 And it is understood by and between the parties hereto that all the covenants and agreements contained herein shall be binding upon the heirs and executors of the party of the first part, and upon the successors and assigns of the party of the second part."

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EXHIBIT P 3.

February 29, 1904.

RECEIVED:

Moore, Del. Co., Penn., from Carrie E. Sawyer, a bargain and sale deed to New Jersey Tube Co., of Harrison, N. J., conveying all her right, title and interest in the property at Harrison, N. J., and being the same property conveyed by the National Conduit and Cable Co. to her and Charles T. Galloway by deed dated Aug. 19th, 1897. The same to be delivered to said company upon payment by them of a certified check to her order for the sum of \$15,319.42. 10

CLARENCE T. VAN DEREN.

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EXHIBIT P 4.

Clarence T. Van Deren,
Real Estate and Insurance Agent,
309 Harrison Ave., Harrison, N. J.
March 7th, 1904.

MISS CARRIE E. SAWYER,
Moore, Delaware Co., Penn.

10 DEAR MADAM:—

I received both of your letters and was all Saturday morning closing up the sale. Mr. Goodwin, of the firm of Gould and Wilkie, attorneys for Mr. Galloway, was here with the deed from Mr. Galloway to the New Jersey Tube Company properly signed and executed and ready for delivery.

20 The reason the matter was not settled on Wednesday last was, as I wrote you, on account of Mr. Goodwin having engagements which were of a very important nature on Wednesday, Thursday and Friday of last week, and it was utterly impossible to close the sale until Saturday.

30 In reference to the taxes or the increased valuations caused by the improvements made to the property in question, Mr. Elwood C. Harris, the counsel for the New Jersey Tube Company, said that the increase of \$1,000 in valuation in 1899 was not caused by the improvements to the property for that year, as no improvements had been made, and that the increase was a natural one made by the assessor, and that he would only pay on \$3,000 of the increased valuation in 1900, 1901 and 1902, and \$4,000 for 1903, as he admitted that said increases were made on account of improvements to and buildings erected on the property in question.

40 Mr. Goodwin agreed to accept that settlement and to settle on that basis, and Mr. Goodwin informed me that it was a very grave question in his mind as to whether, if notice had been served or not, either in

person or by letter in reference to the improvements or the increased valuation, we could collect or compel them to pay any of the taxes caused by the increased valuation and by improvements made to the property and new buildings erected thereon.

He further said that it would be in his opinion unwise to hold out or insist upon the amount to be paid on the increased valuations of \$1,000 for 1899, \$4,000 for 1900, 1901 and 1902, and \$5,000 for 1903. He said as there was nothing in the lease that in case the valuation was increased over and above what the valuation was prior to making the lease, whether by improvements or otherwise, that he was very much in doubt as to whether any claim could be made and collected for and on account of increased valuations and increased taxes, and he was satisfied that \$340.56 should be paid without any trouble. 10

In doing what I have done I have done the very best that could be done, and in case the matter was not settled and deeds refused to be delivered upon the payment agreed upon in the lease, suit would be commenced to compel the carrying out of the agreement, and this would probably be a long litigation and the money would be tied up and it would be expensive on our part, and what I have done I would have done if the property was mine, and I settled to save expense and litigation and tying up the money for the time that it would be, and which I am of the opinion would be some time. 20

The charge of \$10 that I have made for drawing deed, services and expenses I think is a reasonable one, and I trust same will meet with your approval. 30

The money was paid to me, out of which I had to pay the taxes, and therefore that is the reason I send you my certified check.

Mr. Goodwin, for Messrs. Gould and Wilkie, attorneys for Mr. Galloway, claims and demands of me \$408.81, being his share (4/9) of the rents received from March 1st, 1899, to March 1st, 1904, with in- 40

terest for two years, less the expenses that have been paid out on the property, and has notified me to send them that amount, as they will not release me until same is paid, as I had no right to pay you without paying him; and inasmuch as the property was in my charge for you both I was not justified in paying you all the rent and not paying the share due to Mr. Galloway.

10 I have paid the taxes for 1903, as statement shows, and herewith send you receipts and receipted tax bills.

I was further found fault with for not sending Mr. Galloway his share of the rent, as they claim I should have done, and that they looked to me and will demand payment from me of the amount due him with interest.

20 I would have sent you this on Saturday, but I was all the morning getting this matter closed, and had to go to a funeral on Saturday afternoon, and I have been so exceedingly busy all day to-day that by the time I was ready to mail this letter with statement and check the bank was closed, and I therefore could not get the check certified, but will do so to-morrow morning. This is the reason the letter with statement and check was not mailed to you yesterday.

30 I thought in sending the statement and check it was just as well to send same less the amount for taxes that I paid for you, drawing deed, services and expenses, and commission; also amount claimed for and by Mr. Galloway through his attorneys, as if same was not paid by me to them for him that suit would be commenced against me for the same.

40 I notified Mr. Harris on Tuesday morning of the deed being ready for delivery on that day or Wednesday, and also Mr. Goodwin, of the firm of Gould and Wilkie, but have explained to you why Mr Goodwin could not be ready. Would further say that Mr. Harris, the counsel for the New Jersey Tube Company, said that he would not take one deed without the other. He further said that if he wanted to he could compel a joint deed being given. He was ready

on Saturday, and was also ready on Wednesday last, and I was ready, but Mr. Goodwin not being so, he said that he would not pass title or take one deed without he took both.

In reference to the insurance policies, the company have had the buildings insured for the amount they desire to carry and do not need our policies I will therefore cancel same, and will forward you as soon as same is done your share of the return premiums.

I trust I have put these facts before you intelligently and that what I have done, as I could not do otherwise, will meet with your approval. 10

Trusting this will find you both well and with kind regards to you both, I remain,

Very respectfully yours,

(enclosures.)

(dictated.)

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EXHIBIT P 5.

February 22, 1904.

MISS CARRIE E. SAWYER,
Moore, Delaware Co., Pa.

DEAR MADAM:—

10 In accordance with the terms of lease made by yourself and Mr. Galloway to the New Jersey Steel Tube Co., dated March 1, 1899, I herewith enclose notice of their desire to purchase the premises under the option contained in that lease. I have had some correspondence with Messrs. Gould and Wilkie, representing Mr. Galloway, who have asked me about the consideration to be stated in the deed. So far as the company is concerned, we would just as leave have it stated one dollar and other valuable consideration. We have thought it would be more convenient for all the parties to meet here in the heart of Newark, near the banks, than over at the factory in Harrison, or
20 at Mr. Van Deren's office. If, however, you and Mr. Galloway prefer any other place here, arrange to give us notice so that we would be advised about the matter. We will be ready with the cash, \$25,000, on Saturday morning between the hours named. I would suggest that you communicate with Mr. Van Deren as to having your deed prepared. Of course, you can execute it here at my office that morning or at such other place as the matter is to be closed. Kindly let
30 me hear from you by return mail.

Yours truly,

ELWOOD C. HARRIS.

EXHIBIT P 6.

TO CARRIE E. SAWYER AND CHARLES T. GALLOWAY :

You are hereby notified that the New Jersey Tube Company hereby purchases the premises described in a lease made by you to the New Jersey Steel Tube Company (the name now being New Jersey Tube Company), dated March 1, 1899, under the option contained in said lease for twenty-five thousand dollars, and said company demands that you make conveyance of said premises to said company on Saturday, the twenty-seventh day of February, instant, between ten and eleven o'clock in the forenoon, in accordance with the terms of said lease, and said company would name, as a convenient place to receive said conveyance and to pay said consideration the office of Elwood C. Harris, 732 Prudential Building, Newark, New Jersey, or if you would appoint any other place in Harrison, New Jersey, or in Newark, New Jersey, and give written notice to said company, the said company will attend on said date and hour prepared to receive conveyance and to pay such consideration

Dated February 22, 1904.

NEW JERSEY TUBE CO.

JAS. CLOSE, *Pres.*

EXHIBIT P 9.

P 7 for identification.

December 31st, 1900.

MISS CARRIE E. SAWYER,
Moore, Delaware Co., Pa.

MISS SAWYER:—

10 Yours of the 28th inst., with the letter to Mr. Close,
enclosed, received.

I read the letter, as desired, and sealed same and sent it to Mr. Close by one of my clerks. He reported that Mr. Close was not at his office and that the secretary was very busy in the factory, and he was instructed to leave same on Mr. Close's desk, which he did, and which he will receive when he comes to his office to-day

20 I think the position you take in the matter is very fair and just, and that they should pay the increased tax caused by them in building. If I hear anything from them in relation to the matter, as I have expected to before this, as Mr. Close told the doctor and I that he would look into the matter and go over same with their counsel when we were there, I will write you. Should you hear anything from them kindly let me know, so as we both can keep posted on the matter in question.

Thanking you for your good wishes, permit me to extend to you the same.

30

Very respectfully yours,

CLARENCE T. VAN DEREN.

(dictated.)

EXHIBIT P 10.

P 8 for identification.

(dictated.)

February 19th, 1903.

MISS CARRIE E. SAWYER,

Moore, Delaware Co., Pa.

DEAR MADAM:—

Your letter of the 17th inst. received and contents 10
noted. It seemed strange, and probably you will think
so too, when I say that I received at the same time
your letter came and by the same mail a letter from
Mr. Galloway, from whom I had not heard either by
letter, telephone or in person since the leases were
signed

It did, as I have said before, seem strange that both
your letter and his should come at the same time

He wants me to send him on a statement of the 20
account of the property up to date, which I am writ-
ing him to-day, acknowledging the receipt of his letter
and saying that the matter will receive my attention
the early part of the week, and will forward the state-
ment as desired.

The name that appears upon the tax bills is wrong
and I have endeavored to get same right.

If you will kindly return me the tax bills sent you
I will have the books corrected and the proper name
inserted; also proper name on the tax bills.

I suppose the names should be yours and Mr. Gal- 30
loway's. Am I right in this supposition?

I will have the interest on the taxes for 1901 figured
to March 2d and pay same on that date, and will, as
desired, forward you the receipts.

Trust this will find you well, also the doctor, and
with kind regards,

Very respectfully yours,

CLARENCE T. VAN DEREN.

D 2 FOR IDENTIFICATION.

	Increased Taxes.	Taxes.	Int.
1899	\$1,000.00 @ \$2.50	\$25.00	\$6.29
1900	4,000.00 @ 2.42	96.80	18.54
1901	4,000.00 @ 2.42	96.80	12.73
1902	4,000.00 @ 2.42	96.80	6.92
1903	5,000.00 @ 2.54	127.00	1.46
		\$442.40	\$45.94
10		45.94	
	Gross	\$488.34	

Returned Prem.:

	January policy, 5 9	\$39.86
	July policy, 5 9	8.26
	5 9 of foregoing taxes due C. E. S.	271.30
		\$319.42
29	5 9 of taxes, 1903 (C. E. S.) is..	335.85
	4 9, C. T. G.	268.68
		\$604.53
	Ck. to C. E. S.	\$15,319.42

D 2 FOR IDENTIFICATION.

C. T. Van Deren to C. E. Sawyer, Dr.

	Feb. 29, '04. To deed for collection	\$15,319.42
	March 5, '04. To interest past due payment	10.28
30		\$15,329.70

Cr.

	March 9th, '04. By ck. on acct. .	\$14,050.50
	" " " " taxes paid.	344.89
	" " " " commission	375.00
		\$14,770.39
	To balance	559.31
		\$15,329.70
40	March 14th, 1904.	\$15,329.70

EXHIBIT D 5.

OFFICE OF NICHOLSON & GALLOWAY,
Slate and Metal Roofers,
646 Hudson Street,
New York, 16th Feb., 1904.

DEAR MR. VAN DEREN.

As I expect to go away next week, to be away for
some time, I have turned the matter of the sale of
"Harrison Property" to Mr. W. B. Goodwin, of No. 2 10
Wall St., who will represent me in the matter, with
power to do all that is necessary. If you will write
him he would be pleased to hear from you.

Yours truly,

CHARLES T. GALLOWAY.

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EXHIBIT D 6.

GOULD & WILKIE,
Counsellors at Law,
No. 2 Wall Street.

Charles W. Gould.
John L. Wilkie.
William B. Goodwin.
Gustavus T. Kirby.

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NEW YORK, February 16, 1904.

MR. CLARENCE T. VAN DEREN,
309 Harrison Ave., Harrison, New Jersey.

DEAR SIR:—

Our client, Mr. Charles T. Galloway, has sent us the papers in the matter of the property in Harrison leased by him and Miss Sawyer to the New Jersey Steel Tube Company, and has informed us that the steel tube company has decided to avail itself of the option given it in the lease to purchase the property for \$25,000, and has requested us to act for him in drawing the necessary papers.

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Will you kindly let us know whether Miss Sawyer expects to give a separate deed for her interest in the property, or whether we are to include her in one deed with Mr. Galloway. The lease does not require in terms a warranty deed, and we presume that a bargain and sale deed will be all that is necessary.

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Mr. Galloway has also sent us a statement, which we suppose was sent him by you with an endorsement written upon it that Miss Sawyer has sent you check for \$56.32 to balance this account.

Will you kindly also let us know whether you have any outstanding charges or claims in the matter, and if so, the amount.

Kindly let us hear from you as early as possible.
We are,

Very truly yours,

GOULD & WILKIE.

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EXHIBIT D 7.

GOULD & WILKIE,
Counsellors at Law,
No. 2 Wall Street,
New York.

March 7, 1904.

MR. CLARENCE T. VAN DEREN,

Harrison, New Jersey.

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DEAR SIR:—

In computing on Saturday the amount of interest claimed from Miss Sawyer and in my letter of Saturday in reference to it I put the amount as \$98.55. In looking over the figures I have just noticed that this is the interest on the entire \$821.27 of rents received by Miss Sawyer. The interest should have been computed on the \$365.00, being that part of the rents which Miss Sawyer received belonging to us. Two years of interest at 6% on this amount would make the interest due from Miss Sawyer \$43.80, instead of \$98.55.

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We request you to send to us direct the \$240.45 still due Mr. Galloway from the rents received by Miss Sawyer, together with \$43.80 interest thereon, making \$284.25, for which amount we expect to receive your check.

Very truly yours,

WILLIAM B. GOODWIN.

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EXHIBIT D 8.

D 4 for Identification.

MOORE, DEL. CO., PA.

2-18-'04.

MR. CLARENCE T. VAN DEREN,

Harrison, New Jersey.

10 Replying to yours of the 17th. If matters are satisfactorily adjusted, I do not see the necessity of coming over there at considerable expense, when deed can be sent here for signature. It could be sent with certified check for my interest to my bank and returned by them duly executed. The amount due you for commission I will send to you direct by ck. at the same time, which I presume will be satisfactory to you. My portion of the taxes for 1903 I am willing to pay over to the purchasers of the plant, to be paid by them when it can be done without penalty, which time will
20 be Dec. 21st. As you are aware, I required them to pay the extra taxes assessed by reason of their enlargement of the factory and the erection of the new building on the premises. That portion amounts to \$467.51 with interest to March 1st. This, I presume, will be paid. Otherwise my option, as I notified them, will be voided. I have been expecting to hear from you on this point, as you have all along said you thought there would be no question about it.

30 An early reply will oblige. With kind regards from Dr. and myself, I am, respectfully,

CARRIE E. SAWYER.

EXHIBIT D 9.

MOORE, DEL. CO., PENNA.

2-27-'04.

DEAR MR. VAN DEREN.

Since writing you to-day your postal arrived. In order to simplify matters I give you definite statement so that you can come prepared to close the entire transaction at once. My portion, 5|9, of the extra taxes, together with the return premium upon fire insurance policies from March 1st, amounts to \$319.42. Therefore, the total sum of \$15,319.42 will be due me. They can send certified ck. for said sum to me by you and we can execute the deed before you. 10

The taxes for 1903 amt. to \$604.52; my portion of this, 5|9, amounts to \$335.85. I will give you said sum for them by ck. payable to their order if they so direct, thus closing the deal with them. I will settle with you direct while you are here. 20

Respectfully,

CARRIE E. SAWYER.

EXHIBIT D 10.

MOORE, DEL. CO., PENNA.

3-4-'04.

DEAR MR. VAN DEREN.

Enclosed find Jany. policy. The July ones are in the safe deposit box at bank. I will get and forward them the first time I go to bank, which will be within a few days. 30

Respectfully,

CARRIE E. SAWYER.

EXHIBIT D-11.

No. 15153.

CLARENCE T. VAN DEREN,
Real Estate and Insurance Agent,
309 Harrison Avenue,

HARRISON, N. J., March 7, 1904.

Pay to the order of Carrie E. Sawyer, \$14.050.
50|100, Fourteen thousand and fifty and 50|100

10 dollars. Statement of date.

To the

WEST HUDSON COUNTY TRUST CO.,
Harrison, N. J.

CLARENCE T. VAN DEREN.

(Certified

The West Hudson County Trust Co.

Mar. 8, 1904.

Payable at

First National Bank,

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Jersey City, N. J.

W. H. Tuttle, Teller.)

(Endorsed: "Carrie E. Sawyer.")

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EXHIBIT D 12.

MOORE, DEL. CO., PENNA.,
3-10-'04.

DEAR MR. VAN DEREN.

Replying to your postal of the 9th. I herewith enclose policy 827908 National of Hartford. Evidently I picked up the wrong policy in my former enclosure. The July policies were forwarded you yesterday.

You being the writing agent, control the date of termination, so the delay matters not. Probably you wrote the insurance on the factory which you reported they had taken. The return premium on Jany. policy should, under the circumstances, be made in full. 10

I will review your statement within a day or two.

Respectfully,

CARRIE E. SAWYER.

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EXHIBIT D 14.

D 3 for Identification.

CORRESPONDENCE BETWEEN THE PARTIES.

MOORE, DEL. CO., PENNA.,

March 14th, 1904.

MR. VAN DEREN.

10 Dear Sir:—I have carefully reviewed the statement
sent with your letter of Mch. 7th. I fail to see any
justification for your deviation from the specific in-
structions, supplemented by memoranda given you,
concerning the terms of settlement with the tube com-
pany. You were not to receive any money for me
except by ck. to my own order direct from the pur-
chasers, for reasons fully explained to and concurred
in by you. Said ck. was to be for the sum of \$15,-
319.42. The items covered thereby: for extra taxes,
20 \$271.30; returned premium, \$48.12, and price of fac-
tory, \$15,000. I was to return to you upon receipt
of said sum, \$375, commissions due you and my ck.
for my portion of the taxes for 1903. You voluntarily
suggested giving them your ck. for my tax portion in
case they objected to waiting for my return ck. You
specified the sum due you would be \$375.00, saying
nothing of any charge for drawing deed. Which
charge I consider out of order in such transactions,
as I am informed no charge for drawing deed is made
when drawn up by the selling agent who receives his
30 commission. In event the tube company declined to
give ck. for full amount specified you were to return
the deed to me. You positively agreed to carry out
these instructions, as your agreement receipt clearly
shows. Instead of this, you assumed the authority to
close the deal on entirely different lines. You sub-
mitted what they said they would allow for extra
taxes; said offer was flatly refused by me, I declaring
to you that rather than accept their offer the sale
40 might fall through. I cannot accept your assumed

authority to dictate terms to me. I shall hold you for the difference.

In regard to the Galloway matter, it was entirely eliminated in the transaction so far as any adjustment by you was concerned. You were told that we held some moneys belonging to his share of the rent, but that it was on account of an agreement between him and us, and was told we would communicate with him direct, soon as transaction was closed. You have known that Dr. and myself have had the management of the property since before the lease was made. You received all instruction from and made all reports to us. Only once during the five years did you hear from Mr Galloway, and then it was simply to ask how matters were progressing. You wrote us of the fact and reported you had sent him a statement and sent us a copy that we might know how you had replied. That statement showed account to be overdrawn \$94.77. If there was anything wrong in such fact, would not Mr. Galloway naturally direct attention to the fact, and declare its irregularity at once? You are aware that all the negotiations with different persons for the factory concerning either rent or sale were conducted by us exclusively. You have said that Mr. Galloway has told you over the phone—soon after the property was put in your hands for rent—that whatever we agreed upon would be all right. The fact is you have dealt with none but us, and should not have been guided by any other in opposition to our instructions. During the times the factory was flooded, and before it was rented, you knew of our care and frequent visits there in the *the* interest of the property. Also of our efforts to obtain a lower tax valuation, and that finally it was due to us that the purchase price was raised from \$20,000 to \$25,000 after Mr. Galloway had consented to sell his interest for his proportion of the \$20,000. By this one act of ours Mr. Galloway received more than \$1,100 over the sum he was willing to accept. During all that period we

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were spending money to protect and further the interests of the property, Mr. Galloway having agreed with us to bear his proportion of the expenses incurred

Now at the end, knowing all these facts, you ignore our instructions and our equity rights in the matter, and assume the right to pay out our money without authorization or consultation. This we cannot submit to. You are liable and under the terms of your agreement receipt will be held responsible.

Had Mr. Galloway's bal. remained in you hands, no *interest* would have been paid by you, yet you have paid him from our money \$43.80. Even *supposing* interest was payable, how do you calculate that sum? The first deduction from his share was Jany. 10th, '02, \$107.65; Mch. 1st, '03, \$114.11; Dec. 28, '03, \$152.79, of which \$9.65 was returned by me in my ck. for \$56.32 sent you Feby. 4th, to bal. account. You will find that the interest actually amounts to less than half the sum you took, but as heretofore shown no interest is justly payable. It would have been well for you to have considered the situation more carefully and to have consulted us previous to complying so literally with their wishes.

One other point. The purchase price was payable March 1st, and my deed was ready. Payment was not made until the 5th, you were instructed to collect interest, for the four days. You received my instructions in time to have acted upon them. Why did you not follow them? Why exempt me from the rules of business custom?

I enclose statement memo. of the transaction between us, and sincerely hope I will receive an early explanation and settlement. Having no disposition to appear arbitrary, but to simplify the matter as much as possible, I concede taxes paid 1903—\$344.89 and your commission of \$375. This shows bal. due me of \$559.31 on the only lines of settlement you were authorized to make.

Respectfully,

CARRIE E. SAWYER.

EXHIBIT D 15.

MOORE, DEL. CO., PENNA.,
2-24-'04.

DEAR MR. VAN DEREN.

I wrote you the 18th and have been looking anxiously for a reply. Why do I not hear from you?

There were points mentioned that were quite important for me to have your report on, pending adjustment of the N. J. S. T. Co.

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My suggestion of sending papers to the bank might possibly be arranged through you if you preferred to bring them over, especially as there is a payment to be made to you.

I omitted to mention the insurance. There will be \$71.75 due from tube company to us—5|9 to me is \$39.86. There will also be a return premium due me on the July policies, of \$8.26; the total return to be paid by them on the July policies is \$14.88.

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Will you please adjust this and let me hear from you as soon as possible. Respectfully,

C. E. SAWYER.

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EXHIBIT D 16.

MOORE, DEL. CO., PENNA.,
2-27-'04.

DEAR MR. VAN DEREN.

10 I wrote you on the 18th and again on the 24th and
have had no reply to either. Your apparent indiffer-
ence at this particular time is to me unaccountable. I
have received a communication from Gould & Wilkie,
of N. Y., who are looking after Mr Galloway's interest.
I have relied upon you to safeguard mine. They have
notified me that Mr. Galloway will act independently
of me in disposing of his interest in the factory and
will make an independent transfer thereof. I do not
understand their object in so doing. Evidently there
20 is some ulterior motive, which I assumed you would
discover and communicate to me. As matters now
stand I know nothing as to details of proceedings
there, relative to the present status of affairs. Whether
they intend to purchase my interest upon my terms or
rent the place under new arrangement, I have been
depending upon you to ascertain, and expect you to
protect my interest in the premises as March 1st is
so near. I have received communications from El-
30 wood C. Harris, alledged Atty. for the Tube Co. He
said they would be prepared to make payment this
forenoon, but ignored the extra tax question. Not
hearing from you and not being sufficiently recovered
from a recent illness to undertake the journey, I wrote
him that I could not be there to-day and suggested
that they send my ck. and the papers to my bank or
that they send them by you. I do not know whether
Mr. Galloway will waive his portion of the extra taxes
40 or not, consequently cannot state the exact amount

of ck. due me, especially as you had not informed me whether the suggestion I made to you in mine of the 18th would be satisfactory.

You seem to be very busy at this time, but I trust you will find time to give this matter your attention, as there is no time to lose. Respectfully,

CARRIE E. SAWYER.

It seems as though all details should be arranged and the amount of ck. determined so that, if satisfactory, signatures could be made before you as Commissioner of N. J. Certified ck. would be required, or bank draft. 10

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EXHIBIT D 17.

GOULD & WILKIE,
Counsellors at Law,
No. 2 Wall Street,
New York.

Charles W. Gould.

Cable Address

John L. Wilkie.

Goldkey.

William B. Goodwin.

10 Learned Hand.

Gustavus T. Kirby.

L. Hollingsworth Wood.

Moses Ely.

Arthur F. Gotthold.

Robert R. Logan.

February 23, 1904.

MR. CLARENCE T. VAN DEREN,

309 Harrison Avenue, Harrison, N. J.

DEAR SIR:—

20 I received this morning a letter from Mr Harris stating that they would close title at his office on Saturday, February 27th, to the property in Harrison, or they would close it in Harrison if we preferred. I have written him that we would close at your office, but could not do so on Saturday, although we might be able, perhaps, to close on Monday, February 29th.

30 I received a letter from Miss Sawyer in which she stated that there was the controversy of which you spoke in reference to the increased taxation, and that she would want that matter adjusted before conveying her interest. I thereupon wrote her that in view of that, she had better convey her title separately, and that no doubt she could arrange with you in reference to looking after her end of it, and that we would prepare the deed simply for Mr. Galloway.

You may by this time have received instructions from Miss Sawyer in reference to preparing the deed for her and representing her in the matter.

Very truly yours,

WILLIAM B. GOODWIN.

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